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Advocate High Caust

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LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1024 of 1917.

October 31, 1921.

Present:—Mr. Justice Broadway

and Mr. Justice Abdul Q.dir.

HIRA SINGH AND OTHERS—DEPENDANTS—

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APPELLANTS

LAL SINGH-PLAINTIFF, SECRETARY OF STATE FOR INDIA, THROUGH COLLED.
TOR, GURDASPUR-DEFENDANT

-RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 140Punjab Limitation (Ancestral Land Alienation)

Act (I of 1960), Sch., Art. 2—Criminal Procedure

Code (Act V of 1898), ss. 87, 88-Absconder's

property sold—Suit by reversioner for possession—

Limitation.

Where the property of an absconder is sold by an order of a Magistrate under the provisions of sections 87 and 88 of the Criminal Procedure Code, the sale is not by the owner and, therefore, a suit by his reversioners, after his death, to recover possession of the property is governed by Article 140 of Schedule I to the Limitation Act, and not by the provisions of Punjab Act I of 1900. [p. 2, col. 1.]

Second appeal from a decree of the District Judge, Amritear, dated the 23rd January 1917, affirming that of the Sub-Judge, First Class, Amritear, dated the 31st July 1916.

Dr. Nand Lal, for the Appellants.

Mr. Ralli, for Kanwar Dalip Singh, for the

Plaintiff-respondent.

JUDGMENT.—This second appeal arises out of a suit for possession of 108 kanals and 16 marles of land originally belonging to one Thakur Singh, who absconded in a deceity case and whose land was sold by the order of a Magistrate, on the 4th April 1902, in proceedings under sections 87 and 88, Criminal Procedure Code. The land was previously mortgaged to Hira

Singh and others, defendants Nos. 2 to 9. and to Budha Shab, defendant No. 10. At the sale it was purchased by defend. ants Nos. 2 to 9 with a reservation of the rights of the mortgagees. On the 19th January 1916, Lal Singh, brother of Thakur Singh, brought this suit, alleging that the property was ancestral and had been sold without legal necessity and that there were no legal mortgages rights against it. The defendants disputed these allegations and pleaded that the suit was barred by time. The Trial Court held that the land was appestral and the suit was not time-barred. but it found that the mortgages were valid and should be redeemed by the plaintiff before he got possession of the land. Defendants Nos, 2 to 9 appealed against the decree of the Court of first instance and eross objections were filed on behalf of the plaintiff. The learned District Judge upheld the decision of the Court below and dismissed both the appeal and cross objections with costs. The defendants have now come up in second appeal to this Court and have pressed again the question of limitation, which is now the only point for decision in the case.

We have heard Dr. Nand Lal for the appellants and Mr. Ralli on behalf of the respondents. Dr. Nand Lal's contention is that the Courts below have erred in holding that the Punjab Limitation Act, I of 1900, was applicable to this case, so far as the starting point of limitation is concerned, which under the said Act is from the date of mutation. As the mutation in this case was effected very late (in March 1914) the sait has been held to be within time. Dr. Nand Lal urges that the provision alluded to above is for suits to contest

TOARUR PRASAD SINGH U. ADTA PRASAD SINGH.

alienations made by a proprietor during his lifetime, as is clear from the Schedule to the Punjab Act I of 1900, and was meant for voluntary alienations and cannot apply to a sale by order of a Magistrate in the absence of the proprietor under certain sections of the Criminal Law. is argued that the limitation applicable to this case is that provided by Article 140 of the Indian Limitation Ast, under which the starting point is from the time when the estate falls into possession, which means from the date of Thakur Singh's death in the present ease. We think there is force in this contention. Mr. Ralli in reply argues that as the sale in dispute was caused by an act of Thakur Singh, absconding wher by his 18. that he was wanted in a Criminal offence, be must be regarded as the vendor and the same should, therefore, be held to be governed by the Punjab Act I of 1900. We think this argument cannot be accepted as correct and the sale of Thakur Singh's land in his absence under sections 87 and 88 of the Code of Oriminal Procedure cannot be considered to be a sale by him. We take it, therefore, that this case is governed by Article 140 of the Indian Limitation Act. The fact that Thakar Singh is dead is not disputed in this ease. No evidence was produced as to the date of his death in the Trial Court. It was for the plaintiff to prove the time of his death in order to show that his suit was within 12 years from the time when the estate fell into possession. He has failed to do so. The appellants produced before the lower Appellate Court a letter dated the 23rd September 19:6 from the Chief Commissisner, Port Blair, in which it is stated that Thakar Singh died on the 18th April 1901. This letter is not legal evidence but, in the absence of any allegation to the contrary on behalf of the plaintiff, it may, perhaps, be assumed that this official communication in response to the inquiries made by the appellants, states the date of Thakur Singh's death correctly. any case, on the record as it stands, the plaintiff has not been able to show that his suit was brought within 12 years of his brother's death and his suit must, therefore, fail. We accept this appeal and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

Z. L,

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 36 or 1921.

November 4, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

THAKUR PRASAD SINGH AND

OTHERS—PLAINTIFFS—APPELLANTS

versus

ADYA PRASAD SINGH AND OTHERS - DEPENDANTS - RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108, cl. 15— Profits, suit for—Co-sharer need not be full proprietor—Transferee from Hindu widow having life-estate, whether entitled to sue.

A co-sharer need not be a full proprietor to entitle him to file a suit against the Lambardar

for his share of the profits. [p. 3, col. 2.]

Therefore, a person to whom a Hindu widow has conveyed her rights for her life has a power to sue for the share of the profits to which but for such transfer the widow would have been entitled.

[p. 3, col. 2,]

Appeal against a decree of the District Judge, Fyzabad, dated the 6th May 1921, upholding that of the Assistant Collector of the First Class, Sultanpur, dated the 13th May 1920.

Mr. Niamat Ullah, for the Appellants.

Messrs, Bhairon Prasad and Salig Ram,
for the Respondents.

JUDJMENT.—This appeal arises out of a suit brought by the plaintiffs for the recovery of their share of the profits of a certian village for 1324 to 1325 Fasli. The Curts below have dismissed the claim on the ground that the plaintiffs were not relly so sharers of the village within the meaning of section 103, clause (15), of the Oadh Rent Act (XXII of 1886) and that they had no right to sue in the Revenue Court.

the widow of a collateral relation of the plaintiffs, holds an 8-annas share in the village Ashrafpur. The defendants own the remaining 8 annas share. The Zemindar of the village is Adya Prasad Singh, one of the defendants. Musammat Dhramraj Kuar adopted a person named Harbans Narain Singh. Bishunath Singh, the father of the plaintiffs Nos. 1 and 2 and grandfather of the plaintiff No. 3, questioned that adoption and filed a suit against Musammat Dhramraj Kuar and Harbans Narain Singh, which resulted in a com-

THAKUR PRASAD SINGH U. ADYA PRASAD SINGH.

promise by virtue of which Musammat Dhramraj Knar gave the share now in dispute to Bishunsth Singh for her life time subject to his liability to pay the Government revenue assessed on the same to her and sertain other property was proposed to he divided between Bishunath Singh and Harbans Narain Singh after her death. In accordance with that compromies a decree was passed and Bishunath Singh was awarded prasession over the share, the profits of which are now elaimed. In the mutation proceeding which followed this decree the Revenue Court instead of recording the name of Bishunath Singh in sabstitution of Musummat Dhramraj Knar showed him as gabis in the solumn of remarks in the khewat appertaining to the disputed share. The Courts below treated that entry and the sompromise as insufficient to establish that the plaintiffe, who bave succeeded Bishunath Singh on his death, are cocharers so as to entitle them to file a suit for their share of the profits in the Revenue Court. They regarded Bishunath Singh as merely entitled to Rs. 450 per year as a sort of maintenance.

The compromise stated that Musa amat Dhramraj Kuar gave to Bishunath Singh or his heir the property specified therein, yielding an income of B. 450 per year, and that Bishunath Singh and his heirs shall remain in enjoyment thereof by making collections, attachments, filing suits for the recovery of rent and ejectment of tenants and cultivating the land them elves getting it sultivated by others, and possess every other kind of right, short of aliena. tion by mortgage, sale, charge, or otherwise, including a right of realization of the sayer income. It further stated that they were to pay Rs. 537 4 per year on accoint of the Government fixed revenue in instalments to Musammat Dharamraj Kuar and, that, if they made any default in the payment of the same, she should have the power to take the said property into her possession and to pay Rs 450 per year in each in lieu of the same. Bishunath Singh had, therefore, every right, which the lady possessed during her lifetime, short of alienation by mortgage or sale or otherwise and he must be treated for all intents and purposes as a co-sharer standing in the shoes of Musammat Dharmraj Kuar so long as no default is made in the payment of the ravenue above mentioned and the right of resumption is not exercised.

A en sharer need not be a full proprietor to entitle him to file a suit against the Lambardar for his share of the profits. In Azis-un-nier v. Mohammad Saied Khan (1) and Saliva Bibi v. Albar Sing's (2) a mortgages in possession has been treated as a co-sharer within the meaning of section 108, clares (15), of the Oath 1686). (XXII of Ast Rant Masihullah Khan Said V. Ahnad (3) even a lessee of a so sharer or a mortgagee has been similarly treated as a co-sharer entitled to sue for his share of the profits, though the lease may have expired or the mortgage may have been redeemed, if his name has continued to be recorded in the papers. A Hinda widow also holds a limited interest; but she can file a suit for her share of the profits; and so can a mortgages in possession though his right is restricted and terminable. There is no reason why a person to whom a Hindu widow has conveyed her rights for her life should not have a similar power to sue for the share of the profits to which but for such transfer she would have been entitled. The plaintare duly shown in the revenue papers as in possession of the share in question. There would have been admittedly no difficulty, had their names been entered below that of Musammat Dharmraj Kuar as holding her rights for her life, following the analogy of mortgagess whose names are entered below those of mortgagors, but the mere fact that their names are entered in the remarks column as qubic ought to make no material difference. The Lambardar shall not have to pay the crofits twice over, particularly as Musanmat Dharm-' raj Kaar does not set no any elaim to them.

The appeal is, therefore, allowed and the suit remanded to the Court of first instance with a direction to reinstate it under its original number and to dispose of it in the manner required by law. The plaintiffs shall get their costs here and of

^{(1) 2 0, 0, 84,}

^{(2) 2 0. 0 299.}

^{(8) 18} Ind. Cas. 975; 34 A. 260; 9 A. L. J. 152.

INDAR SAIN t. PRABHU LAL.

the appeal to the Coort below from the respondents, who shall bear their own costs in both those Courts.

J. P.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2233 OF 1917.

November 7, 1921.

Present: -Mr. Justice LeRossignol and

Mr. Justice Campbell.

INDAR SAIN-PLAINTIFF-APPELLANT

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PRABHU LAL AND OTHERS - DEPENDANTS -- RESPONDENTS.

Minor, decree against, validity of-Execution of decree-Sale-Title of auction-purchaser.

Where a minor is entirely unrepresented before the Court which issues a decree against him, that decree is a nullity so far as the minor is concerned. But where a minor is a party to the case and a decree is issued against him, that decree, so long as it stands, is not invalid, it is only voidable at the instance of the minor, [p. 4, col. 2; p. 5, col. 1.]

A bona fide auction-purchaser need look only to the decree and order of sale of the Executing Court and is not bound to enquire further into title. So long as the decree remains valid, the proceedings taken under that decree, so far as they affect third parties in the same position as bona fide auctionpurchasers, cannot be impugned. [p. 5, col. 1.]

Shielal Bhogvan v. Snambnuprasad, 29 B 4 5 at p. 426; 7 Lom. L. R 585 (F. B. and Zain-ul-Abain Khan v. Muhammad Asghar Alt Khan, 10 A. 10; 15 I. A. I; 5 Ear. P. C. J. 129; 6 Ind. Dec. (N. 8.) 112, followed.

Second appeal from a decree of the District Judge, Hissar, dated the 1sth June 1917, varying that of the Munsif, Second Class, Hissar, dated the 30th June 1916.

Mr. Manchar Lal, for the Appellant.

Lala Har Gopal, for Prabhu Lal, Respondent.

JUDGMENT,—This second appeal arises out of a suit brought by a quondam minor for possession of a bouse sold in execution of a decree in 1906 under the following ciremmetances:—

Nadir Mal brought a suit for recovery of monies due on book assount against the present plaintiff as representing his deceased brother Jethu. The plaintiff, then a minor, was represented by his father's eister's son who compromised the slaim on the condition

that the money was to be recovered by instalments from the estate of Jethu, whatever it might be, in the possession of the minor. The decree was drawn up against the minor but the reservation that it was to be executed only against the property of Jethu in the minor's hands was erroneously omitted. The house now in dispute was attached and ultimately sold in spite of an objection from the minor's guardian that the house had never belonged to Jethu. The bouse was sold for Rs. 245, out of which the decree of Nadir Mal, the decree of one Ramji Das and the decree of one Ranjit Singh, the last two of whom had already obtained decrees against Indar Sain as representative of his deceased brother. were satisfied. The purchaser at the auction was one Ram Kishen, who, some years later in 19:0, transferred the house by sale to Prabhu Lal, the only respondent who defends this appeal.

The first Court, holding that the minor's interests had not been properly safeguarded, decreed his claim and the relief granted was to restore the case, i.e., Nadir Mal's suit, to its original number and to direct that proeeedings should continue as from the date when the compromise was accepted by the guardian with the consent of the Court. It did not find that the house in dispute was the property of the plaintiff and had never belonged to Jethn, but it ordered that the bouse should be sestered by Prathu Lal to the plaintiff until such time as the house was proved to have been the property of Jethu Mal. The lower Appellate Court accepted Prabbu Lal's appeal and modified the relief granted to plaintiff by the first Court by maintaining the house in Prabbu Lal's possession and giving the plaintiff a decree for the aggregate of the amounts paid to Nadir Mal, Ramji Das and Ramjit Singh out of the sale proceeds of the Lones.

In this Court, on second appeal, it is admitted that the possession of a bona fine auction,
purchaser is different from that of partiesto the original suit, but it is contended that,
inasmuch as the compromise was to affect
merely the property of Jethu in the hands
of his minor brother, and whereas the decree
did not restrict execution to that property, the
decree is a mere nullity and was void ab
initio. We see no reason to dissent from
the proposition that when a minor is entirely

PRESUMAL D. GAGAMMAL.

unrepresented before the Court which issues the decree against him that decree is a nullity so far as the minor is concerned. But when a minor is a party to the case and the desree is issued against him we see no reason to hold that that deeree, so long as it stands, is invalid, it is only voidable at the instance of the minor, and we must note that in this case although the wording of the decree was defeative the property proceeded against was regarded by both the decree. holder and the Executing Court as the property of Jethu and not as the property of the minor so that the defective wording of the deeree is not responsible for the prossed. ings of which the plaintiff now complains. But the main point for us now to deside is whether, in spite of the fact that it has not been established that the property in dispute was the property of Jethu, the auction purchaser has to suffer dispossession, and on this point we have no hesitation in following the well known principles laid down, inter alia, in Shivlat Bhagvan v. Shambhuprasad (1), and Zain ul-Abdin Bhan v Muhammad Asghar Ali Khan (2), that a bona file austion purchaser need look, only to the decree and order of sale of the Executing Court and is not bound to inquire further into title. So long as the decree remains valid, the proceedings taken under that decree, so far as they affect third parties in the same position as bonz file ane ion purchasers, sannot be impugned.

must fail. As to the equities, although strictly we are not concerned with them, we note that Jethu was an adult; that at the time of his death the plaintiff was still a minor; that their father left no immoveable property; that the plaintiff has failed to establish that the house was his own exclusive property, and that even if the house was not the explusive property of Jethu but he obtained it by suspession, in that ease the plaintiff would not be entitled to the whole of the sale-proceeds of the house but only to one moiety of the same. We dismiss the appeal with easts.

Z. K. Appeal dismissed.

SIND JUDIDIAL COMMISSIONER'S

BITISION APPLICATION No. 34 or 1918.

August 7, 1 19.

Mr Raymond, A. J C.

PESSUMAL, SON OF RELOOMAL -

APPLICANT

D37145

GAGANMAL, SON OF HARUMAL, -

Stamp Act (II of 1833), s. 12-Stamp, cancellation of, criterion for determining-Parallel lines across stamp, whether effective cancellation.

The criterion for determining whether an adhesive stamp has been effectually cancelled within the meaning of section 12 of the Stamp Act is, whether the ordinary conscientious man would, on seeing the stamp, come to the conclusion that it has already been brought into use. The drawing of two parallel lines across an adhesive stamp extending beyond its edges is an effectual ouncellation of the stamp within the meaning of the section, [p. 6, col. 1.]

Revision application from a judgments and decree of the First Class, Sab Judge,

Sakkar.

Mc. Futehchand Assuloma, for the Appli-

Mr. E. Castellino, for the Opponent.
JUDGMENT.

RATHOND, A. J C .- Defendant, Gagan. mal, was a servant of the plaintiff's father in Sourabaya. He borrowel a sum of Rt. 257 from him and signed a bill of exchange which was duly stamped. Defendant shortly after left Sourabaya and came to Shikarpur. Plaintiff's father was dead and plaintiff, who was a minor, through his goardian, his mother, filed a suit agains; the defendant for resovery of the amount mentioned in the billof exchange. Before the suit was filed, an ed to ter ma saw sams eno to cmets evicedta bill of exphange as required by law, the ebistao betroexe caed goived tacmacob British India, The stamp was cancelled by having two parallel lines drawa across it extending on either eids of the stamp on to the paper to which it was affixed. The lower Court held that the stamp was not properly emeelled within the meaning of section 14 of the Stamp As, and the bill of exchange was, therefore, inadmissible in evidence, and as the suit was based on it, dismissed it.

it is argued in appeal that the lower Court was wrong in holding that the stamp was

^{(1) 29} B. 435 at p. 438; 7 Bom L. R. 535 (F. B.).
(2) 10 A. 186; 15 f. A. 12; 5 Sar. P. C. J. 129; 6
Ind. Dec. (N. B.) 112,

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not properly eancelled, and this is substantially the only point raised in this appeal.

Section 12 of Act II of 1899, sub section (1) requires a person affixing an adhesive stamp to any instrument to cancel the same so that it cannot be need again, and sub section (3) of the same section describes some of the methods in which an adhesive stamp may be cancelled and concludes with the words "or in any other effectual manner." The question, therefore, whether a particular stamp has or has not been effectually cancelled so that it carnot be used again is a question that depends on the facts of each ese. In the present case there cannot be the slightest doubt that the plaintiff or his guardian did intend to cancel the stamp on the dosument in suit. As I have remarked, two parellel lines were drawn across the stampextending beyond its edges. And it eannot be alleged for a moment, nor has it been, that this was not done with the intention of cancelling the stamp.

Now, sub section (3) of section 12 does not profess to exhaustively prescribe the various methods by which a stamp may be cancelled. And drawing lines across a stamp may be as effectual a mode of cancelling it as by writing one's signature across it. In my opinion section 12 does not make it obligatory that a stamp should be so cancelled as to make its use again a physical impossibility. An ingenious secondrel may devise various means of re-using a stamp of the effective cancellation of which there could be no reasonable doubt. I think the eriterion for determining whether a stamp has been effectually cancelled within the meaning of section 12 is, whether the ordinary conscientious man would, on seeing the stamp, some to the conclusion that it has already been brought in use. In the present case I feel no reasonable doubt that a person observing the lines across the stamp, would feel convinced that the stamp was used. possible that the two lines on the stamp could be obliterated and the stamp brought into requisition again, but I hold, despite this eircumstance, that the stamp was effectually cancelled within the meaning of section 12.

The lower Court in holding that the stamp was not cancelled has followed the ruling in Virabhadrapa v. Bhine (1). It

was held in this case that the more drawing of two parellel lines without more over a reseipt stamp affixed to an instrument does not have the effect of cancelling it 'so that it cannot be used within the meaning of the Stamp Act." With due deference to the learned Judges who decided this case, I must corfess I am unable to follow the reasoning of the desision. In the judgment it is stated that, "as the law is that a need stamp cannot be need again the object of the Legislature in making cancellation obligatory is that the used stamp should bear on it some effective mark to show that it has been used, Two parellel lines drawn over a stamp are not sufficient to earry out that object because mere lines would not be effective for the purpose in view." But why may not lines be as effective as any other mode of carcellation? They are sufficiently indicative of the user of the stamp and any honest man on seeing the stamp would understand that it has been used, and should not be used again. This decision purported to follow an earlier Varamalli decision Ralli in ٧. (2). But the latter case was different. There the stamp on the dosument was cancelled "by a small portion of the first letter of the defendant's signature consisting of a slightly curved line," and it was held that this was not a sufficient cancellation. This is, however, widely different to two lines being drawn across the whole width of the stamp. It is very probable that in the care of a elightly curved line appearing at one end of the stamp it may lead one to imagine that it was there by assident, but the two lines across the stamp would indicate a deliberate act.

I think that section 12 has been correctly interpreted in Mahadeo Kori v. Sheoraj Ram Teli (3). In this case at the top of a document was affixed a one anna stamp on which there was one horizontal line drawn across it. It was held that a stamp may be effectually cancelled by merely drawing a line across it. And section 12 of the Act does not mean that it is necessary to cancel a stamp in such a manner as to make it physically impossible for any dishonest person to make hereafter a fraudulent use of the stamp. It was further

^{(2) 14} B, 102; 7 Ind. Dec. (N. s.) 526.

^{(3) 52} Ind. Cas. 974; 41 A. 169; 17 A. L. J. 19; 1 U. P. L. B. (A.) 29,

^{(1) 28} B, 432; 6 Bom. L. R. 436.

NABAIN U. RAMDULARE.

said in this care by Piggott, J., that it is impossible to treat the words of section 12 of the Indian Stamp. Act as requiring such a degree of eancellation as would make it physically impossible for any dishonest person to make hereafter a fraudulent use of the stamp label. And Walsh, J., said that a line drawn through a stamp with the object of cancelling it is as effectual a cancollation as writing part of a signature or of a date upon it. The Allahabad judgment followed one reported in 15 Oadh Cases Mohammad Amir Mirsa Beg v. Babu Kadar Noth (4)), where a stamp has been cancelled by having three lines drawn acress it in different directions each of the said lines extending more or less beyond the edges of the stamp on to the paper on which the document was written, (in the present ease the lines unmistakeably extend beyond the edges of the stamp) it was held that the stamp was effectually cancelled within the meaning of section 12. The sorrestness of the ruling in Virabhadrapa v. Bhimani () was doubted in the case of Piran Ditta v. Mongal Singh (5). In McMullen v. Sir Alfred Hickman teamship Co., Ltd. (6) where some adhesive stamps were cancelled either by lines or a cross, with neither the eignature or the date, it was held that they were properly and effectually caseelled so as to prevent their being used again.

I am, therefore, of opinion that the lower Court was in error in holding that the stamp was not esneelled within the meaning of section 12 of the Stamp Act and, therefore, in refusing to admit the bill of exchange in evidence. I would reverse the decree of the lower Court dismissing the suit and direct it to admit the document in evidence and try

the enit on the merits.

Costs of this appeal on the respondent. KINC.ID, J. O.—I concur. W. C. A.

Appeal allowed.

(4) 15 Ind. Cas. 20?, 15 O. C. 58.

(5) 108 P. R. 1908, 207 P. W. R. 1908.

(6) (1903) 71 L. J. Ch 763; 18 T. L. R. 650,

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPR. L No. 187-B or 1920, January 7, 1922.

Fresent: - Mr Kotval, A. J. C.
NARAIN - DIFE "DANT - APPELLANT
versus

RAMDULARE AND ANOTHER-PLAINTIPES-

Limitation Act (IX of 1908), Sch. I, Art. 152—
Decree signed on date subsequent to judgment—Appeal
—Period of limitation runs from date of judg.
ment—Civil Procedure Code (Act V of 1208), O. XX,
r. 7.

The date of a decree is the date of the pronouncement of judgment and the period of limitation for an appeal against the decree begins to run from the date of the judgment, even though the decree is drawn up and signed on a subsequent date.

Appeal against the decree of the District Judge, Amraoti, dated the 19th of March 1920, in Oivil Appeal No. 1: 4 of 1919,

Mr. D. W Kathale, for the Appellant. Mr. M. R. Dizit, for the Respondents.

JUDGMENT .- This an appeal against the deeree of the lower Appellate Court dismissing an appeal on the ground that The judgment of it was time barred. the Trial Court was delivered on the 21st July 1919 but the decree was not signed till the 29th July. The appellant applied by post for copies of the judgment and decree. The application was received in office on the 28th July 1919. Copying was stopted for want of funds on the 10th September. A subsequent advance was paid on the 19th September. The copies were ready and posted on the 24th September. The appeal was filed on the 15th October.

It is admitted that Seth Jagannath v. Gangaram (1) is against the appellant and that, assording to it, the appeal is barred by four days, but it is contended that these eases have not considered that the right to appeal does not come into existence till the decree is signed and, consequently, the period of limitation for filing an appeal does not commence to run till that date.

The third solumn of Article 152 of the Schedule to the Limitation Act gives the date of the decree appealed from as the time from which the period begins to run in the

L. & I, BAPAPORT U. KALLIANJI HIBACHAND.

Code to the Court of a District Judge. This date is the date of the pronouncement of judgment: whe Order XX, rule 7, First Schedule, Civil Procedure Code. The decree must be deemed to some into existence on the day the judgment is pronounced. The contention advanced by the appellant assumes that decree is no decree until it bears the Judge's signature, but looking to Order XX it would seem that a judgment is a judgment even before it is signed by the Judge who wrote it: vide rules 2 and 3, and similarly a decree is a decree before it is a signed: vide rules 7 and 8.

The appeal fails and is dismissed with

J. P. & G. R. D.

Appeal dismissed.

BOMBAY HIGH COURT.
OF 1921.

Ostober 8, 1921.

Trecent: - Sir Norman Maeleod, Kr.,
Chief Justice.
L. & I. RAPAPORT-PLAINTIPPS

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KALLIAN II HIRACHAND - DEFENDANTS.

Civil Procedure Code (Act V of 110), O XI, rr. 15,

18-Inspection of documents - Unnecessary documents,

A defendant is not entitled to the production and inspection of documents which are referred to in the plaint merely as part of the narrative of the history of the dispute and which are not necessary either for proving the plaintiff's case or for assisting the defendant in his defence. [p. 9, col. 1.]

Mr. Desai, for the Plaintiffs.

Mr. Thakordas, of Thakordas & Co., for the Defendants.

noted therein and to pay for the goods at the current rate of exchange for demand Bank Bills on London on delivery of the shipping documents. The goods arrived but the defendants refused to take delivery or to pay for the goods. In the plaint the plaintiffs referred to the invoices received from England for the goods which the plaintiffs had ordered to fulfil their sontracts with the defendants. It appears that the defendants were willing to take delivery goods provided the plaintiffs the were willing to fix the rate of exchange at 2s. On the 9th of February 1941 the defendants wrote: -

"Received your letter and in reply I beg to write that if you agree to give me the rate of exchange at 2s. for said five cases according to the resolution passed by our Native Piece Goods Merchants Association, I will be prepared to take up there

eases."

The defendants before filing their written statement have taken out this summons asking for an order that the plaintiffs should give inspection to the defendants of the invoices referred to in paragraphs 10 to 15 of

the plaint.

Now, undoubtedly, the defendants are entitled, under Order XI, rule 15, Civil Procedure Code, to give notice to the plaintiffs to produce there invoices for their inspection and if inspection is refused, they are further entitled to get the opinion of the Judge whether such a demand for inspection is justifiable. That is provided for by rule 18, under which "the Court may, on the application of the party desiring it, make an order for inspection ... Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not becessary either for disposing fairly of the suit or for saving coste."

It appears now that the defendants claim that, under their contracts with the plaintiffe, they are not obliged to pay for the goods at the contract price but at some other price at which the plaintiffs may have secured the goods in England; and it is for that purpose that they are now seeking inspection of these invoices, which would show the prices at which the plaintiffs secured the goods. On the facts alleged in the plaint and on the written con-

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tracts signed by the defendants, it is perfeetly obvious that the contention raised
now by the defendants is untenable, as
the defendants under their contract had
nothing to do with the prices which the
plaintiffs paid in England. Accordingly,
the defendants have not made out a case
for an order directing the plaintiffs to
give inspection.

The law is laid down under the correeponding Supreme Court Rule in Quilter v. Heatly (1), where Bowen, L. J. said:

"Order XXX', rule 14 provides for immediate production of any documents which a party has referred to in his pleadings or affidavits. The party against whom the application is made must produce them unless he can show good cause why he should not. If he refuses, the party applying can go to the Judge who may refuse the application if he sees good reason for so doing......In my opinion the onus is on the refusing party."

So that the plaintiffs here have to give sufficient reason why they should not be ordered to give inspection of these invoices. Now it is slear that these invoices are merely referred to in the plaint as part of the narrative showing how the plaintiffs reseived advice of the goods they had purchased in England so that they could make out their own invoices to send to the defend. The plaintiffs were not obliged to mention the invoices they recieved from England since the invoices were not necessary either for proving the plaintiffs' case or for assisting the defendants in their The present application is obdefence. viously made for the purpose of delaying the plaintiffe' enit.

The summone will be discharged with

Counsel sertified.

Z. K.

Summons discharged. 821. (1883) 23 Ch. D. 42; 48 L. T. 873; 81 W. R. LAHORE HIGH COURT.

MISCELLANEOUS FLAST CIVIL APPEAL No. 817

OF 1920.

November 2, 1921.

Present: -Mr. Justice Spott-Smith.

Lali DIWAN CHAND -PLAINTIPF
APPELLANT

ver sus

JHARIA COAL CO.-DEPENDANTS-

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2 (3., O. XLIII, r. 1 (r.—Temporary injunction, disobedience of -Order refusing attachment—Appeal, whether maintainable.

An order refusing to attach property for disobeying an injunction is an order passed under Order XXXIX, rule 2 (3) of the Civil Procedure Code and is appealable under Order Xulli, rule 1 (r, of the Code. [p. 10, col. 2.]

Appeal from an order of the Senior Sab-Judge, Delhi, dated the 2nd March 1920.

Lala Moti Sagar, R. S., for the Ap. pellant.

Mr. S. K. Mukerji, for the Respondents,

JUDGMENT.—In the plaintiff's suit for damages against the Jharia Coal Company, defendant, the Court below has granted the plaintiff's prayer for a temporary injunetion restraining the defendant Company from alienating their colliery. It has also refused to make an order for attachment of the said colliery. From the order granting a temporary injunction the defendant has appeared to this Court, and from the order refusing to attach the colliery the plaintiff has appealed.

Defendant objects to the temporary injunction on the following grounds. He urges that the injunction is contrary to Order XXXIX, rule 1 (a) as the colliery in question is not the property in dispute in the sait. It is quite clear that clause (a) does not apply. He says that clause (b) does not apply because the plaintiff cannot be said to be a creditor of the defendant. There was no such contention, however, in the defendant's written pleas as will appear from a perusal thereof. Plaintiff claims to be a creditor of the defendant and Mr. Moti Sagar, who appears for the defendant, says that if such a plea had been raised, proof would have been adduced to the effect that there were other creditors of the defendant whom he intended to defrand by alienating this property. After the service of the injunction upon the defendant Company, it actually transferred the colliery by a registered deed

GOGOLA TENKANNA C. GOGOLA NABASIMHAM.

was good ground for asking the Court to issue an injunction. Further, I am of opinion that the plaintiff was entitled to ask the Court to attach the property as the defendant had disobeyed the temporary injunction. In the case reported as Ottapurakkal Thatath Suppi v. Alabi Mashur Koyanna (1) it was held that an order refusing to attach property for disobeying an injunction is an order passed under Order XXXIX, rule 2 (3) and is appealable under Order XLIII, rule 1.

I am, therefore, clearly of opinion that the defendant's appeal should be dismissed, and I order assordingly. The plaintiff's appeal is assepted, and I direct the lower Court to pass an order of attachment as prayed for. Costs of the plaintiff in this Court in both appeals will be paid by the defendant.

Z, K.

Appeal occepte 1.

(1) 27 Ind. Cas 131.

MADRAS HIGH COURT.

CIVIL APPE L No 165 of 1918.

April 12, 1 21.

Present:—Sir John Wallis, Kr., Chief Justice,

and Mr. Justice Krishnan.

GOGCLA VENKANNA—PLAINTIFF—

APPELLANT

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GOGULA NARASIMHAM AND OTERES

Hindu Law-Waste by widow of corpus of moreables

-heversioner, right of-Relief, nature and form
of, against widow and her transferee-Limitation
Act (IX of 1908), Sch. I, Art. 120.

A Hindu widow is accountable to her reversioners for waste of the corpus of the moveables and she can be made to re-place it if she is in a position to do so. [p. 11, col 1.]

A reversioner is entitled to sue for the moveable corpus in the hands of a Hindu widow being reduced to possession and handed over to a Receiver appointed in the suit subject to any question of limitation. [p. 11, col. 1]

Transferees from a Hindu widow without consideration may be made to re-place any part of the moveable corpus of the estate of the last male owner which can be traced to their hands, [p. 11, col, 1.] A reversioner's right to sue to restrain waste of moveables by a Hindu widow is governed by Article of the First Schedule of the Limitation Act. [p. 10, col 2.]

Appeal against a decree of the Temporary Subordina's Judge, Vizagapatam, in Original Suit No. 14 of 1913.

Mr. A. Krishnasawmi Aiyar, for the Appel-

Mr. P. Narayanamurthi, for the Respondent.

JUDGMENT.

0. J - The defendant's appeal from the decree in this suit has already been dismissed. This is an appeal by the plaintiff, the next reversioner, from the decree of the Temporary subordinate Judge in so far as it refused to make the widow accountable for wasting the moveable property of the husband which came to her hands and to make her brother, the second defend. ant, and the third defendant, his undivided brother, accountable for so much of the corpus of the estate of the husband of the first defendant, the last male owner, as has some to their hands. In the case of immoveable property the Hindu reversioner has 12 years to sue from the date of the widow's death under Article 141 of the Limitation Ast and it is, therefore, unnecessary to elaim such reliefs as are sought in the present suit, but, as regards moveables, his right to sue is governed by Article 120 of the Limitation Ast and the question when his right to sue accines under that Article is in much the same position as it was with regard to immeveable property urder the earlier Limitation Act of 1859, under which it was held by Sir Barnes Peacock and the Fall Bench of the Calentta High Court in Nobin Chuckerbutty v. Issur Chunder Chunder Ohuc erbutty (1) that possession adverse to the widow was also adverse to the In that case the question reversioner. of the reversioner's remedies during the widow's lifetime with regard to the moveable corpus of the estate which she was wasting was considered, and Sir Barnes Peacock observed: "Reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow from committing waste, and I have no

^{(1) 9} W. R. 505,

KUNJAMMAL U. BATSNAM PILLAI,

doubt that, if a proper case were made out, reversionary beirs would have a sufficient interest, as well as creditors of the ancestor. by suit against the widow and the adverse holder, to have the estate reduced into possession, so as to prevent their rights from becoming barred by limitation," and he goes on to say that edverse po-session of Government paper or the like would give a cause of action to the beirs; sc, too, Jackson, J, observed that a reversioner aggrieved by the fraudnlent action of the widow would be entitled to bring his action. On the authority of this esse it was beld in Kudha Mohun Dhur v. Ram Dass Dey (2), before the ensetment of the present Article 141, that the next reversioners were entitled to have immoveable pro perty of the estate abandoned by the widow reduced into possession and to put a manager in charge of them. This case is authority for the proposition that, as regards the moveable corpus of the estate also, it is open to the reversioners to file a suit praying that such moveable corpus mey be so reduced into possession and handed over to a Receiver appointed in the suit subject to any question of limitation. Transferees from the widow without consideration may be made to re place any part of the moveable corpus of the estate of the last male owner which can be traced to their hands on the equitable prirciple recently applied in sinclair v. Brougham (3), which imposes upon reople into whose hands the property of other persons has come without consideration the duty of assounting for it and restoring it.

Then, as to the widow's own accountability for wasting the moveable corpus of the estate, the authorities are mesgre because the remedy against her would rarely be effective, but on principle I see no sufficient mason for refusing to hold her accountable for waste in the sense of making her re-place the moveable corpus which she has made away with if she is in a position to do so, allowing her, of course, to enjoy the insome of the fund re-placed. She is not a trustee of her deceased husband's estate, or a tenant intail or for life, or the manager of a joint family, but the owner of a widow's estate

(2. 8 B. L. R. 862; 24 W. R. 86 note. (3) (1914; A. C. 898; 88 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 802; 80 T. L. R. 815.

with all the peculiar insidents of such ownership. As the owner of such a widow's estate she is under a clear duty to ab-tain from wasting the moveable corpus of the estate just as a tenant in tail or for life is bound to abstain from sommitting waste, and if she commits a breach of that duty I san see no reason why she should be allowed to go free and not to be held assount-The Subordina's Judge has referred to the case of the manager of a joint Hindu family who is only held accountable for the property of the joint family as it exists at the da'e of partition, but this now wellestablished rule is based on practice on the ground that it is always open to the other meu bers to put an end to the management by partition, which can even be enforced in a proper case on behalf of the minor members of the family. Confirming the reliefs already granted to the plaintiff, we must allow the appeal and eet aside so much of the deeree as dismisses the plaintiff's claim for an account against the widow and the second and third defendants in the light of the above observation. Costs to abide.

KRISHNAN, J .- I agree.

M C. P.

J. P.

Apre il alioued.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL NO 1892 OF 1920.
December 12, 1921.

Fresent:—Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

KUNJAMMAL AND OTHERS - DEFENDANTS --

versus

BATHNAM PILLAI-PLAINTAPP-

RE PO-DENT.
7 of 1-82), ss 15, 9

Easements Act (V of 1-82), ss 15, 98—Right of way through another's land, acquisition of -Access for scav-nyer-Enjoyment of right for over statutory period—Acquisition of right,

An easement can be acquired to a right of way through a dwelling house, [p. 18, col. 1.]

Section 15 of the Easements Act which deals with the requisites necessary to acquire a right

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under the Act is not exhaustive and does not exclude or interfere with other titles and modes of acquir-

ing easements. [p. 13, col. 1.]

Where user is proved, the presumption is that it is of right till the contrary is proved. Such a presumption is not in India a presumption de juris et de jure. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate against, the inference. [p. 13, col. 2; p. 14, col. 2.]

It is competent to a person to acquire a right of way for a scavenger to gain access to his house by passing through his neighbour's house by user for over the statutory period. Such user need not have been exercised as of right. [p. 15, col 1.]

Second appeal against the decree of the Additional Subordinate Judge, Trichinopoly, in Appeal Suit No. 344 of 1920, (Appeal Suit No. 172 of 1920 on the file of the District Court, Trichinopoly), preferred against that of the Court of the District Moneif, Trichinopoly, in Original Suit No. 171 of 1918.

FAOTS appear from the judgment.

Messre, K. Rajah Aiyar and R. Ganarathi Aiyar, for the Appellants.-Defendants are the appellants. The suit is brought by the plaintiff for a permanent injungrestraining the defendants from obstructing the scavenger from passing through the defendant's house and elearing the plaintifi's privy. It has been decreed in both the lower Courts. My contention before your Lordships is that the plaintiff has not acquired the easement under section 15 of the Easements Act under which easements are acquired. The right claimed must have been exercised as 'of right' and to the knowledge of the defendant. Further, there is no right of way through a dwelling house. Such an carement is unknown to law. Now about section 15 all that the lower Court has found is that the privy was eleaned by the seavenger entering through the defend. ant's doorway from 20 to 40 years. But it has not been found that that was done as of right. No presumption in such cases could be made that it is exercised 'as of right.' The presumption in favour of the exercise being as of right does not apply to India. [Shaikh Khoda Bukeh v. Shaikh Tojuddin (1). Meier Mullick v. Hafizuddi Mullick (2), Saminatha Mudaly v. Velu Mudaly (3) Phillips v Halliday (4).] So in this country, user must

(1) 8 C. W. N. 859.

(2) 9 Ind. Cas £65; 13 C. L. J. 316.

(3) 25 Ind. Cas. 749; 4 L. W. 128; (1916) 2 M. W.

N. 192; 20 M. L. T. 544. (4) (1891) A. O. 228; 61 L. J. Q. B. 210; 64 L. T. 745; 55 J. P. 741. be presumed to be by license' and not as of right.' Farther, there can be no right of way through another man's house.

Mr. 8. Krishnamurthi Aiyır, for the Respondent.—It must be presumed from long user that the user had a lawful origin. Section 15 does not exclude other modes of acquiring easements. Rairup Korr v. Abul Hossein (5). See also Thillips v. Hallilay (4), Goodman v. Saltash Corporation (6), Mercer v. Denne (7), Gale on Easements, page 222, Saminatia Mudaly v. Velu Mudaly (3). These cases sufficiently establish that where there is an exercise of a right, if it could be suggested that it had a lawful origin, it must be presumed in favour of the right. If that is presumed then plaintiff has got a right to get an injunction and the lower Court is right.

Mr. K. Rajah Anyar in reply.—Right of way through another man's house is an easement unknown to law. Moreover, my client will be put to a lot of inconvenience by having to

keep the doors open.

JUDGMENT,-This appeal arises out of a sait by the plaintiff for a permanent injunction restraining the defendants from obstructing the seavenger from passing through the defendants' house and eleaning the plaintiff's privy. The case for the plaintiff is that the seavengers have been cleaning his privy for over 60 years by going through the defendants' doorway marked in the plan, erossing the defendants' privy and then passing by a doorway in the wall to the plaintiff's privy which is adjacent and cleaning it. The first defend. ant's care was that the right was never exercised. The District Munsif found that the plaintiff's privy was elegned over a0 to 40 years by the seavenger passing through the defendants' house as alleged in the plaint and that it was not obstructed before October 917. The suit was filed on the 19th of March 19:8. On appeal the Sutordinate Judge consurred with the findings of the District Mansif and dismissed the appeal.

(6) (1882) 7 A. C. (33: 52 L. J. Q B. 193; 48 L. T.

239; 31 W. R. 293; 47 J. P. 276.
(7) (1904) 2 Ch. 534 at p. 538; 74 L J. Ch. 723; 93 L. T. 412; 70 J. P. 65; 54 W. R. 303; 3 L. G. R. 1293.

^{(5) 6} C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. s.) 257 (P. C.).

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It is contended in second appeal that section 15 of the Easements Act cannot apply to easements like the present one, that there was no allegation that the right claimed was exercised as a matter of right and to the knowledge of the defendant, and that there can be no right in law to a right of way through a dwelling house.

Section 15 of the Easements Act deals with the requisites necessary to acquire a right under the Act, but as pointed out by their Lordships of the Privy Council in Rayrup Koer v. Abul Hossein (5) other titles and modes of acquiring easements are not

excluded or interfered with.

It is argued that in the present case all that both the lower Courts have found is that the privy was cleaned by the scavenger entering through defendants' doorway from between 30 to 40 years, but that it has not been shown that this was done as a matter of right and that there is no presumption in such cases that the exercise was of right.

The plaintiff in paragraph 4 of the plaint states "that seavengers have had access to the privy in his house through the doorway of the defendants for the past 60 years" and in paragraph 5 it is alleged "that owing to misunderstandings between the parties the defendants with a view to prevent the seavenger from eleaning the privy have looked up the door D on their side and are obstructing and appropring the plaintiff in various ways contrary to his right, and that the defendants have no right whatever to prevent the reavengers." Paragraph 6 states that the wrongful acts of the delendants have a great deal of trouble and besused loss to the plaintiff and are also likely to give rice to various Civil and Criminal proceedings and that defendants should be restrained by an injunction. So far, therefore, as the plaint is conserned, not only is it not alleged that the user was permissive but the allegations show that plaintiff claims it as of right,

The defendants deny that the scavengers passed through their house in order to clean the plaintiff's privy and state that even if the user were true it could not have been as of right.

Four witnesses were examined for the defendants but their evidence is to the effect that the right claimed was never exercised.

There is no suggestion of any license given by the defendants or their predecessors in title to the scavenger cleaning plaintiff's privy by entering through their house.

In the case of long enjoyment of the right slaimed, a legal origin should, observed by Lord Herschell in Phillips v. Halliday (4), be presumed when there has been a long continued assertion of a right if such a legal origin were possible, and the Court will presume that those acts were done and those eircumstances existed which were necessary to the creation of a valid title. The presumption of a lost grant in each cases has been recognised in the leading ease of Goodman v. Saltash Corporation (6), Circumstances, however, should exist which would render the drawing of the presumption reasonable in law and probable in fast, but, as pointed out by Farwell, J., in Mercer v. Denne (7) not only would Courts be slow to draw an inference of fact which would defeat a legal right which has been exercised for a very long period unless such inference is irresistible but will presume everything that is reasonably possible to presume in favour of such a right.

Where user is proved, the presumption is that it is of right till the contrary is proved. Gale in his valuable treatise on Easements observes: "The effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement for in such a case the user would not have been had with the intention of asquiring or exercising a right. The presumption, however, is that a party enjoying an easement asted under a claim of right until the contrary is shown." (Page 222, ath Edition). In Campbell v. Witson (8) it was held that where there was no evidence to show that the way over another's land been used by permission such user over 20 years exercised adversely and under a elsim of right was sufficient to enable the Jury to raise the presumption of a grant. In Saminatha Mudaly v. Felu Mudaly (3) Wallis, C. J., observed: 'On the other hand, the user of the plaintiffs may be presumed to be as of right and to have a lawful origin, and if a lawful origin of the plaintiff's right can he suggested such an (8) (1803) 8 East 204 7 R. B. 46 ; 102 E. R. 610. KUNJAMMAL U. RATHNAM PILLAI.

origin can be presumed." It has been argued for the appellant that the presumption in favour of the exercise being as of right rather than license does not apply to India and reference has been made to the cases referred to below.

In Shaikh Khola Buksh v. Shaikh Tanul. din (1), Bannerjee, J, was of opinion that it would not be safe to follow the rule of English Law without qualification. was of opinion that, as section 25 of the Limitation Act requires the user to be as of right, the onus will be on the plaintiff to prove it, and that h ving regard to the habits of the people of the country it would not be right to draw the same inference from mere user as would and proper legitimate in a case arising in England. The learned Judge approval with quotes the following passage in Mitra on Limitation: "The nature and character of the servient land, the friendship or relationship between servient and the dominant owners and the circumstances under which the user taken place may induce the Court to hold that the user was not 'as of right' although there is no direct proof that the enjoyment was had with the permissoin of the servient owner." In Meser Mullick v. Hafisuddi Muilic. (2) Pigot and Rampini. JJ., were of opinion that in questions regarding a right of way the Court should consider the character of the ground, the space for which the right is claimed, the relations between the parties and the eircumstances under which the user took place.

In Saminatha Mudaly v. Velu Mudaly (3) Phillips, J., while referring with approval to the distum of Lord Herschell on thillips v. Halliday (4) and to the rule laid down by Gale, was disposed to draw a difference between a right of way and a right to water. Referring to the observations of Banerjee, J., in Shaikh Bhoda Buksh v. Shaith Tauddin (.) the learned Judge ob erves: "No doubt, as was remarked by Banerjee. J., in Shaikh Khoda Buksh v. Shaikh Taundin (1), that in this country it would not be right to draw the same inference from user as in England, but his remarks had reference to a right of way, in respect of which I agree that the observation has considerable force; but rights to water stand on a different footing, for in this country

they are very highly valued and a license for the use of water gratis is by no means common."

We do not think it can be easid that rights of way into and through a private dwelling house in this country are not as highly valued as rights to water.

In Muthu Goundan v. Anantha Goundan (9). which related to a right of way, it was found that the plaintiff and his predece sors-intile were u ing the path for over 20 years that though there were objections more than 2 years before suitastual user did not sease till a fence was put no a few days prior to suit. It was held by Salasiva Aigar and Bakewell, JJ., that the plaintiff was entitled to sassed both under the Eisaments Ast and under the General waw, Sidasiva Iger, J., held that when open enjoyment has taken place for a long term of years title by preseriation was asguired independently of the Stature and a sait to establish that right can be brought within 12 years after the obstraction."

We do not think that the cases eited by the appellant's Vakil establish that no presumption should be raised by user and that in this country enjoyment of a right of way should be presumed to be by lisense till the contrary is proved. All that they decide is that there are conditions and circumstances to be taken note of in this country before the Court can come to the conclusion that the exercise of a right of way can be held to have been as of right. What the eircomstances are which militate against the user being exercised as of right must, like any other fact, be pleaded and it is for the Court to consider whether, having regard to the existence of all or some conditions and considerations referred to by Bannerjee, J., a reasonable presumption can be drawn as to the exercise being of right. The presump. tion of right from long user is not in this country a presumption de uris et de ure. It only starts a party with a presumption in his favour which can be rebutted by proof of fasts which are inconsistent with, or which militare agains, the inference # 11sh, in the absence of evidence by the defendant, would entitle plaintiff to a decree.

(9) 21 Ind Cas. 528; 23 M. L. J. 635; 18 M. L. T. 476; 2 L. W. 1107; (1916) 1 M. W. N. 113,

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It has been argued that there can be no right of way through another person's bouse. No authority had been eited in support of this proposition. Having regard to the fact that in towns houses without compounds or backyards are contiguous to each other and that very often access through another house may be the only way which seavengers ean gain ascere, it is difficult to see why no right of way can be acquired. The right to a kitchen of neighbouring house 8 bas been reongt ised for washing 10 England (Gale on Easements, page 28). is, no doubt, true that the use should not go beyond what is reasonably required for the enjoyment of the dominant tenement, but this does not mean that the right itself cannot be acquired where its user may be irksome. All that Mr. Bajah Iyer was able to urge was the trouble his elients will be put to in having to keep the door of his house open.

We are of opinion that the decrees of the lower Court are right and dismiss

the second appeal with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL PROM OR GIN-L DECKEE

No 119 of 1919.

April 14, 1921.

Present: -Justice Sir Acutoch Mcokerjee, Kr., and Mr. Justice Buckland. LUCHIRAM MOTILAL-PLAINTIFF-

APPELLANT

HADAN DOD

RADHA CHARAN PODDAR AND OTHERS-

Evidence Act (I of 1872), s. 154—Hostile witness, who is—Evidence, admissibility of—Statement of insolvent in insolvency proceedings—Omission to object to reception of evidence, effect of—Plaintiff calling defendant as witness, whether entitled to crossexamine him as of right Basis of Court's decision.

An admission of an insolvent, if made after the act of insolvency, may be admissible against himself but it cannot furnish evidence against another insolvent or as against the Official Assignee, [p.17, col.1.]

The statement of an insolvent in the course of his public examination under section 27 11 of the Presidency Towns Insolvency Act is not admissible in evidence in a subsequent suit in which he is not examined as a witness by the court [p 17, col .]

An erroneous omission to object to the reception of evidence does not make it legally admissible

in evidence [p. 7, col]

If the plaintiff calls the defendant as a witness, he is not entitled to cross-examine him as a matter

of right [p. , col. 1]

Radha Jeebun Moostuffy v. Taramonee Dossee, 11 W. R. P C. 3; 2 B. . . R. P. C. 79; 12 M I. A. 8; 2 Suth P C. J. 201; 2 Sar. P. C J. 457; 4 Mad ur. 176; 1 Ind Deo N s 534; 0 E R 38, discussed

* party when called as a witness by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Lourt [p 8, col. ?.]

A witness who is unfavourable is not necessarily hostile, for a hostile witness is one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the court, [p 17, col, 2.]

A Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony.

[p 19, col 1.]

Mina Kumari v. Bijoy Singh, 40 Ind. Cas 242: 1 P. L. W. 425; 5 L. W. 71; 82 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 844; 15 A. L. J. 382; 25 C. L. J. 509; 19 Bom. L. B. 424; (1917) M. W. N. 473; 44 C. 662; 44 I. A. 72 (P. C.), relied on.

Apreal against a decree of the Subordinate Judge, Pabna, dated the 12th February, 1919.

Babus Manmatha Noth Muker ee and Satis Chandra Munshi, for the Appellant.

Dr. Dwarka Nath Mitter, Babus Satindra Nath Mukerjes and Narain Chandra Kar, for the Respondents.

JUDGMENT.

MCOKERJEE, J .- The appeal arises out of a suit commenced by the appellants for deelaration that two mortgages for Rs. 5,000 each taken by the first two defendants, Radba Charan Poddar and Radbaballay Poddar, one from Lalbihari Saha (now deseased) on the 30th January 1914, and the other from Sukh Lal Sabs, Matial Saba and Nrityalal Saha on the 7th February 1914, had been made gratuitously with intent to defeat their ereditors and were consequent. ly voidable under section 53 of the Transfer of Property Act. The plaintiffe are creditors of the Sabas and instituted this suit on the 5th March 1918 on behalf of themselves and the other ereditors whose names were set out in a schedule appended to the plaint, The mortgagore as also the mortgagess were made defendants; and as the Sanas had been adjudicated insolvents on the 23rd

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July 1914 by this Court in the exercise of its Incolvency Jurisdiction, the Official Assignee also was joined as a defendant. The suit was thus constituted as a representative suit of the type contemplated in the case of Hakim Lal v. Mooshahar Sahu (1), which was affirmed by the Judicial Committee in Musahar Sahu v. Hakim Lal The case for the plaintiffs is that after **(2)**. Sahas had been adjudicated insolthe vents, they proved their claim before the Official Assignee in due course. On the 4th April 1916 three of the insolvents, Krishnalal Saba. Matilal Saha and Narityalal Saba were publicly examined before Registrar in Insolveney, in the course of such publie examination it was elicited that they had executed the mortgages now in suit in favour of their relations. The plaint ffs intended to apply for an order under section 55 of the Presidensy Towns Insolvency Act for avoidance cf the mortgages as against the Official Assignee. But before the termination of the proceedings, they discovered insolveney that the mortgagees had obtained decrees on the mortgages on the 15th March 1917, against the mortgagors and the Official Assignce. They have consequently been constrained to institute the present suit, as otherwise complications might result if the deerses should be executed and the hypothecated properties should on sale pass into the bands of strangers. The claim was resisted by the mcrtgagors and mortgagees defendante, in other words, by the Sabas and the Pocdars. The Official Assignee supported the plaintiffs and stated that he was not aware of the fraudulent character of the mortgages at the time when the mortgage decrees were made and he could not accordingly take steps to defend these suits. On these pleadings, the substantial question in controversy was formulated in the eighth issue in the following terms:

by the insolvents without consideration and were they executed mala fide and fraudulently as shields against their creditors

(1) 34 C. 569; 11 C. W. N. 889; 6 C. L. J. 410. (2) 32 Ind. Cas. 348; 80 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 338; 14 A. L. J. 188; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 28 C. L. J. 406; 18 Bom. L. R. 878; 43 C. 521; 43 L. A. 104 (P. C.). as stated in the eixth and eighth paragraphs of the plaint?"

The Subordinate Judge held on the evidence that the plaintiffs had failed to discharge the burden which lay upon them to prove that the mortgages were fraudulent; he further found that the defendants had established that the mortgages were for consideration. On the present appeal, the arguments have centred round the question whether the mortgages were gratuitous or for consideration.

for consideration. At an early stage of the arguments, it transpired that certified copies of the record of the public examinations of Matilal Saha. Nrityalal Saha and Krishnalal Saha were received in evidence by the Subordinate Judge. None of these persons had, however, been examined as witnesses in the lower and consequently their previous statements could not be taken to have been utilised to contradist them. The question thus arose, whether the statements in the insolvency proceedings could have been reseived in evidence under either section 32 or section 33 of the Indian Evidence Act. Section 32 was of no avail, because, even if it were assumed that the requirements of the introductory clause were satisfied, the ease could not be deemed sovered by any of the eight clauses. The elause which looked most helpful was the third, but this, it was conceded, was useless, as the statements were not against the pecuniary or proprietary interest of the persons making them. Section 33 was equally of no assistance, because, even if it were assumed that the requirements of the introductory elanse were fulfilled, none of the three conditions mentioned in the provice could be teld to have been realised. The insolveney proceeding could not be treated as a proseeding between the same parties as the parties to the present suit. Nor could it be said that the adverse party in the first proceed. ing bad the right and opportunity to eross. examine or that the questions in issue were substantially the same in the first as in the second proceeding. The scope of the public examination of the insolvert, as indicated in section 27 (1) of the Presidency Towns Insolvency Act, is to examine him as to his conduct, dealings and property. At that stage, the ereditors who may have been notified are arrayed together: no question

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arises whether there is a conflict between sesured and unsecured creditors, or whether the alleged claim of one or other of them is or is not fraudulent. They cannot at the time be treated as adverse parties, nor ean the question in issue in this suit be deemed, by any stretch of language, to be substantially the same as the question then in issue. There is the additional difficulty that the statement of one of the insolvents sould not by any device be used as against another or the others. The admissions of an insolvent, if made after the act of insolvency, may be admissible against bim. self, but they cannot furnish evidence against another insolvent or as against the Official Assignee. Reference may in this connection be made to the decision in Board of Trade, Ex parte, Brunner, In re (3), where it was ruled that the answers of a bankrupt on his public examination are not admissible in evidence even in proceedings in the came bankruptey by the trustee against parties other than the bankrupt. There was thus no escape from the position that the statements made by Krishnalal Saha, Matilal Saha and Nrityalal Saha, in the course of their public examination under section 27 (1) of the Presidency Towns Insolvency Ast, were not admissible in evidence in this suit. When we indicated our view this point, Mr. Mukerjee on behalf of the plaintiffs requested that steps might be taken to examine these three persons in this Court. We desided to assede to this request, although we were not unmindful of the observations made by the Judicial Committee as to the reception of additional evidence in appeal, in the came of Kessow, i Issur v. G. I. P. Ry., Co. (4). We were, however, largely influenced in our decision by the circumstance that some endeavour had been made to examine the insolvents in the Court below, but the attempt proved infructuous as the witnesses sould not be found and the warrants could not, consequently, be executed. No doubt, all the steps which might possibly have been taken to enforce attendance were not exhausted, but this might have been due

to the fast that the previous statements were allowed to be reseived in evidence without objection. The erroneous omission to object to the reception of the evidence did not, as pointed out by the Judisial Committee in Miller v. Madho Das (5), make it legally admissible in evidence; but as such omission might possibly have induced the plaintiff not to take resourse to the extreme measures provided for the enforcement of attendance of witnesses, we thought it right to summon them for examination in this Court. Two of them, Matilal Saha and Nirtyalal Saha, did attend in obedience to the sub poena issued by this Court; Krishnalal Saha did not attend and it was stated that his absence was due to illness. But when the witnesses appeared in Court, Mr. Makerjee deslined to examine them in chief, on the ground that as his clients were plaintiffs and the witnesses were mortgagors defendants, they were bound to be hostile. He accordingly asked that they might be treated as witnesses called by the Court and that he might premitted to cross examine them. In support of this position, he placed reliance upon the decision of the Judicial Committee in Radha Jeebun Moostuffy v. Taramonee Dossee (6). That desision is of no assistance to the appellant. There the witnesses summoned for the plaintiff (except one) did not appear. The plaintiff thereupon filed a petition praying that the case might be decided by his summoning the defendent in person and taking his deposition. The defendant was accordingly summoned and was asked by the Court whether the money slaimed by the plaintiff was justly due from him or not. The defendant anthat he was not liable for the awered The plaintiff then olaim. submitted that he had not intended to abide by the answer of the defendant and asked leave to eress examine him. The Trial Judge refused to put any further question to the defendant or to allow any to be put on behalf of the plaintiff and dismissed the sait. On appeal to this Court, Morgan and Pandit, JJ., expressed their disapproval

^{(8) (1887) 19} Q. B. D. 572; 53 L. J. Q. B. 608; 57 L. T. 418; 85 W. R. 719; 4 Morrell 255.

^{(4) 31} B, 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 O, L. J. 5; 4 A. L. J. 461; 17 M. L. J. 847; 2 M. L. T. 485; 81 L. A. 115 (P. O.).

^{(5) 19} A. 78; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. B.) 50; 23 I. A. 106 P. C.).

^{(6) 11} W. R. P. C. 31; 2 B. I. R. P. C. 79; 13 M. I. A. 380; 2 Suth. P. C. J. 2)4; 2 Sar. P. C. J. 457; 4 Mad. Jur. 175; 1 Ind. Dec. (N. 8) 584; 20 E. E. 383.

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of the course adopted by the Trial Judge, and, when the case went up to the Judicial Committee, their Lordships fully consurred in the propriety of that course. This is elearly no authority for the proposition that if the plaintiff calls the defendant as a witness, he is entitled to cross-examine him as a matter of right; in the case before the Committee the defendant was Judioial treated as a witness called by the Court. the contention of the appellants were to prevail, it would involve in substance an approval of the procedure condemned in emphatic terms by the Judicial Committee in two recent cases. In Kishori Lat v. Chunni Lal (7), Lord Atkinson observed as follows :-

"It would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as witness, and thus give the Counsel for each litigant the opportunity of crossexamining his own elient. It is a practice which, their Lordships cannot help thinking, all judicial Tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarrass judicial investigation as it has done in this instance."

Reference may also be made, in this connection, to the decision of the Judicial Committee in Lal Kunwar v. Chiranges Lul (3); see also Venkata Samba Sadasiva Devara v. Papayya Devara (9); Rangaswamy Iyengar, In re (10). The matter must plainly be decided under section 154 of the Indian Evidence Act which gives the Court a discretion to permit the person who calls a witness to put any question to him which might be put in cross-exmination by the adverse party. The rule recognised in

Olarke v. Soffery (11) and Bastin v. Carew (12), namely, that when the witness stands in a situation which naturally makes him adverse to the party who desires his testimoney, as, for example, when a defendant is called as the plaintiff's witness, the party calling the witness is entitled to cross examine him, cannot be held applicable in this country in view of the provisions of section 154 of the Indian Evidence Act. Indeed, even in England, it has been ruled in later cases that the situation in which a witness stands towards either party does not give the party calling the witness a right to crossexamine him, unless the witness' evidense be of such a nature as to make it appear that the witness is unwilling to tell the truth; Parkin v. Moon (13), Reg. v. Ball (14), and it now appears to be settled law in England that a party when called by his opponent cannot as of right be treated as hostile, the matter being solely in the discretion of the Corri; Price v. Manning (15). We must further remember that a witness who is unfavourable is not necessarily hostile, for a hostile witness has been defined as one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court : Coles v. Coles (16); Greenhough v. Eccles (17), Surendra Krishna Mondal v. Rance Dassi (18). The position, consequently, is that, although Matilal Saha and Nrityalal Saha were present in this Court, the plaintiffs did not examine them. We are thus left with the evidence adduced in the Court below, after the depositions of the insolvents before the Registrar in Insolvency have been exeluded therefrom. Upon that evidence, there is no room for serious argument that the decision of the Subordinate Judge must be upheld. He has referred in detail to the oral evidence to show that the mortgages were for consideration and that oral testimony

 ^{(7) 1} Ind. Cas. 128; 31 Λ. 116; 13 C. W. N. 370; 9
 C. L. J. 172; 5 M L T. 5°; 11 Bom. L. R 196; 19 M. L. J. 186; 36 I A 9 P C.).

^{(8, 5} Ind. (as. 549; 20 M. L. J. 182; 7 M. L. T. 57; 14 C. W. N. 285; 1 C. L. J. 172; 12 Bom L. R. 244; 32 A. 104; 37 I A 1; (1910) M. W. M. S. P. O.).

^{(9) 21} Ind. Cas. 7 7: (1913) M. W N 8 8. (10) 21 Ind. Cas. 781; (1913) M. W. N. 998.

^{(11) (1824)} R. &. M. 126; 27 R. R. 736.

^{(12) (1824)} R. & M. 127; 27 R. R. 737.

^{(13) (1836 7 (}ar & P. 408. (14) (1839) 8 Car & P. 745.

^{(·5) (18-9) 42} Ch. D. 372; 58 L. J. Ch. 649; 61 L. T. 537; 37 W. R. 785.

^{(16 (1866) 35} L. J. P. 40; 1 P. & D. 70; 13 L. T. 60; 14 W. R. 290.

^{(1) 1859 5} C. B. N s.) 786; 28 L. J. C P. 160; 5 Jur. N. s.) 7 6; 116 R R. 8 5; 141 E R. 8 5.

^{(8) 59} Ind Cas. 814; 47 C. 1043; 33 C. L. J. 34; 24 C. W. N. 860.

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is largely supported by the secount-books. As regards the mortgage of the 3 th January 1914, he has found that Lalbibari Saha had borrowed Rs. 4,000 from the first two defendants on the oceasion of the marriage of his son in 1913, and executed a promissory note for the amount. The mortgage was granted to seeare the sum due on the note and a subsequent advance of Rs. 440. As regards the mortgage of the 7th February 1914 the Subordinate Judge has found that it was granted to seemre a prior loan of Rs. 3,000 taken in 1908. The oral evidence and the extrasts from the account books have been placed before us and carefully commented up in. We see no reason to doubt the correct. ness of the conclusion of the Subardinate Judge that both the mortgages were for consideration and he, in our opinion, properly declined to decide in favour of the plaintiff on mere grounds of suspicion, for, as Sir Lawrence Jenkins said in Mina humarı v. Bi oy Singh (19, the Court's desision must rest not upon suspicion but ucon legal grounds established by legal testimony.

The result is, that the decree of the Sabardinate Judge is affirmed and this appeal dis

missed with sosts.

BUCKLAND, J .- I agree.

B. M. Appeal dismissed.

(19) 40 Ind Cas 242; 1 P. L. W. 425; 5 L. W. 711; 82 M. L. J. 4:5; 21 C. W. N. 585; 21 M. L. T. 844; 15 A. L. J. 282; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W.N. 473; 44 C. 682; 44 I. A. 72 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2022 OF 1918.

November 12, 1921.

Present:—Mr. Justice Le Rissignol
and Mr. Justice Campbell.

BADAM AND OTHERS DEFENDANTS—

APPALLANTS

versus

MADHO RAM AND OTHERS PLAINTIESS -BERPOWERS

Hindu Law-Joint family-Ailenation by father-Declaration in facour of son-Consideration, return of. Where a Hindu son obtains a decree that a sale of family property by his father shall not affect his rights as a co-parcener the veadee is not entitled to have a condition attached to the decree that the plaintiff should refund the sale-price paid by the vendee in respect of the portion of the property affected by the decree. [p. 20, col. 2.]

Appeal from a decree of the District Judge, Ambala, dated the 2nd April 1918, affirming that of the Junior Sabordinate Judge, Second Olass, Ambala, dated 28th

August 1917.

Mr. Manchar Lal, for the Appellants. Dr. G. O. Narang, for the Respondents.

JUDGMENT.—This and the two connested appeals arise out of actions brought by the son of a Hindu for a declaration that three sales of joint family property effected by his father shall not affect his (plain iff's) rights as a co-parcener.

Once finding of fast arrived at by the Chart below is, that the sales were not effected for an immoral purpose, but that they were without necessity and were not for the benefit of the family and the

plaintiff's prayer has been granted.

In second appeal the only point urged is, that though the sales must be set aside they should be set aside only on equitable terms, and the only matter debated before us has been whether to the plaintiff's decree should be attached a condition that he must refund to the vendees the amounts paid by them for the properties sold.

As a preliminary point it was arged that the prayer should not have been confined to a declaration, but should have been for possession inasmuch as the plaintiff could have been given at least joint possession with the vendees, the transferees of his father.

This objection, involving as it does the right of a son to separate possession from his father during his father's life-time, need not detain us, for it is raised for the first time in this Court and does not affect the merits of the case.

On the main dispute, the argument for the defendants accellants is, that the success of the plaintiff's suit will force them to sue plaintiff's father on the ground of failure of consideration, and that the shares of both father and son in the co parcenary property will be liable to satisfy their decrees. It is retorted that at the present BADAM U. MADRO BAM.

moment and till the defendants obtain decrees, the plaintiff's father owes no debt.

In Keer Hasmat Rai v. Sunder Das (1) it was held that sons could not recover properly alienated by their father without refunding the whole of the sale price, inasmuch as if the sale were set aside, the vendee would be entitled to recover from the alienor the purchase money which would become a debt due by the father and so recoverable from the whole of the joint property. Himmot Bahadur v. Bhawani Kunwar (2) was referred to by appellant but the ratio decidendi in that case was that the sale price was brought into the common purse of the whole family.

v. Bhup Singh (3) has been cited but that judgment throws no light on the problem concerning us.

Bohadur Singh v. Desraj (4) deals with

a mortgage and does not help us.

Chandradeo Singh v. Mata Prasad (5) was a suit to enforce a mortgage against joint family property.

In Ram Dayal v. Ajudhia Prased (6) a son was decreed one-half of the property and there appears to have been no prayer that he should first pay a portion of the sale price.

In Chandradeo Singh v. Mata Prasad (5) it was held by a majority that though a son might be liable to pay a mortgage dobt due by his father, he could resist a mortgage based on that very same debt.

In Matho Parshad v. Mehrban Singh (7) the vendor had died at the time of the suit and their Lordships held that an equity which might have been enforced against the vendor's interest while it existed could not be made to affect that interest when it had passed to a surviving co-parcener.

(1) 11 C. 395; 10 Ind. Jur. 26; 5 Ind. Dec. (N. s.) 1023.

(2) 30 A. 352; 5 A. L. J. 339; A. W. N. (1908) 143. (3) 39 Ind Cas. 280; 39 A. 437 at p. 444; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom, L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.),

(4) 53 P. R. 1901 (F. B.); 62 P. L. R. 1901.
(5) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.
(6) 28 A. 328; 3 A. L. J. 81; A. W. N. (1906) 40.

Madan Gopal v. Sati Prasad (8), Kilaru Kotayya v. Polavarapu Durgayya (9), Muthukrishna Naidu v. Kano i (10) also have been sited and it has been pointed out that in Ran Dayal v. Sura Mal (11) the Allahabad Court refused to follow Koer Hasmat Rai v. Sunder Das (i).

The point is one on which there has been much conflict, and in appellants' favour there stands only Koer Hasmat Rai v. Sunier Dis (1) and the obiter dictum in Madho Parshad v. Mehrban Singh (7), but in all the other rulings the Courts have marked the distinction between the liability of the sons to pay their father's debts and their right to avoid an alignation of the family properly.

It is difficult to see how the distingtion is of much benefit to the sons, except in this respect that it forese aliences to look more carefully into the necessity for the alienation and so sets as a check on the alienation of family property.

In these eases if we issued decrees conditional on the payment of the son's share of the purchase price, we should be in effect granting the vendee a lien on the son's share in the property sold and that course would be opposed to principles observed in the majority of the rulings cited.

For these reasons, we must decline to interfere and we dismiss the appeals with costs.

The appellants have their remedy; only the rights of the son are affected, therefore, the sales will be affected only in respect of one-half of the property sold; and, for the consideration which has failed, the appellants may either secure payment from the vendor or sue him and execute their decrees against the whole family property. This course, it appears, may involve much unnecessary litigation and as each is to be depresated, but on the authorities no other course is open.

z. K.

Appeal dismissed.

(8) 40 Ind. Cas. 45'; 15 A. L. J. 425; 39 A. 485,

(9, 47 Ind. Cas. 192; 35 M. L. J. 451. (10) 39 Ind. Cas. 501; (1917) M. W. N. 273.

(11) 23 Ind Cas. 891.

^{(7) 18} C. 157; 17 J. A. 194; 5 Sar. P. C. J. 585; Bafique & Jackson's P. C. No. 121; 2 Ind. Dec. (N. s.)

MOHAMMAD MASUD ALAM U. MOHAMMAD MAHMUD ALAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 92 of 1918. October 24, 1921.

Present: - Pandit Kanhaiya Lal, J. C., and Mr. Dalal, A. J. C.

MOHAMMAD MASUD ALAM AND OTHERS
—PLAINTIFFS—APPELLANTS

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MOHAMMAD MAHMUD ALAM AND ANOTHER-DEFENDANTS-RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 4 (3)— Oudh Rent Act (XXII of 1886), s. 126—Lambardar, whether can grant long term leases—Transaction by lambardar—Co-sharers deriving benefit under it, wheher can repudiate.

In, the absence of a custom to the contrary, a lamburdar has no power, without the consent of his co-sharers, to grant a lease of co-parcenary land beyond such term as the circumstances of the particular year or season might require, but in circumstances of an exceptional nature a lambardar is justified in the exercise of his powers as a manager, charged with the collection of rents, to grant leases for a longer term to raise the largest income to the co-sharers on whose behalf he purports to act. Where the granting of a lease by a lambardar is shown to be for the benefit of the co-sharers, and the co-sharers have derived benefit under the lease, they cannot repudiate a transaction entered into on their behalf. [p. 21, col. 2.]

Appeal against a decree of the Additional Subordinate Judge, Lucknow, dated the 16th August 1918.

Mr. Hoider Husain, for the Appellants.

Mr. Makund Behari Lal, for Respondent No. 2.

JUDGMENT.-The parties are co-sharers in two villages named Ludbausi and Bilgara, situated in Tabsil Melihabad, district Lucknow. The plaintiffs Nos. 1 to 5 are the brothers of the defendant No. 1. The plaint iff No. 6, Musammat Kapiz Fatime, is the sister and the plaintiff No. 7, Musammat Siddigan Bibi is the mother of these persons. The defendant No. 1 is the lambardar of these villages. On the let January 1916 he granted a lease of these villages to Abdul Malik, defendant No. 2, for a period of seven years in his capacity as lambardar with the object of paying the decretal money, for the satisfaction of which one of there villages was threatened with sale. The plaintiffs seek to avoid that lease on the ground that it was granted by the defendant No. 1 with a view to set up an adverse title to the property comprised in the lease. It is further stated that the lessee was a man of no means, that

no security was taken from him, and that the lanbardar had no power to grant a lease for a long term. It was not alleged that the lease was granted on a low or inadequate rept.

Additional Subordinate learned The Judge found that the lease in question was executed by the lambardar for the benefit of his co-sharers and that, but for the premium reseived from the lessee, one of the villages comprised in the lease would have been lost to the plaintiffs and the defendant No. 1. He farther found that the interests of the plaintiffs, including two of them who are minors, were in no way prejudiced by the transaction, and that the lambardar had authority to grant the lease on the terms spesified therain.

The only contention urged on behalf of the plaintiffs appellants in appeal is, that the defendant No. I was not competent in his capacity as lamburdar to grant a lease for a period of seven years; and reliance is placed in support of that contention on the decision in Bansidhar v. Dip Singh (1) and Chattray v. Nawala (2). It was laid down in those eases that, in the absence of a custom to the contrary, a limbardar had no power, without the consent of his co sharers, to grant a lease of co-parcenary land beyond such term as tho siraumstances of the particular year or season might require. That is unquestionably one of the limitations on the powers of the lambardar under ordinary oircumstances; but there might be cases where the lumbardar, in the exercise of his powers as a manager, might have to grant leases for a longer term than what the terms of the particular year or season might require. There might, for instance, be ban ar or waste land which no person might be willing to take up for sultivation upless a lease was given for a sufficiently long term to re-pay him for his labours. There might be land not sufficiently productive on account of the nature of its soil or the absence of facility for irrigation, the lease of which no person might be willing to take except for a sufficiently long term to compensate him for the expenses that he might have to incur in improving the land or devising facilities for its irrigation. These are sireumstances

^{(1) 23} A. 488; A. W. N. (1898) 103; 9 Ind. Dec' (N s.) 641.

^{(2) 29} A. 20; 3 A. L. J. 639; A. W. N. (1906) 257.

MOHAMMAD MASUD ALAM U. MOHAMMAD MAHMUD ALAM.

of an exceptional nature, which might possibly justify a lambardar in the exercise of his powers as a manager, charged with the collection of rents, to deal with the property in a manner suited to raise the largest income. He has no power to alienate the corpus of the joint estate even for necessary purposes (Bhajan Lal v. Moti (3)). But, within the limits of hisauthority and the scope of his employment, he can manage so as to scoore the greatest benefit to the so sharers on whose

behalf he purports to set.

A lambardar is described in section 4, subsection (3), of the U. P. Land Revenue Act (III of 1901) as a co-sharer of a mahal appointed under the Act to represent all or any of the co-sharers therein. represents them for purposes of management, including the collection of rent and the payment of land revenue. Section 12 of the Oudh Rent Act (XXII of 128) provides that no co-sharer of a joint estate has a right, in the absence of a local custom or special contract to the contrary, to realize rents or to take steps for the ejectment of tenants or for the enhancement of rents otherwise than through a manager authorized to collect the rents on behalf of all the co sharers. If a manager can eject tenante, he can also grant fresh leases on behalf of his co sharers. If he has a duty to pay arrears of revenue or other does charged on the estate, which cannot otherwise be discharged, be can grant a lease to secure the requisite premium so long as he does not prejudice the interests of his co-sharers thereby. He has, in some respects, larger powers than an ordinary manager or agent appointed by an instrument. He can act as a prudent manager for the benefit of his so sharers so far as such act falls within the purview of the objects for which he is so appointed.

The property in dispute in the present instance was liable for the payment of Rs. 834 : 3.0 on account of gueara or maintenance dues to Subhan Ali Khan. Subhan Ali Khan had obtained a decree for arrears of maintenance and in execution of that dacree he had applied for the sale of the village Bilgara, A date was fixed for the austion sale. One of the plaintiffs and the defendant No. I moved the Court holding the sale to adjourn it, but without success. They got permission to transfer the property to pay off the decretal amount. The defendant No. 1 thereupon arranged with the present leaves, the defendant No. 2, to pay the entire descetal money within four months and, in considera. tion of his agreeing to do so, granted him a lease of the two villages in question on a rent of Ro. 3, 00 per year, cut of which Ro. 2,8+1 were to go in payment of the land revenue, eesses, nankar and maintenance charges due on account of the property and the balance was payable to the lamburdar. It is admitted that the lessee paid the money due on account of the decree and that the village Ludhauri was thus saved from sale. The grant of the lease in question was, in the circumstances, nothing more than an act of prodent manage. ment, intended to seemre the largest amount of benefit to the so starer both by saving the property from sale and by securing an economic method of collection without in any way prejudicing the interests of the cosharers or reducing the profits derivable from the estate. In Mu ta Prasid v. (4) Singh lease 8 by the lambardar for a period of ten years to a person who had agreed to build a parca well on the laid at a considerable cost in order to provide facilities for irrigation, which did not exist, was upheld. In Muhimmal Kazim v. Mian Ahan (5) & lease granted for a period of seven years was similarly upheld. Such cases fall within the exception to the general rule. As Knox, J, rightly pointed out, every case of this kind must depend upon the faets and eircumstances in which the lease has sprung. Where there is any suspicion established that the lambardar has granted a long lease to the detriment of so sharers, a heavy burden would be placed on the lessee to show that, by sustom or for some other cause, the lambardar is authorized in granting the lease". On the other land, where the granting of the lease is shown to be for the benefit of the co-sharers and the co sharers presumably have been shown to have derived benefit under the lease, it is highly inequitable that they should be permitted to repudiate a transaction entered into on their behalf, the benefit of which they had

^{(4) 8} A. L. J. 655; A. W. N. (1906) 277.

^{(5) 29} A. 554; A. W. N. (1907) 165; 4 A. L. J. 538,

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enjoyed. Two of the plaintiffs in the present instance were minors; but inasmuch as it is not suggested that the lease was granted on a low or inadequate rent or that the amount needed to pay the arrears of mainten. ance charges due by the estate, could otherwise have been secured on more favourable by a lease granted for a shorter period. the transaction must be upheld as an act of management justified by the posuliar eireametances of the ease. One of the plaintiffs, admittedly, attested the lease and made an application to the Court holding the sale saying, that the money requisite to pay the decretal money had been raised by a lease of the two villages and that the sale might be postponed till a certain date in order to enable him to deposit the amount due on the decree. The entire term of the lease has now almost run out. There is no reason, therefore, for granting the declaration asked for.

The appeal fails and is dismissed with costs.

J, P.

Appeal dismissed,

MADRAS HIGH COURT. SECOND CIVIL APPEAL No. 1155 OF 1920. March 23, 1921. Present: - Mr. Justice Spencer and Mr. Justice Odgers. VALLAIYAMMAL BIBI AND OTHESS-PLAINTIFFS - APPELLA: TS

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KOOLAYANNA AND OTHERS-DEFENDANTS -BREFONDENTS.

Limitation Act (IX of 1908), s. 12 (2), (3)-Appeal -Computation of time-Tine requisite for obtaining copies of decree and judgment, how excluded.

In computing the period of limitation prescribed .. for an appeal, an appellant is entitled to exclude, under clauses (2; and (8) of section 12 of the Limita-' tion Act, both the periods requisite for obtaining copies of judgments and decrees, respectively, so long as they are not counted twice over [p. 24, col. , 1.]

Raman Chetti v. Kadirralu, 8 M. L. J. 148 and Belamban Chetty v. Ramanadhan Chetty, 4 Ind. Cas. 801; 83 M 256; 7 M L. T. 23; (1910) M. W. N. 141; 21

M. L. J. 152, followed.

Second appeal against the order of the District Court of Coimbatore, in Interlocatory

Appeal No. 28 of 1920, preferred against the decree of the District Mansif of Uda. malpet in Original Suit No. 328 of 1917.

F & CTS appear from the judgment.

Mr. T M. Krishnasami Aiyar, for the Appellants: -The lower Appellate Court did not adopt the correct method of computing time for presenting the appeal If the time taken in obtaining copy of judgment be excluded, as appellants are entitled to do, appallants' appeal to the lower Court was in time. The party is entitled deduction of time ossupied in obtaining copies of both the deeree and the judg. ment under elauses (2) and (3) sestion 12 of the Limitation Ast. The 14th November, the date by which appellants were late in furnishing stamp-papers called for for copy of the decree, was one of the days requisite for obtaining copy of the judgment. Raman Obstit v. Kadirvalu (1) and Selambin Chetty v. Rimanathan Ohetty (2).

Mr. N. Rama Aiyar, for the Respondents:-Appellants cannot claim to deduct 14th November as stamp papers for copy of the decree were called for OD November and they were furnished only on 15th November. If 14th November be not excluded the appellants were out of time for their appeal. Raman Chatti v. Kadirvalu (1) and Selamban Chettu Rumanadian Chetty (2) were wrongly desided. The matter should be referred

to a Fall Banch.

JUDGMENT .- The judgment appealed against was delivered on November 3rd and an application for copies of judgment and deeres was made on the same date. Copies were ready on December 12th and the appeal was presented on January 12th.

i.e., the 70th day.

But the appellants were entitled to deduct 27 days in November and 12 days in Desember which were occupied in obtaining a copy of the decree. Deducting these 39 days, the appeal was presented on the 31st day, but January 11th was a Sanday and, therefore, under section 4, Limitation Ast, the appeal might be presented on the next working day, and was in time, if so presented.

(1) 8 M. L. J. 148.

(2) 4 Ind. Cas. 301; 33 M. 256; 7 M. L. T. 29; (1910) M. W. N. 141, 21 M. L. J. 152,

HAFIZUNNISA C. JAWABIR SINGH,

It is argued for the third respondent that the appellants were not entitled to deduct the 14th November, seeing that copy stamps for the copy of the decree was called for on November 13th and were not furnished till the 15th.

But that day (November 14th) has to be excluded under section 12 (3) of the Limitation Act as one of the days requisite for obtaining a copy of the judgment; and it has been held in Raman Ohetti Kadirvalu (1) and Selamban ٧. Ramanadhan Chetty (2) that a 18 entitled to exclude both these periods long as they are not counted twice over. It is suggested that those desisions are wrong and that the question should be referred to a Full Bench, but we see reason to decline to follow them, and we think that they correctly interpret the intention of the Legislature in enacting section 12 of the Limitation Act, which was that parties should have the benefit of excluding both of these periods under clauses (2) and (3) in somputing the period of limitation prescribed for an appeal.

This appeal is allowed with costs. The District Judge will be directed to admit the appeal and dispose of it on its merits.

M. C. F. & J. P.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. : 3 or 1920.
October 27, 1921.

Present:—Mr. Daniels, J. C., and
Mr. Dalal, A. J. C.

Musammat HAFIZ UN-NISA
AND OTHERS—PLAIRTIFFS Nos. 1-3—

APPELLANTS (ETSUS

Kunwar JAWAHIR SINGH

AND CTHERS—PLAINTIFFS NOS. 4 6 AND

Musammat BATUL UN-NISA

AND OTEERS—DEFENDANTS NOS. 1 4—

RESPONDENTS.

Muhammadan Law—Dower—Widow in possession of husband's estate—Lien for unpaid douer—Gift—Possession, when not necessary—Mushan, doctrine of, applicability of—Deed for maintenance—Life interest—Construction of docume—Civil Procedure Code (Act V of 1908), O. XXII, 11.2, 4—Death of respondent—Legal representative on record—Procedure,

Under the Muhammadan Law if a widow has obtained possession of her husband's property lawfully and peaceably, without force or fraud, she has a lien for her unpaid dower and it is not necessary that her possession should be the result of any agreement or consent of her husband or his heirs, [p. 26, col. 1.]

Ali Bakhsh v. Allahdad Khan, 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567, Ramzan Ali Khan v. Asghari Begam, 6 Ind. Cas. 405; 32 A. 563; 7 A. L. J. 614, Beeju Bee v. Syed Moorthiya Sahib, 53 Ind. Cas. 905; 43 M. 214; 37 M. L. J. 627; 26 M. L. T. 419; 11 L.

W. 150 (F. B.), followed.

Under the Muhammadan Law, in case of a registered deed of gift executed by a donor in favour of his minor children under his own guardianship, delivery of possession is not absolutely essential. An unequivocal declaration that the donor has ceased to hold the property as owner is sufficient. [p. 27, co!, 2.]

The doctrine of mushaa should be confined within the narrowest limits. Any defect due to mushaa is cured by taking possession of the property by the

donees in definite shares. [p. 29, col. 1.]

A deed for maintenance prima facie imports only

a life-interest. [p. 29, col. 1.]

Where a transaction is carried out openly and publicly and everything is done which ordinarily would be done to give effect to it, it certainly lies on the plaintiffs to show that the transaction was other than appeared on the face of it and was really intended to cover a fraudulent motive [p. 28, col. 2.]

If a document is open to a construction which makes all parts of it harmonise with one another, that construction is always to be preferred to one which introduces a repugnancy between one part of the document and another. [p. 29, col. 2.]

Where the representatives of a deceased respondent are already on the record in another capacity and no application is made for substitution within time an entry should be made in the record under Order XXII, rule 2, of the Civil Procedure Code and such a case is not governed by rule 4 of Order XXII of the Code. [p. 30, col. 1.]

Appeal against a decree of the First Subordinate Judge, Sitapur, dated the 19th February 1920.

Mesers. Wazir Hasan and Niamat Uilah, for

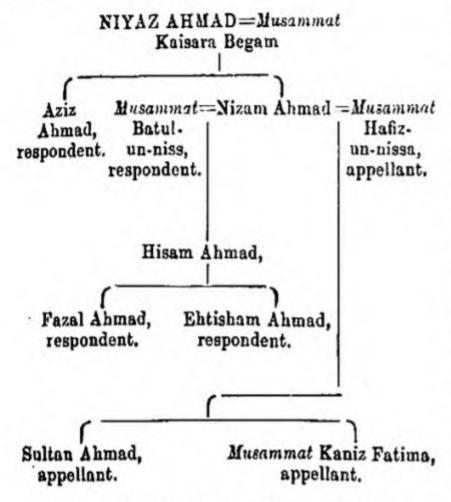
the Appellants.

Mesers. Wasim and Molamnad Ayub, for Respondents Nos. 5 to 7.

JUDGMENT.—This is an appeal by three plaintiffs, Musimmat Hafiz-un-nisa, Sultan Ahmad and Musammat Kaniz Fatima, in a suit in which they claimed 15/16ths of the property left by Nizam Ahmad as his heirs under Muhammadan Law leaving 1/16th as the share of the first respondent, Musimmat Batul un nisa. Musammat Hafiz-un-nisa and Musammat Batul un nisa are both widows of Nizam Ahmad. The other two plaintiffs-appellants are the son and

HAPIZUNNIBA D. JAWABIR BINGH,

daughter of Nizam Abmad by Musammat Hafiz un-nise. Nizam Ahmad had one sor, Hisam Ahmad, by Musammat Batulan. Hisam Ahmad predeceased his father leaving two sone, Fazal Ahmad and Entisham Ahmad, minore, who are also contesting respondents in this case. The following pedigree will serve to make the position of the parties clear:—



In the first Court the status of the first plaintiff, as the legally married wife of Nizam Ahmad, and the legitimacy of her shildren was denied. This point has been found in favour of the plaintiffs and is not now contested.

There are three different sets of properties in dispute and the defence to the suit is different as regards each set of property. A number of properties resorded in List C. in the written statement of the first defendant. are in the possession of Musammat Batul. un nies and she claims to hold them in lieu of dower. Three villages, Mirpur, Nirbhan. pur sud Thawai, two houses, and certain miscellaneous properties, shown in List D in the same written statement and also in the written statement of the second third defendants, were granted to and the third pacond and defendants registered under deed of gift 8 excented by Nizam Ahmad on 26th Ostober 1906, three days after the death of Hisam Ahmad, and the second and third defendants elaim them under this title. There remains one property, called Chak Niyazganj, included

in the village of Dharaicha. In the written statement eight-annas of this was shown in List C. The remaining eight annae elaimed by the fourth respondent Azz Ahmad as heir of Niyez Ahmad. Out of this eight-annes Aziz Ahmad has transferred 32-annas to the minor respondents under a deed of gift. After the filing of the present suit four annas out of the eight annas not claimed by Aziz Ahmad was sold by auction in execution of a money-decree for a debt due from Niyaz Abmad at his death and was purchased by Az'z Ahmad. Out of this Obak, therefore, Aziz Abmad now claims 82. annas and the minor respondents 3-1 annas making up a twelve-annas ghare. remaining four-annas is held by Musammat Batul-un-nisa under her elaim to dower.

We deal first with the question of dower. It is admitted on all bands that Musammat Batul-un-nisa is in possession of the property in dispute under this issue, and has been in possession of it ever since her husband's death on 15th January 1915. The learned Subordinate Judge on issues 8 to 10, which deal with this portion of the case, has found that she entered into possession peaceably and lawfully in her double sapasity of one of the heirs of the deceased and of a widow entitled to dower, that her dower amounting to Rs. 12,500 is unpaid, and that she has a lien on the property in lieu of this sum and is entitled to retain possession until it is paid to her. The main argument of the appellants before us war, that a widow was not entitled to claim a lien for dower unless she entered into possession either in the lifetime of her husband or by an express or tacit agreement with the remaining beirs. In support of this position he relies on certain observations of the Privy Council ceeurring in the course of the judgment in Hamira Bibi v. Zubaida Bibi (1). As has been pointed out by the Madras High Court, the point now in dispute was not at all in issue in that case. The question was as to the right of the widow to interest on the unpaid dower. The proposition that a widow in possession of her husband's property has a lien for her unpaid dower provided that

^{(1) 86} Ind. Cas. 87; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 81 M. L. J. 799; 20 M. L. T. £05; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 48 I. A. 294 (P. C.).

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she entered into possession peacefully and lawfally in virtue of nerolaim to dower, and that it was unnecessary that there should have been any agreement between her and her husban's heirs, has been laid down by the Allahabad High Court in two eases in the year 1910, tide Ali Bikhsh v. Allahdad Khan (2) and Ramean Ali Khan v. Asghari Begam (3). Those cases have never been by the Privy Council. The overruled whole question was re-examined in great detail, with reference to the Privy Council desision in Hamira Bibi v Zubaida Bibi (1), and all the Indian decisions, by a Fall Bench of the Madras High Court in the case of Besju Bee v. Syed Moorthiya Sahib (4) as recently as 1919, and they again affirm the proposition, previously laid down by the Allahabad High Court, that if the widow has obtained possession of the property lawfully and peaceably, without forse or fraud, it is not necessary that her possession should be the result of any agreement or consent of her husband or his beirs. The leading judgment was delivered by Mr. Justice Abdur Rabim, himself a Muhammadan and a high authority on questions of Muhammedan Law. It is sufficient for us to say that we agree with the reasoning of the Fall Bench and with the conclusion at which they arrived and that we cannot neefully add anything to what is to be found in the judgments in that osee.

The appellants have, however, a second line of argument. They rely on the fast that Musammat Batul un nisa filed her application for mutation of names only three days after her husband's death and that, in regard to some at any rate of the properties, the plaintiff Sultan Ahmad filed a cross-applica tion at the same time. They urge that her possession cannot possibly be treated as peaceable when her application for mutation was of posed, and that her application was made so soon after her husband's death that there was not even time for her to have taken possession of the property at all. As against this, we have the fast that the Revenue Court unanimously found her possession established and decreed mutation in he farmar. The Assistant Collector who first tried the ease found to this effect and his desision was apheld in first and second appeals. No evidence whatever has been put forward that her possession was ever disputed on the spot and the present sait was not filed till three years later. Sultan Ahmad's application for mutation is not on the resord and the only evidence of it is derived from references to it in the Assistant Collector's order, Exhibit A.9. These references show that in his original application Sultan Ahmad never claimed to be in posasssion. This is expressly stated by the Assistant Collector, who savs: Ahmad claimed mucation so'ely on the ground that he is the son of M. Nizam Ahmad", In contrast to this he notes the fast that Batul un nisa had based her elaim on two grounds,-

(1) the fact that she was the lawfully

wedded wife of the deceased, and

(2) that she was in presession of the entire estate of the dessated in lieu of her dower debt.

It is true that some evidence was, afterwards, rut forward with a view to show the plaintiffs' possession, but the fast that no such allegation was made at the outset of the case is a strong argument for the fact that Musammat Batul-un-nisa did, in the first place, eater into possession peacefully and without opposition. As against the argument which appears to be raised here for the first time that the could not have got possession so quickly, it may be pointed out that two items of the property are houses of which possession could be taken at ones. As regards the Zamindari property, it is probable that as she was living in the house with her deceased husband at the time of his death the karinds and other servants who were actually managing the estate commenced to render their accounts to her as they had formerly done to Nizam Ahmad. We are not prepared, on the bare fact that some dispu'e as to possession was raised in the course of the mutation proceedings, to set aside the finding of the Court below that Mus.mmat Batal un nisa did enter into possession peaceably and lawfully in lieu of her elaim for dower,

In connection with this part of the case there is one point more to be considered. The appellants argue that, even if the main

^{(2) 6} Ind. Cas. 376: 32 A 551: 7 A L. J. 567,

^{(3) 6} Ind. Cas . 05; 32 A. 563; 7 A. L. J. 6!4.

^{(4) 53} Ind. Cas 905; 43 M. 2 4; 57 M. L. J. 6 7; 26 M. L. T. 419; 11 L. W. 150 (F. B.).

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question is found against them, they should be given a decree subject to payment of any amount which may be found due to the defendant. This contention was put forward in argument in the Court below, but the learned Subordinate Judge refused to entertain it and referred the plaintiffs to a separate suit. He pointed out that, not only was no such claim made in the plaint where the elaim for dower was altogether ignored, but even after Musammut Batul un nisa's written statement was put in no applieation to have a conditional decree passed if the question of dower was found in her favour was ever made. To go into this question would involve re opening the case and taking fre-h evidence inasmuch as a question of assounts would have to be gone into. Musommat Batol-un-pisa would, on the one hand, be liable to account for the profits of the property and, on the other, would have a claim to interest on her dower. In a very eimilar case, Z. ibunnissa v. Hasaratunnisa (5), one of us took the same source which the learned Subordina's Judge has taken. That decision followed a similar ease of the Allahabad High Court in Amani Begam v. Muhammad Karimullah (6) and it has been pointed out in the source of the rgument that this course has the support of their Lordships of the Privy Council in Bebee Bachun v. Hamid Hossein (7). The matter is one of discretion, and we are certainly not prepared to say that the learned Subordinate Judge exercised his discretion wrongly in the circumstances of this care.

We now turn to the property covered by the gift. Here the case of the respondents is an exceptionally strong one. The deed of gift is Exhibit BI on the record. As has been already stated, it was executed on 26th October 190%, only three days after the death of Risam Ahmad, who was the only sen of the deceased by his biradari wife Musammat Batul-un-nisa. Under Musammat Batul-un-nisa. Under Musammadan Law Hisam Ahmad's orphan children would be excluded from inheritance by their uncle Sultan Ahmad and, in order to prevent this result, a deed of gift of the three

villages and certain minor properties was exesuted in their favour. The donor states in the gift that, from the date of its execution. he is to be desmed to be in possession of the property as guardian of the minors and not in his own right. It has been suggested that the reason why the deed was executed so soon after Hisam Ahmad's eath war, that plague was raging at the time, and there is some evidence on the record that after his death Nizam Ahmad feared that his life was uncertain and wished to ensure provision for his grandsons without delay It has been expressly admitted by the appellants' learned Advocate, in argument, that, so far as outward appearances go, everything that Nizam Ahmad annid possibly do to perfect the gift was done. The gift being one in favour of minor shildren under the guardianship of the donor. delivery of possession was not absolutely escential . Wilson's Mabammadan Law, fourth edition, page 323) An unequivosal declaration that the donor has ceased to hold the property as owner has been held sufficient. In any case, whatever sould be done possession and ownership was transfer done. The document was duly registered. The names of the donees were, on the application of the donor, recorded in the revenue papers in respect of all the properties covered by the gift. In some cases the elder miner was appointed Lambardar. Nizam Ahmad, himself, repeatedly declared that not he but the minors were the owners of the property. In 1513, seven years after the gift, he applied to be appointed their guardian under the Guardians and Wards Ast and gave in his application a full list of the gifted property which he described as the property of the minors. The District Judge did not appoint him guardian, but the refusal to do so was based solely on the ground that this would be superfluous as he was already the guardian of person and property of the minors under Muham. madan Law. In 1910 he was called on to give evidence as a proscoution witness in a criminal case. In cross examination was asked about his property and he then stated the fact that the villages in suit had been given by him to his grandsons three or four years earlier. A great deal has been made for the appellants of the fact that, in some instances, the Patwari's papers other than the khewat of

^{(5) 52} Ind. Cas. 162; 22 O. C. 124; 1 U. P. L. R. (J. C.) 1.

⁽N. s.) 46.

^{(7) 14} M. I. A. 377 at p. 860; 17 W. R. 113; 10 B. I. R. 45; 2 Suth P. O. J. 581; 8 Sar. P. O. J. 89; 10 E. R. 828.

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proprietary register were not corrected by substituting his name as guardian for his name as propriator, and that in one or two instances rent suits (filed by his agents) were brought in his name instead of in those of the minors. Mistakes of this sort are very easy to make where the management rested, as it necessarily must do, with Nizam Ahmad. As regards the Patwari's papers, nearly all the entries relied on are of the years 1:06 or 1907 very shortly after the gift. The delay which occurred in correcting the entries has been explained by the Patwaris eonsernad. Absolutely no importance can be attached to these papers. Nothing is more common than for incorrect entries in a khetauni or Jamabandi to continue for three or four years, the entry of the previous year being copied on each occasion before it occurs to the Patwari that the entry is wrong or his attention is drawn to it by some inspecting officer. In two cases suits were brought against Nizam Ahmad in personal capacity and it is significant that on both these coessions in his written statements he took exception to the form of the plaint and pointed out that the property belonged to his grandsons under his guardianship—tide Exhibits B97 and 140. In the former case an express plea was taken in paragraph 11 of the written statement; in the latter the heading of the suit was changed to Chhedi against Nizam Abmad, guardian of Fazal Ahmad and Ebtisham Ahmad, whereas in the plaint, Exhibit 137, Nizam Ahmad alone was shown as defendant. In one single instance, shortly after the gift, a mortgage for Rs. 222 was taken from a saltivator in the name of Nizam Ahmad. mortgage was in respect of arrears of rent some of which at least may have asorned prior to the gift. Apart from this, and the fact already referred to that Nizam Ahmad's name was shown mistake in the plaints in one or two rent suits (there are a large number of others in which he sued as guardian), no single act of Nizam Ahmad can be shown which is inconsistent with the gift. In fact, when challenged to say what more Nizam Ahmad could possibly have done to give effect to the gift than he did lo, the only suggestion which the appellants could put forward

was that separate assounts should have been kept in the name of the minors, whereas no such accounts have been produeed. In the case of an Zamindar it does not at all follow that such accounts would be kept, or that, if kept, they would be available some years after Nizam Ahmad's death. The ordinary accounts showing income derived from the villages would probably not affast the question either way and these are the only accounts of whose existence there appears to be evidence. Certainly, this single fact cannot be allowed to outweigh the vast mass of evidence on the resord that Nizam Ahmad did, from the date of the gift, absolutely divest himself of the ownership of the property and do every. thing that it was possible to do to sesure the title and possession of the doness. The appellants' argument is that the gift was intended as a Will in order to evade the provisions of Muhammadan Law which limit the right of disposal to one-third of the testator's property; but where a transaction is carried out openly and publicly and everything is done which ordinarily would be done to give effect to it, it certainly lies on the plaintiffs to show that the transaction was other than appeared on the face of it and was really intended to cover a fraudulent motive. Tais barden they have wholly failed to discharge. The contention that the does. ment was intended as a Will is rendered possible by the assidental circumstance that Nizam Ahmad died while the doness were still minors. If they had come of age in his lifetime, it is difficult to see how, in face of his own acts and declarations, Nizam Ahmad could possibly have resisted a claim by them to have his guardianship discharged and the management of the property made over to them. Reference has been made in the course of argument to the fact that N'zim Ahmad was at one time in monetary difficalties, but it is highly significant that though in 1913 Nizam Ahmad was in such straits for money that he was driven to execute a mortgage for Re. 30,000, he carefully refrained from ensumbering any of the gifted property but confined the mortgage to property of which he remained the owner-vile Exhibit The same is true of another mortgage, Exhibit 46, which he executed in the following year. It may be noted, in conclusion, that the

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plaintiffs have not been consistent as to the ground on which they should oppose the gift. At one time in their plaint they denied the gift altogether. At another time they asserted that the denor was so overcome by grief at his son's death that he was not a free agent when he made it. At another time it was suggested that he made it to defraud creditors or to anticipate a possible suit for dower either by Musammat Batul un nisa or by his mother Musammat Kaisara Begam.

The gift has also been attacked as offending against the Muhammadan doctrine of mushaa inasmuch as the property was given to the two grandsons without specification of shares. The dostrine of mushaa is one arising out of an archaic state of society, and their Lordships of the Privy Council have laid down that it should be confined within the parrowest limits-Muhammad Mumtas Ahmad v Zubaida Jan (8). Apart from this, the Fatawah Alamgiri, reproduced in Baillie's Digest, shows that where the only confusion or lack of definiteness is that a person who owns an entire property confers it on two donees without apportionment, the gift is valid according to both Abu Yusuf and Mohammad though not according to Abu Hanifa. general rule is that the concensus of the two disciples outweighs the opinion of Abu Hanifa alone and the opinion of the two disciples is accepted as being the law in Mr. Ameer Ali's learned work on Muhammadan Law (fourth Edition, page 79) and, likewise, in the case of Sharifa Bibi v. Gulam Mahommed Destagir Khan (9). There is also authority for the proposition that any defect due to mushaa is eured by taking possession in definite shares and there is no question here that the gift was treated throughout as a gift to the two grandsons in equal shares and mutation was applied for and obtained on this basic. The objection of mushaa cannot, therefore, be sustained.

It remains to consider the twelve-annas share in the Chak Niyszganj property. As regards the four-annas share purchased at auction by Aziz Ahmad, the documents referred to by the learned Subordinate Judge conclusively establish that it was purchased

(8) 11 A. 460, 16 I. A. 203, 5 Sar. P. C. J. 433; 6 Ind. Dec. (N. s.) 721 (P. O.).

in lieu of the debts of the original owner, Niyez Ahmad, and no argument as to this part of the case has been addressed to us on behalf of the appellants. As regards the remaining eight-annas the question admittedly turns on the construction to be placed on Exhibit 22, which is a desd of gift of this property executed by Niyaz Abmad in favour of his wife Musammat Kaisara Begam on 12th September 1901. This deed is construed by the learned Subordinate Judge, as it was construed by all the parties affected by it, as a gift of a life interest to Musammat Kaisara Begam with a reversion to the donor. If this construction is correct, the appellants admit that their case must fail, Niyez Ahmad left two sone, Nizam Ahmad and Aziz Ahmad, and the former could not possibly inherit more than a half share in the property. The present plaintiffs claim through Nizam Abmad. The plaintiffe, on the other hand, contend that this document conferred an absolute estate on Musammat Kaisara Begam accompanied by attempting to limit her power of alienation. and that these latter words are repugnant to the absolute interest previously erested and must, therefore, be disregarded. Reading the deed as a whole, we are of opinion that the learned Subordinate Judge has rightly interpreted it, and that it is not open to the construction contended for by the plaintiffs. The deed was emphatically a deed for the purpose of maintenance and a deed for maintenance, prima facie, importe only a life-interest. The case is very strong here inasmuch as the property is given for the maintenance both of Musammat Kaisara Begam berself and for a maid servant, Musammat Idan, and the operative words are, for,.....the maintenance and daily expenses without power of transfer of any kind," If a document is open to a construction which makes all parts of it harmonise with one another that construction is always to be preferred over one which introduces a repugnancy between one part of the doonment and another The construction that the document gave a life-interest not only avoids repugnancy but no one reading the document can have any doubt that it correctly represents the intention of the executaut,

The appellants have also objected to the fact that separate scate have been allowed in

^{(9) 16} M. 43 at p. 49; 8 M. L. J. 14; 5 Ind. Dec.

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favour of the two sets of defendants. As the two sets of defences were entirely distinct, the order of the learned Subordinate Judge appears to us an eminently proper one.

Certain cross-objections were put in by the respondents but these were withdrawn at the

hearing and have not been argued.

We ought, perhaps, to mention that Musammat Batul un nisa died during the pendency of the appeal and that no application was made within the period allowed by law to bring on the resord her legal representatives. As, however, the minor respondents, Fazal Ahmad and Entisham Ahmad, who are already on the record in another capacity, are her sole legal representatives, it appears to us that Order XXI, rule 2 only requires that an entry to this effect should be made in the record, and that rule 4 of the same Order is not applicable.

The result is, that the appeal fails on all points and it is accordingly dismissed with costs. The cross objections having been withdrawn are dismissed without costs.

J. F

Appeal dismissed.

PATNA HIGH COURT.

FIRST APPEAL No. 94 of 1919.

February 23, 1922.

Present:—Mr. Justice Coutts

and Mr. Justice Ross

GOPAL RAI and OTHERS—DEFENDANTS

—APPELLANTS

FIRM HARCHAND RAM-ANANT RAM-

"Account, mutual, open and current," meaning of— Test of mutuality-Limitation Act (IX of 1:08), Sch. I, Art. 85.

An account current is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or can be ascertained, from which it follows that such an account comes under the term of open account in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings be-

tween the parties, and do not embrace those having items on one side only, though made up of debits and credits [p 2, col 2]

The test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. An account which consists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account and, also, if the balance is sometimes in favour of the debtor but generally in favour of the banker the account is not a mutual one. [p. 33, col. 1.]

Where, therefore, an account does not indicate transactions creating independent obligations on both sides but there is sometimes a credit in favour of the defendant, and that only for a few days, the account is not a mutual account, and in a suit on such an account the plaintiff is not entitled to the benefit of Article 85 of Schedule I to the Limitation

Act, [p. 34, col. 2.]

Appeal from a decision of the Subordinate Judge, Bhagalpur.

Masers. C. O. D s and Lalmohan Ganguly,

for the Appellants.

Messrs. P. K. Sen, N. C. Sinha, Jugarnuth Frasad and Bindherwari Prasad, for the Respondents.

JUDGMENT.

Cours, J .- This is an appeal against a desree of the Sabordinate Judge of Busgalpur, decreeing a suit brought by the firm of Hareband Ram-Anant Ram against Gopal Rai and others. The plaintiff is a firm trading in Boagalpur and the defendants are members of a joint Hindu family, of which the defendant No. 1, Gopal Rai, is the k rta and they also have a business in Bhagalpur known as Gopal Rai-Sagar Mall. The plaintiff's case is that they had a mutual, open and surrent account with the defendants' firm, that there was an adjustment of this assount on the 18th of Savan Sambat 1973, when it was found that a sum of Ra. 4,49 - 15.6 was due by the defendants to the plaintiff. This sum with interest amounted to Rs. 5,721.8.6 and the plaintiff brought the suit for this amount.

The defendants admitted that they had dealings with the plaintiffs' firm, but they contended that the transactions between them and the plaintiff's firm were not a mutual, pen and correct account and that the claim was barred by limitation. They also denied their liability for interest at the rate clarked by the plaintiff. In addition, they pleaded a set-off of Rs. 14,580

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on the following allegation :- There was a suit which involved a large property. known as the Lashmipur case, ore Radha Kishen Bhagaria, the plaintiff and one Sheedut Ram entered into a champertons transaction and advanced money for that litigation their scares in the litigation being 8-annas, 6 annas and 2 annas respectively. Bansidhar was the managing member of the plaintiff firm and the defend ants' case is that he made an arrangement with the defendant No. 1, Gopal, by which Gopal was to make pairvi in that case; for this he was to receive 2 per cent, of all money advanced by the plaintiff for the litigation whether it was successful or not and 6 per sent. more if it was successful. The plaintiff's share of the money advanced for the litigation was Bs. 7,27,500. The litigation was not successful and, consequently, Gopal claims only 2 per cent. which amounts to Re. 14 550. The learned Subordinate Judge has found that portion of the plaintiff's elaim for Rs. 5,724-8 6 is barred by limitation and he has found that there was no arrange. ment between the plaintiff and Gopal by which G pal was to be paid 2 per cent, of the sum advanced by the plaintiff for the litigation in the Lachmipur case whether it was successful or not. The plaintiffs' suit has, consequently, as I have already said, been decreed. The defendants appealed, and in the appeal the same points are raised as in the Trial Court, vis., (1) that the plaintiffs' claim on the account between the parties is barred by limitation and (2) that the defendants are entitled set-off which they claimed. I propose to deal with this question of setoff first.

It is an admitted fact that the Lachmipur sait was financed by certain Marwaris on behalf of the plaintiffs in that suit. Bansidhar, who is the Manager of the plaintiffs' firm, denies that he or his firm had anything to do with that litigation but it seems clear that the conclusion of the learned Subordinate Judge that Bansidhar did in fact enter into the champertous transaction alleged is correct. There is no document to show this, but in his evidence Bansidhar admits that he consulted Pleaders about that case, met Counsel and made arrangements for their convenience.

The Commissioner of the Division spoke to him about the case, he came to Patna in connection with it when it was on appeal before the High Court, and there was a question of a compromise. He attended the trial, he was present at the bearing of the appeal, and he paid the costs of the suit, both in Bangalpur and in the Patna High Court. He says that this was done on behalf of Radha Kishen Bhagaria, who is a relative of his; but from the evidence of Radha Kishen it is elear that this is not so, for his evidence shows that he himself was paying money and was looking after the case and he had no oseasion to use Bansidbar to do any. thing for him. In these eircumstances, I have no doubt that Baneidhar was one of the shampertors, as has been found by the learned Subordinate Judge,

The question remains, however, whether in fact Baneidhar made the arrangement with Gopal, as the latter contends. We are not concerned with that portion of the alleged agreement relating to the payment of 6 per cent. in the case of the plaintiffs in the Lachmipur case being successful basause, so far, they have not been successful. We are concerned only with the matter of the 2 per cent. which Ransidhar is said to have agreed to pay whether the litiga. tion was successful or not. Now, the probabilities are against any such arrangement having been some to. If Bansidhar bad wished Gopal to be zealous in looking after the case he would bardly have promised him 2 per sent, which amounted to a large sum of over Rs. 14,000 in the ease of non success. Farther, it is difficult to understand why Bansidhar alone of all the champertors should have entered into such an agreement. The champertors were all working together, the pairei benefited all, and if any arrangement was being made it would certainly have been made with the knowledge of them all. Again, it is unlikely if the defendant No. 1 was to get 2 per cent, win or lose, that he would not have asked for and got something advanced during the litigation which was of a protracted nature. Another very important so sideration which tends to show that the defendants' story is untrue, is that there no document syidene. 18 ing the agreement. It bas been urged

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that the parties are on friendly terms and have been doing business together, and that between Marwaris who are friends dccaments are very often dispensed with. This is true but there is evidence of other transactions entered into by the defendant No. 1 with Marwaris in which he took documents and one is a transac. tion between him and his own brother in which he got a letter specifying his claim. I think, therefore, that it is unlikely that in the ease of a speculative suit such as is the Lashmipur case the defendant No. 1 would not get some document executed as There are evidence of the agreement. other circumstances referred to in judgment of the learned Subordinate Judge which also indicate that there could not have been any such agreement. Against these we have only the statements of defendant No. 1 Gopal and his gemasta. The defendant No. 1 is admittedly not on good terms with one Debi Prasad Marwari who was interested in the Lashmipur ease on behalf of the defendants and it is not at all improbable that he might have interested himself in the Lachmipur ease on behalf of the plaintiffs for that reason. The gomasta is a servant in the employ of Gopal Babu and to that extent he is an interested witness. The evidence of the agreement is thus of a very weak character and in the circumstances of the case I find it impossible to ascept it as sufficient evidence of the agreement. I accordingly agree with the learned Subordinate Judge that the set-off must be disallowed.

I now some to the question of the sum of Rs. 5,724-86 which is claimed by the plaintiff on a mutual, open and current account adjusted on the 15th of Savan 1973 Sambat. The plaintiffs' elaim was based, in the first place, on the account being a mutual, open and current account and consequently coming within the provisions of section 85 of the Limitation Act; and, in the alternative, on an adjustment which would bring it within the provisions of Article 115 of the Limitation Act. The learned Subordinate Judge has found in favour of the plaintiff on both there points and he has also found that the suit is not barred by limitation on the prinsiple laid down in the case of Kedar Nath

Mitter v. Denobandhu Shaha (1), which refers to a tradesman's account. In regard to the last point the plaintiff never claimed that limitation would be saved on the principle enunciated in the decision I have just referred to, and it is clear that the case is not one of a tradesman's assount. In regard to Article 115 of the Limitation Act it is also clear that the learned Subordinate Judge has taken an incorrect view of the law. He has relied on the case of Jalim Singh Choonee Lal Johurry (2) for the proposition that an adjustment of assounts between the parties in the defendants' presence operates as an implied contract to pay. Now, in the present case the adjustment is said to have been made in the presence of the parties but the case of Jalim Singh v. Choonee Lal Johurry (2), which related to a partnership, is no authority for the proposition that in any case of accounts an adjustment in the presence of parties operates as a fresh contract and it is conceded by Mr. Sen the learned Counsel appearing on behalf of the respondents that, unless the account is a mutual, open and current account, the adjustment will not save the suit from being barred by limitation.

The question then is, whether the ascount is a mutual, open and current account. The question of what a mutual, open and surrent assount is has been fully discussed by Mr. Justice Mookerjee in Ram Pershad V. Harbans Singh (3) in a judgment in which he reviews all the previous decisions on this point. In that judgment he says: An account current is an open or running account between two or more parties or, an account which contains items between the parties from which the balance due to one of them is or can be ascertained, from which it follows that such an account comes under the term of open account, in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and eredits." It is not disputed that the ascount with which we are concerned in the present case

(3) 6 C. L. J. 158.

^{(1) 31} Ind. Cas. 626; 19 C. W. N. 724; 42 O. 1043,

^{(2) 11} Ind. Cas. 540; 15 C. W. N. 852.

January 1913 there are shifting balances,

sometimes in favour of the plaintiff and

sometimes in favour of the defendants; and,

so far as I can discover, there were in all

17 ossasions on which the balance was in

the defendants' favour during this period.

From the 18th January 1913 onward until

the last item of account, the balance has

been sontinuously in favour of the plaintiff.

On the face of the assounts, therefore, it

would appear that, in the years 1906 and

1907, there was a shifting balance once in

favour of the plaintiff and again in favour

of the defendants, and that, between the

23rd January 1912 and the 18th January

1913, there were shifting balances some.

times in favour of the plaintiff and some-

times in favour of the defendants, and, on

the face of it, the account would appear to

be a mutual account, It is contended,

however, by the learned Counsel for the

appeliants that if the accounts are properly

examined, it will be found that in 1906 1907

there was in fact no balance in favour of

the defendants and that all the payments

which have been made for the other period

are merely payments to reduce a debt owed

by them to the plaintiff or as to a banker

for purpose of remittance. So far as the

years 1906-190/ are someerned, there can be

no doubt. The item with which we are

concerned is the item of Rs. 2,075-8 9

which is shown as a credit in favour of

the defendants in 1907. One of the items

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is an open and surrest ascount. The quastion is, whether it is a mutual account. The test of mutuality which has been laid down in a number of decisions is, that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. An assount which sonsists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual assount - Velu Pillai v. Ghose Mahamed (4). In Hajee Syud Mahomed v. Ashrufsonnissa (5) it was held that if the balance was sometimes in favour of the defendant but generally in favour of the plaintiff, the banker, the account would not be a mutual one : and in Phillips v. Phillips (6) it was held that a mutual assount is not merely one where one of two parties has reseived money and paid it on account of the other, but where each of two parties has paid on the other's account. An assount under which one party has received money and paid on account of the other is not a mutual account, and this view has been adopted in a series of English desisions,

In the present case the account between the parties began as early as the year 1906 and the last transaction is said to have been after the adjustment which was made on the 3rd August 1916. The only assounts on the resord are the plaintiff's account. The their defendants have not produced assounts, and, although no presumption san arise against them for not doing so, the fact that they have not produced them has considerably increased our difficulty. As I have already said, the accounts began in 1906 and the first balance was struck after only five transactions had taken place; this shows a balance in favour of the plaintiff of Rs. 1,253. The next balance was struck in 1907 and shows a balance, in favour of the defendants of Rs. 2,075.8 9. From this time on there is a balance of different amounts always in favour of the plaintiff, till the 23rd of January 1912 from which date until the 18th of

1,500 19th Chait Sadi

keats which shows Rs. 6.0.0 as a credit is for the dates beginning with 6th Magh Sudi. This clearly indicates that the Rs. 6,000 should have been shown as a credit in the

on the credit side of the account, when it was made up in 1907, is a sum of Rs. 6 000 item transferred from Was an which the natal bahi. It appears, however, from the nakul bahi, Exhibit 3 A, that in fact this sum of Rs. 6,000 had not been really paid in at the time that the assount was made up; the nokal bahi itself shows that these items were sredited as follows :-Rs. 2,000 6th Magh Sudi 2,500 7th Magh Sudi and the khata immediately following the next account. There was, therefore, in fact no credit of Rs. 2,075 8 9 in favour of the de-

^{(4) 17} M, 293; 4 M. L, J. 140; 6 Ind. Dec. (N. s.) 203.

^{(5) 5} C. 759, 6 C. L. R. 112; 2 Ind. Dec. (N. s.) 1091.

^{(6) (1852) 0} Hare 471, 68 E. B. 506.

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fendants when the assount of 1907 was made up.

The account from the 23rd January 1912 up to the 18th January 1913 is a more difficult matter and, at first sight, it would appear to be a mutual assount. On careful examination, however, I am satisfied that this is not so. Up till the 23rd January 1912 there was a continuous debit against Gopal, but on the 20th January he paid in Rs. 1,500 and again on the 23rd January he paid in Rs. 300 which raised his credit to Rs. 100. On the 25th January he paid in Rs. £00; on the 29th January he paid in Rs. 300 which raised his credit to Rs. 900. On the 2nd February he withdrew Rs. 3,15) which left him again with a debit of Rs. 2,250. Between this date and the 23rd February be paid in various sums and withdrew various sums there being always a debit balance until the 15th March 1912 when, by paying in Rs. 575, his account stood at this amount to his eredit. On the 29th of March he withdrew Rs. 300, reducing his balance to Rs. 275; on the 3 th March be paid in Rs. 400, increasing his balance to Rs. 675. On the 2nd April he withdrew Rs. 10 leaving his balance at Rs. 665; on the 4th April he withdrew Rs. 4-8-6 reducing his balance to Rs. 660.7 6, and on the 12th April he withdrew Rs. 3,000, which again left him owing a sum of Rs. 2,339.8.6 to the plaintiff. He again paid in various same of money up to the 25th April when, by paying Re. 1,075, he was left with a eredit of Re. 810.7.6. On the 29th April he paid in Rs. 700, making his balance Rs. 1,510 7.6, but on the 2nd May 1912, he withdrew Rs. 4,200, when the balance again became a debit one, and this debit continued until the 9th January 1913 when he again had a credit of Rs. 24 2.0. On the 10th January 1913 he had a credit of Rs. 624 2.0; on the 12th January a credit of Rs. 1,524 2 0; on the 13th January a credit of Rs. 1,474 2.C; on the 15th January a credit of Rs. 2,374.2.0; on the 17th January Rs. 3,374-20; and on the 18th January Rs. 4,124-2 0. From this date onwards there was a continuous debit balance against Gopal. This can hardly, I think, be called a mutual account. There was never a credit in favour of the defendant Gopal for more than a few days at a time and the account appears to be of the nature of those accounts referred to in Vellu Pillai

v. Ghose Mahamed (4), in Phillips v. Phillips (6), and the cases following that decision, It was not an account indicating transac. tions which created independent obligations on both sides as is required in the case of a mutual account. It is true that there was sometimes a credit in favour of Gopal, but the credit, as I have said, was only for a few days and such an account cannot be held to indicate a mutual account in which there has been reciprosal dealings between the parties. Some argument has been addressed to us in respect of two items, (1) Rs. 408-14-0 which was realized from the estate of Rani Keshowati of Handwa, and (2) costs in respect of the Lodipur estate; and it is contended that there items show that there were mutual dealings between the parties. I car, however, see no difference between realization from an estate and a payment of cash to the deferdants' oredit. The account ther, in my opinion, is not a mutual account. This being so, the plaintiff is not entitled to the benefit of the limitation prescribed in Article 85 of the Limitation Act; and it is admitted that if this Article does not apply then the plaintiff can get a decree for Rs. 1,045-10 0 only.

In the result, then, I would uphold the decree of the learned Subordinate Judge with regard to set off, but would modify his decree in regard to the principal amount claimed by the plaintiff to the extent indicated above. Costs will be in proportion to the success of the parties.

Ross, J .- I agree.

. J. P.

Decree modified.

LAHORE HIGH COURT.

MICCELLANEOUS FIRST CIVIL APPRAL

No. 501 of 1921.

November 5, 1921.

Present:—Mr. Justice Scott-Smith.

NANDAN MAL-PLAINTIFF-

versus

SALIG RAM AND OTHERS—DEPENDANTS
—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suits

MANDAN MAL U. SALIG RAM.

Valuation Act (VII of 1887), s. 8-Suit for declaration with consequential relief-Valuation.

A suit for a declaration that the plaintiff is the owner of certain property and that he is not bound by an ejectment decree obtained against him by fraud, and for an injunction that the defendants shall not interfere with his possession, falls within clause c of sub-section iv) of section 7 of the Court Fees Act. [p 25, col. 2.]

In a sait to which section 7, clause 4 (c) of the Court Fees Act applies the Courts are bound to accept the valuation placed by the plaintiff upon the relief sought by him, even though such valuation is arbitrary and inadequately represents the value of

the property. [p. 36, col. 1.]

As a general rule, under section 8 of the Suits Valuation Act, the jurisdictional value of suits falling under section 7 iv c: of the 'ourt Fees Act is the same as the value for purposes of Courtfee, [p. 36, col. 1.]

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Delbi, dated the 27th January 1921.

Lala Kahan Chand, for the Appellant. Lala Sardha Ram, for the Respondents.

JUDGMENT.—This is a first appeal from the order of the Subordinate Judge, First Class, returning a plaint for presentation to the District Judge in order that it might be transferred to a subordinate Court.

The facts of the case are as follows:-

Plaintiff alleges that he is the owner of the house described in the plaint; that the defendants Nos. 1 and 2 claim to be the owners and that defendant No. 3 as their thekedar fraudulently obtained a decree against him for ejectment on the ground that he was a tenant. Plaintiff accordingly asked in his plaint for the following reliefs:—

I. Deelaration that he is the owner;

2. That the ejectment decree obtained against him should be cancelled on the ground of fraud and that he is not bound thereby:

3. For a perpetual injunction that the defendants should not interfere with his possession.

He valued the plaint for the purpose of declaration at Rs. 5,000 and for the purpose of injunction at Rs. 100, total Rs. 5,100. On the 10th January 1921 the Court recorded an order in which it held that the value of the portion of the house in dispute for which the suit was brought appeared to be between Rs. 1,500 and

Rs. 2,000. The Court went on to say that the suit was not merely for a declaration, but that a consequential relief in the form of an injunction was claimed. It, therefore, the plaintiff to make up the ordered deficiency in Court fee, but it did not record any finding as to how much Court. fee should be paid. By a subsequent order of the 27th January it reviewed this order and held that the plaintiff had valued the suit as far as the declaration was concerned at Re, 130 and as far as the injunction was conserned at Rs. 100, total Rs. 230, and that this was accordingly the proper jurisdictional value of the suit and not Rs. 5,100 as stated in the plaint. Holding, apparently, therefore, that the suit was triable by the Court of a Munsif it returned the plaint as already stated. From this order the plaintiff has appealed.

Counsel for the appellant urges that, so far as the prayer for a declaration is concerned, the value for purposes of jurisdiction should be the value of the property. He also arges that an injunction is not a consequential relief and that, therefore, the suit is not one to which section 7, clause 4 (c) of the Court Fees Actapplies. Section

7, clause 4 (c) is as follows:-

In suits to obtain a declaratory desree or order, where consequential relief is prayed, the Court fee has to be calculated ad valorem. according to the amount at which the relief sought is valued in the plaint. Now, in the present case, as already stated, three reliefs are sought, but if the plaintiff obtains a decree for a declaration that he is the owner of the property together with an order that the defendants should not interfere with his possession, he will get all that he requires, for that decree will be tantamount to a deelaration that the ejectment decree is not binding on him. In Deokali Roer v. Kedar Nath (1), it was held that an injune. tion is a consequential relief; and in Arunachalam Ohetty v. Rangasawmy Pillai (2) it was held that a suit for a declara. tion that a mortgage-deeree is not binding on the plaintiff and for an injunction restraining the defendant from executing the same is a suit for a declaratory decree with

^{(1) 15} Ind. Cas. 427; 89 C. 704; 16 C. W. N. 888.

^{(2) 28} Ind. Cas. 79; 88 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154,

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consequential relief within the meaning of sestion 7, clause 4 (c) of the Act and an ad valorem fee is payable on the valuation fixed in the plaint. These authorities are distinctly in point in the present case, and it must be held, therefore, that the suit is one for a deslaration with consequential relief. In Barru v. Lachhman (3), it was held that in a suit under section 7, clause 4 (c) of the Court Fees Act the Courts are bound to ascept the valuation placed by the plaintiff upon the relief sought by him, even though such valuation is arbitrary and inadequately represents the value of the property. It was further held, in regard to the jurisdictional value of suits falling under section 7, clause 4 (c) of the Court Fees Ast, that as a general rule the value as determinable for the purposes of Court-fee and the value for purposes of jurisdiction were the same under section 8 of the zuits Valuation Act. In the present case all that was nesessary for the plaintiff to do was to value the relief sought by him. Instead of doing this, he valued the suit for the purposes of declaration separately and the suit as far as the injunction was concerned separately. He paid a Court fee of Rs. 10 so far as the declaration was and Rs. 78.0 so far as the conserned injunction was concerned, total Re. 17-8 0. It may be taken, however, that he valued the total relief sought at Rs. 23) and the plaint was, therefore, properly stamped, and the total value for the purposes of jurisdiction must be taken to be Rs. 230.

The appeal fails and is dismissed with

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Appeal dismissed.

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(3) 22 Ind liCas 503; 111 P. R. 1913 (F. B.); 228 P. W. R. 1913; 23 P. L. R. 1914.

OUDH JUDICIAL COMMISSIONER'S COURT.

Present: - Mr. Daniels, A. J. C.
RAM SARAN-PLAINTIFFAPPELLANT

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DAWAN SINGH AND OTHERS-DEFENDANTS-

Hindu Law-Legal necessity-Recital of purpose, evidentiary value of-Loan for particular purpose-Evidence.

A recital in a deed of the purpose for which the money is borrowed may not by itself be sufficient to prove the purpose for which the money was borrowed and is not in itself sufficient against third parties, but it is clear evidence of the representation made to the creditor, and if the circumstances are such as to justify a responsible belief that an enquiry would have confirmed its truth then when proof of actual inquiry has become impossible the recital coupled with the circumstances will be sufficient evidence to support the deed. [p. 37, cols. 1 & 2]

Nanda Lal [Banga Chandra] Dhur Biswas v. Jagat Kishore, 66 Ind. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M. L. J. 563; (19.6) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 863; 14 A. L. J. 1103; 24 C. L. J. 487: 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177;

43 I. A. 249 (P. C.), followed.

In considering for what purpose a particular loan was taken evidence which proves that just before the loan two of the borrowers came to an independent third party and asked him to arrange a loan for a particular purpose, and that he did arrange the loan in suit for that purpose is valuable and important evidence to show that the money was borrowed for that purpose. [p. 35, col. 1,]

Appeal against a decree of the Subordinate Judge, Sultanpur, dated 13th May 1921.

Mr. Hyder Husain, for the Appellant. Mr. A. P. Sen, for the Respondents.

JUDGMENT,-This is a first appeal in a suit for forcelceure brought by the plaintiff, Ram Saran, on the basis of a mortgage excepted in favour of his father, Ram Adhin, on 5th August 1910, by four parsons, namely, Dawan Singh, Mahabir Singh, Payag Singh Mahabir Singh and and Mabatal Singh. Dawan Singh were brothers and the other two executants were the scns of a deseased third brother, Udairaj Singh. Mahabir Singh died after the institution of the suit and is now represented by his son Mats Bakhsh Singh. Mahabal Singh is also dead and is represented by his widow, Musammat

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Ram Kali. The other two executants are the first and third defendants to the suit. At the time of the execution of the mortgage the family was joint, and it is admitted that some of the mortgagors had sons who did not join in the execution of the mortgage. The suit was resisted, and has been dismissed by the learned Subordinate Judge, on the ground that the mortgage being a mortgage of joint family property has not been proved to have been executed for legal necessity. The family was admittedly split up subsequently by a partition which took place in 1914. There was another branch of the family, that of Jagrup Singh, some members of which are in existence. They were not joined in the suit and it is stated that no slaim has been made against their share in the family property. No controversy as to them has been raised at the trial of the suit or in the appeal to this Court. The purpose for which the consideration of the deed in suit is said to have been borrowed is stated in the deed itself. It was for payment of a foreslosure decree held by one Pandit Uman Nath against the family prop-A preliminary deeree had been passed in August 190b against the executants of the mortgage deed in suit and against the three sons of one Mardan Singh whose name does not appear in the pedigree. One of these sons was named Pirthi Singh. The date originally fixed for the passing of a final decree was 17th February 1909 but time for payment was extended from time to time and, ultimately, 6th August 1910 was the date fixed for disposal of the case. One day before this date, namely, on 5th August, Uman Nath applied to the Court stating that he had received a sum of Rs. 1,585.8.0 in payment of his decree and asked that time might be given for the balance of Rs. 125 (Exhibit 3). Shortly afterwards, Pirthi Singh paid the balance of Rs. 125 and the case was settled. The learned Subordinate Judge has broshed aside the resital in the deed as being of no value whetever. This is not at all the correct position to take up. The resital may not by itself be sufficient to prove the purpose for which the money was borrowed -indeed, it is well settled that it is not in itself sufficient against third parties-but, as their Lordships of the Privy Council laid down in Nanda Lal Banga Chandra | Dhur Biswas v.

Jagat Kishore (1), the resilal is clear evidence of the representation made to the creditor, and if the circumstances are such as to justify a responsible belief that an enquiry would have confirmed its truth, then, when proof of astual enquiry has become impossible, the resital coupled with the sirsumstances will be sufficient evidence to support the deed. Their Lordships were dealing with the ease of a very old deed, and the same before them was, therefore, a much stronger ease than the present one, but it is an important element in the present case that the original ereditor, Ram Adhin, who could have given direct evidence of the representation made to him and of the enquiries he made, is no longer alive and his evidence is not available. We have here the encurrence of three eirenmstanses.

First, there was a decree outstanding against the mortgagors which, if not estisfied. would lead to the total loss of an important part of the family property.

Secondly, we have the execution of a mortgage which purports to be executed to pay off the money due under this desree.

Thridly, we have the fast that on the very day after the execution of the mortgage almost the entire amount outstanding under the decree is paid off and the creditor applies to the Court to give time for the payment of the small balance that remains.

These facts taken together are sufficient to raise a strong presumption that the representation contained in the deed was true and that the money was really borrowed to pay off the amount due under the decree. It is true that the amount paid to the was approximately double amount borrowed under the dead but this is what one would expest, as half the amount due to Uman Nath was presumably due from the executants and the other half from the sons of Mardan Singh. The plaintiff also produced a witness, Baijnath Singh, who was an attesting witness to the deed in suit and who swears that the money was borrowed for the purpose of paying off Uman Nath's deeres. He says that two of the executants, Dawan and Mahabal, came to him and that he himself at their request arranged the

(1) 36 Ind. Cas. 420; 44 C. 186 at p. 198; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 888; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10

Bur. L. T, 177; 43 I. A. 249 (P. O.),

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loan for the purpose. The learned Subordinate Judge has not in any way discredited this witness. His only comment is that any statement made by Mahabal and Dawan will not bind the minors. This comment entirely misses the significance of the evidence. There is no question of binding the minors. The question is, for what purpose a particular lcan was taken, and evidence which proves that just before the loan two of the borrowers came to an independent third party and asked him to arrange a loan for a particular purpose, and that he did arrange the loan in suit for that purpose is certainly valuable and important evidence to show that the money was borrowed for that purpose. only other evidence to which referense has been made is the evidence of Uman Nath, the ereditor. He was called by the plaintiff to prove the payment to him and he verified the application which he made to the Court. He stated that he did not know where the judgment debtors obtained the money but added that Pirthi Singh told bim that he had raised Rs. 8:0 by sale of some property and had borrowed Rs. 800 from the plaintiff. The second Rs. 800 must refer to the mortgage deed in suit for it has not been suggested any where that any other mortgage-deed was executed at this time in favour of Ram Adhin. After this, the witness proceeded to add that Pirthi Singh only told him this after the instituion of the present suit. In cross examination he stated that the whole of the Rs. 1,583 8 0 was actually raid to him by Pirthi Singh (the actual sum paid was Rs. 1,585.8.0 as is shown by the documents). It is true that this transaction took place eleven years ago but I am bound to say that the evidence of this witness produces on my mind the impression that he has not been entirely candid and that he is anxious to say as little in favour of the plaintiff as possible. quite possible, however, that the money was actually paid into his hands by Pirthi Sirgh. If it was so, no importance can be attached to this fact. Where two sets of parties jointly owed money it is probable that the actual payment to the creditor would be made in a lump sum by one of them. I do not think, therefore, that the evidence of Uman Nath really damages the plaintiff's oase. On the dense on the record I feel no doubt that the amount of the bond in suit

was borrowed for the purpose of paying off Uman Nath's decree which was admittedly a purpose binding on the family property and I find this issue in favour of the plaintiff.

In view of this finding, the only other point which arises is the question of interest. The learned Subordinate Judge has held that, even if there was necessity for the deed, there was no necessity for the high rate of interest stated in it, which was two per cent. per mensem compound interest. The learned Counsel for the appellant has not pressed this point. He has stated that if the first issue is found in his favour he has no objection to the Court reducing the interest to one per cent, per mensem or any amount which the Court may consider reasonable.

I, therefore, allow the appeal and give the plaintiff a preliminary decree for foreclosure for the amount claimed, with this modification that, instead of compound interest at 24 percent per annum, simple interest at 12 percent. per annum, will be allowed. A foreclosure decree in the usual form will be prepared. The plaintiff appellant will get his costs in both Courts on the amount allowed.

J. P.

Appeal allowed

OALOUTTA HIGH COURT.

APPEAL FROM OSIGINAL DECREE No. 305 OF
1918.

February 7, 1921.

Present: - Justice Sir John Woodroffe, Kr.,
and Mr. Justice Walmsley.

Srimati KRISHNA BHAMINI DASI—
PL: INTIFF - APPELLANT

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Srimati BRAJA MOHINI DASI AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Hindu Law-Adoption-Acknowledgment, effect of-Widow-Maintenance, amount of-Principle.

Under the Hindu Law if in case of an adoption giving and taking is not established as a fact, no amount of acknowledgment would make one an

adopted son. [p. 40, col. 1.]

No hard and fast rule can be laid down that a Hindu widow is entitled to a particular fraction of the income of her husband's estate as her maintenance. The circumstances of each case must be considered, such as, the value of the estate and its income, the position and status of the deceased husband and his widow, the expenses involved by the religious and other duties which she has to

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discharge, and so forth, together with the fact that whether the widow has been given a separate property by her husband for her maintenance. [p. 42, col. 2.]

Appeal against a decree of the Sabordinate Judge, Fourth Court, 24 Perganaha,

dated the 24th of June 1918.

Babus Bepin Behari Ghote and Abinash Ohan-

dra Ghose, for the Appellant.

Babus Mohendra Nath Roy, Hara Kumar Mitter, Karunamoy Ghose, Rupendra K. Mitter and Prokash Chandra Pakrasi, for the Respondents.

JUDGMENT.

WOODBOFFE, J .- The plaintiff appellant is the widow of one Hari Cheran Base, a Mukhtar, who, starting life without means, amassed at length a considerable fortune which is the subject matter of this suit. He died on the 11th April 1910 leaving another widow, the first defendant, no natural children but grand-children by the plaintiff. The first defendant was childless. point at issue is, whether the second defen !ant is the adopted son of Hari Charan Bose. If not, then the plaintiff elaims possession of half the property of her late husband and, alternatively, in the event of its being held that the second defendant is the adopted son of the plaintiff's husband, then the plaintiff claims maintenance from the estate. There is no dispute that the dessased had no natural son and that the second defendant, an infant of about 12 years, was brought into the house in the beginning of Assar 12-9, that is, the end of Jane 189?, some 18 years before H. C. Boze's death and lived there all along as a foster son assording to the plaintiff or sines July, 1832 as an adopted ton according to the defendants. There can be no question that on the 3rd July 1892 an unregistered deed of authority for adoption was executed by H. C. Boss and that a registered deed of premission to a lopt was expented by H. C. Bose on the 6th August 1892. Some 12 days before the alleged adoption a registered deed of gift of his son was executed by one Abhoy Oharan Bose, the natural father of the second defendant, in favour of the first defendant Srimati Brojo Mohini Dassi. There is evidence which the Judge has accepted that the boy was given and taken in adoption on the 18th August 1892 and that homa was performed later on the lat Ostober 1892.

There is evidence also that H. C. Bose and others treated the boy as his son even before the date next mentioned. It is admitted that it is shown that from some six years after the date of the alleged adoption Hari Charan Bose spoke of and treated the second defendant as his adopted son: for, as regards this, we have dccumentary evidence. In 1:08 the second defendant, who was then about 17 years old, married as the adopted son of H. C. Bosc. The eard of invitation described him as sor. On the 11th April 1910 the second defendanl's adoptive father died. Not till six years later, that, is on the 10th April 1916, this suit was instituted. According to the plaintiff's evidence she had not been receiving anything from the estate from about two or three years before 1918. It must be admitted that the above mentioned facts constitute a strong case against the plaintiff.

The latter's case is that she and her so widow were on bad terms. The second widow, the first defendant, was shildless and jealous. To satisfy her maternal cravings she took the second defendant during his infancy from his father in exchange for money (which is denied) and brought him up and introduced him into the family as a foster son. There was it is said (not withstanding the execution of the dosuments above mentioned) no actual adoption though after some years H. C. Bass came to speak of the defendant No. 2 as his adopted son. he was a possibly thinking (though Makhtar) that such admissions were sufficient to make the defendant his adopted son or would be operative in fact for that purpose. They, after the death of the plaintiff's hasband, the first defendant took advantage of the fast of the presence of the second defendant in the family and set up the alleged adoption with the object of depriving the plaintiff of her right of inheritance and her children of their reversionary interest. .

The first defendant, on the other hand, alleges that the second defendant is the adopted son of H. C. Bose and not a mere foster son, as alleged; that the plaintiff has admitted that fact and was aware of the adoption all along. The heirship of the plaintiff is denied and as regards maintenance and residence it is eaid that sufficient provision has already been made. The defendant claims property No. 18 in the schedule to the plaint as her own property

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stating that it is no part of the estate of her husband. The written statement of the second defendant is on the same lines with greater details upon the issue of maintenance.

Eighteen issues were framed; but we are now concerned with four, viz., (1) Whether the defendant No. 2 was validly adopted, and if not (for otherwise the issue does not arise); (2) Is property No. 18 part of the estate of H. C. Bose. Then, if the appellant fails to show that the judgment in appeal is wrong as to the adoption then; (3) Is the plaintiff entitled to get maintenance, and (4) arrears of same.

No question of law arises on this issue of adoption the question being one purely of fact. It is common ground that if giving and taking is not established as a fact no amount of asknowledgment would make the second defendant an adopted son. The question is one of fast, namely, what occurred on the 18th August and 1st October 18.2, when the adoption and subsequent ceremonies were performed. There is no question here as to whether the adoption was by the first defendant and whether a wife can adopt even with permission during her husband's life time for the facts (if true) are that the taking was by H. C. Bose. The only question which arises is, whether the evidence to that effect is true. There is no question whether subsequent ceremonies were necessary. The ease made is that the parties who are Kayasthas are Shudras. It is not said that religious ceremonies such as the dattaka homa were necessary but it is denied as a fact that such ceremonies were performed. it being said that the allegations made in this respect are not true. The issue of fact is, whether there was a giving and taking on the 18th August 1892 and ceremonies on the 1st October 1892 or not.

The learned Judge has held that the defendant No. 2 was validly adopted, that the plaintiff is entitled to maintenance at the rate of Rs. 200 a month, and that the same should be a charge upon the immoveable properties of H. O. Bose and that there are in fact no arrears due. From this decision the plaintiff appeals both on the question of adoption and maintenance and there is a cross-appeal to the respondents on the question of maintenance. As regards the probabilities, it is said that it is improbable

that the defendant No. 2 should have been adopted for H. C. Bose was then rich and it is said that he asked three persons to give their sons in adoption, viz., Ackhoy Kumar Bose and Gobordhan Bose and a relative Bhuban Mohini Dasi. Yet they all refused, It is the plaintiff's case that even the natural father of the boy, a very poor man, was at first unwilling and only gave way when the boy became ill and on the terms that if the boy would be sured by H. O. Bose he would be given in adoption. The refusal is not contested, but it is asked is this likely except on the assumption that they were not asked to give their son in adoption by H. C. Bose but to give one of their children as foster son for the defendant No. 1, a very different matter. It is to be observed that Gobordhan who is alive is not called. It is said that he is a Pleader of defendant No. 2. Is it likely, it is said, that this rish man had to get a son from a poor vendor of sweetmeate, What happened, it is suggested, is that the latter made a gift of his son to the defendant No. I and that was all. There alleged. The giving and taking as Anumatipatras were given with a view to adoption after death. Then it is suggested that the defendant No. 1 worked upon the mind of her husband and got him to recognise the foster son as adopted son some six years after the date of the alleged adoption, If it is asked, how a Mukhtar who had (in whatever way) consented to the defendant No. 2 being his adopted son could leave the matter in so uncertain and voidable a state as the plaintiff's story suggests, it is replied that at that time it was too late to go through a regular adoption, though it is admitted that strictly there was no impediment, it is argued that Bhadro is an unlucky month to make any gift and that it is not likely, therefore, that the giving and taking in adoption took place in that month that the persons, relations or Brahmins who might be expected to be invited on such an present. were not occasion Gobordhan, Probash, Prokash, Mrinalini Dasi, Hemangini Dasi, Surendra, Jogendra, Upendra and Akshoy K. Bose. It is said that there is no entry of any gift to Brah. mins in the assount nor is the deed of gift attested by any Brahmin. In the assount of 3rd Bhadra (18th August) there is no relevant entry, the only entry relevant to the

KRISHNA BRAMINI DASI U. BRAJA MOHINI DASI,

saleged adoption being an entry of 23rd Sraban (6th August) touching deposit made by defendant No. 1 for the purpose of adopting a son. This, it is suggested, was owing to pressure of defendant No. 1 on H. C. Bose who may have been willing that his wife should prepare a deed of permission to adopt but it does not follow that the adoption took place. The giving and taking in adoption is spoken to by both the natural and adoptive mother of the second defendant, Srimati Padmamukhi, second wife of Bama Charan Bose, the brother of H. C. Bose, Chandra Bhusan Chaudhury, the sister's son of defendant No. 1, and an employee of the second defendant, Srish Chandra Biswas.

the second defendant, Srish Chandra Biswas. It is a point worthy of consideration, in support of the contention that such giving as there may have been was only by deed, that the deed of gift of the 18th August 1892 sasts doubt on the oral evidence in that, if the document was executed after the giving and taking that fact would have been recorded, but it was not, that if the taking had been as alleged by H. C. Bose, his name would have appeared as donee; that if H. C. Bose had really been present and took the shild the resital of permission having been given was unnecessars; that the deed recites that the adoption was said to be "by you," that is, the first defendant, and that the deed resites that the boy was taken in adoption after the performance of the rites and eeremonies prescribed by the Hindu Law when no such rites were performed on that day and homa is said to have been done about a month and a half after the deed. The learned Judge has dealt with these arguments. Farther, it is note. worthy as regards this last allegation it was first made when the written statement was amended under order of the 3rd April 1917. It is also a substantial point that it is unlikely that H. C. Bose was driven by the refusal of his relatives to give a son in adoption, had to seek through a barber an adoptive son from a man in such a position as that of the natural father of defendant No. 2 who was a sweetmeat vendor without position or means. This last seems established whether he was, as the plaintiff says, a street bawker or had a shop as the respondents say. This fact is really the chief basis of the attack on the defendants' case, We have, however, not thought it necessary to

call upon the respondents because it seems to us that whatever ground may exist for the criticism passed by the learned Vakil for the appellant on the story of the adoption and the circumstances which led up to it, we have the fast of the adoption spoken to by the witnesses named in their evidence which the learned Judge has described of a con. vincing character; and it is an undoubted fast that H. C. Bose deslared that [the second defendant was his son and treated him as such. This appears not only from documents such as the conveyance. Exhibit I of the 19th February 1:99 where H. C. Bose describes the second defendant as his son, the school register, and so on, but from the evidence of reliable persons such as Sir David Yule, and Mr. MeNair, to whom H. C. Bose introduced the second defendant as bis son. Babu Sabodh Chandra Mitter, an Attorney of this Court, also says he knew the defendant No. 2 to be the adopted son of H. C. Bose. We have also the fact that the second defendant lived all along in the house and was treated as a son and the fact that there was a written registered permission to adopt and a registered deed of gift by the natural father. As the learned Judge says. it is natural that H. C. Bose, who was an orthodox Hindu of the old type, should adopt a son. It is not explained when the plaintiff first assertained that the defendant No. 2 alleged himself to be the adopted son and why she took no action at an earlier date than 1916 some eix years after her husband's death. I think also that there is some ground for the learned Judge's observation that the plaintiff did not call evidence Farther, for what it is available to her. worth, the plaintiff appears to have admitted the defendant No. 2's ticle as heir. It is said that this may have been because, though not admitting his title, she may have at first desired to respect her husband's wishes-for there is no doubt that he wished the defend. ant No. 2 to be recognised as his son. It may be she changed her mind on account of disputes as to payment of money. It is not possible, however, to say that the body of evidence is overcome by the enggestion that all that happened was that the defendant No. 2 was brought in as a foster son that no actual giving took place but that about 1898, 1599 H. O. Bose determined to regard him as his adopted sonl and thought KRISHNA BHAMINI DASI O. BRAJA MOHINI DASI.

that an asknowledgment was sufficient to make up for the want of a proceeding of giving and taking. This is the less possible when the learned Judge who has heard the evidence has accepted it. I am of opinion, therefore, that this part of the appellant's ease fails; that we should hold that there is no sufficient ground for reversing the decision of the Subordinate Judge that the second respondent is the adopted son of H C. Bose. It is on this finding unnecessary to discuss the question whether property No. 18 is the property of the estate or of the first

respondent.

The remaining question of maintenance divides itself into two points, viz, whether the plaintiff is entitled to maintenance, if so, what and whether any arrears are due. The respondent's cross appeal urges that plaintiff's husband had in as the life time provided for her residence and maintenance by the setting aside of specific properties and funds she is not entitled to elaim maintenance against his assets without first surrendering her interest under the said gift. It is not objected that the Judge was wrong in awarding the sum of Rs. 200 a month. At the hearing the eross-appeal was not pressed, the learned Vakil for the respondent stating that he was not opposed to the appellant receiving what the Jadge has given her but to her receiving more. The question then is one of fact, namely, the amount of the maintenance to be awarded.

As regards the amount of maintenance it has been held that no hard and fast rale can be laid down that a widow is entitled to a particular fraction of the income. The circumstances of each case must be considered, such as, the value of the estate and its income, the position and status of the deceased busband and his widow, the expenses involved by the religious and other duties which she has to discharge, and so forth, together with (as is here the case) that the appellant has been given a separate property for her maintenance. The Judge on a detailed examination of the facts has fixed a sum of Rs. 200 a month and held that there are in fact no arrears due.

It is taken as sommon ground (however saleulated) the de. 32,000 is the net yearly insome from improveable property. The

respondent says that from this must be deducted interest on account of loans. This the appellant does not admit. The latter under the deeree gets Rs. 200 a month in addition to the sum of about Rs. 75 which she gets from immoveable property. She claims Rs. 750. The maintenance awarded is about 1/10th and it may be less of the respondent's (No. 2) income. From evidence it appears that at one time, even during the life of her husband, the appellant got Rs. 200 a month and after his death the respondent No. 1 used to pay Rs. 200 a month over and above the income of her immoveable property. This rate appears to have been paid until shortly before the suit and by consent after the suit at the same rate. The cross-appeal, as I have said, is not pressed. The learned Pleader for the respondent is only concerned to see that the plaintiff appellant does not get any more than the learned Judge has awarded her. With the Rs. 75 this makes Rs. 275 a month. Seeing that the appellant used to reseive the same sum of Rs. 200 years ago and the present lowering in the value of money I think that something should be added to the sum awarded. I think that this should be Rs. 75 so that the appellant will then have, including income from immoveable property, the sum of Rs. 350 a month. With this exception, the deeree is affirmed and the appeal is dismisted. As the appellant fails on the main point, the discussion of which has occupied all the days of hearing except some portion of the last, the appellant must pay the costs of the appeal.

WALMSLEY, J .- I agree.

B. N.

Appeal dismissed.

RADHA BIHARI-DIWAN SINGH C. G. B. ALEXENDER.

LAHORE HIGH COURT.

MISCELLANGOUS FIRST CIVIL APPEAL No. 1273

OF 1921.

November 16, 1921.

Present:—Mr. Justice Scott Smith and
Mr. Justice Abdul Qadir.

RADHA BIHARI-DIWAN SINGH—

DEPENDANTS—APPELLANTS

tersus

G. B. ALEXANDER, TRADING AS JAFFE AND SONS-PLAINTIFF-RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, r. 18-Negotiable Instruments Act (XXVI of 1881), s. 32-Sale of goods-Arbitration clause in indent-Suit on bills-Stay of suit.

The defendant firm placed an indent for the purchase of certain goods with the plaintiff firm. One of the clauses of the indent was as follows:—

The plaintiff firm after shipment of goods drew two bills of exchange against the defendant firm which the latter accepted but refused to pay on maturity. The plaintiff firm accordingly sued them and their claim was based, in the first instance, upon the accepted but unpaid bills, and, in the alternative, they sued for the price of the goods and

for certain expenses:

Held, (1) that the claim of the plaintiff firm was based primarily on the accepted but unpaid drafts as contemplated by section 32 of the Negotiable

Instruments Act; [p. 44, col. 1]

(2) that, therefore, the defendant firm could not demand that the dispute must be referred to arbitration under the provisions of the indent, and were not entitled to get a stay of proceedings under paragraph 18 of Schedule II to the Civil Procedure Code, [p. 44, col. 1]

Missellaneous first appeal from an order of the Senior Subordinate Judge, Delhi, dated the 25th April 1921.

Lala Mool Chand, R. S., for the Appellants.

Lala Moti Sagar, R. S., and Mr. Frem Lal,
for the Respondent.

JUDGMENT.—This is a first appeal from the order of the Senior Subordinate Judge, Delhi, refusing to stay proceedings in a suit under rule 18 of the Second Schedule to the Civil Procedure Code. The facts of the case, which are given fully in the order of the Senior Subordinate Judge, are briefly as follows:--

On the 22ad January 1920 the defendant firm appellant placed an indent for the purchase of 10 bales of white shirting of estain specified qualities, July to September 1920 shipments, with the plaintiff firm respondent. The terms governing the contract are those given in the indent form-vide Exhibit Pon the record. The sellers, Messrs. Jaffe and Sons (the firm of the plaintiffs), after shipment of goods, drew two bills of exchange against the buyers on the 19th May and let June 1920, respectively, at 60 days' sight. These were presented by the National Bank of Indie, Limited, Delhi, to the defendant firm; who accepted them on the 9th June and the 23rd June, respectively, but subsequently refused to pay them upon maturity. The plaintiff firm accordingly sued them and their slaim was based, in the first instance, upon the accepted but unpaid bills, and in the alternative they sued for the price of the goods and for certain expenses. Clause 15 of the indent form provides that if any claim or dispute arises in connection with this contract, unlere an amicable cettlement oun be arrived at, it must be referred to arbitra. tion in Delhi, in accordance with the Survey and Arbitration Rules of the Delhi Hindus. tani Mercantile Association. Relying upon this clause the defendant says that the dispute must be referred to arbitration, and, therefore, an application was made to the Court to stay proceedings under rule 18 of the Second Schedule of the Civil Procedure Oode. The Court refused to stay proceedings holding that the slaim was primarily on the basis of accepted, but unpaid, drafts as contemplated by section 32 of the Negotiable Instruments Act.

In our opinion, the order of the lower Court is clearly right. It is not denied that the bills of exchange were accepted by the defendant firm. Section 32 of the Negoliable Instruments Act lays down that in the absence of a contract to the contrary the acceptor before maturity of a bill of exchange is bound to pay the amount thereof at maturity, according to the apparent tenor of the acceptance. The suit as brought upon the acceptance. The suit as brought upon the accepted, but unpaid, bills of exchange is, therefore, a suit governed by this section and is not a suit for damages or for the price of the goods at all. Ganesh Das.

BAYAPATI VENKATASUBBA RAO U. KALAPATAPU MABATANA BAO.

Ishar Das v. Durga Dat-Jagan Nath (1) which is relied upon by respondent's Counsel, is, in our opinion, distinguishable because that was a suit for damages and not one based upon an accepted bill of exchange which had not been paid. Moreover, clause (i) of the indent form is as follows:—

In our opinion this clearly shows that drafts must be assepted on presentation and paid at maturity in spite of any objection which the indentors may have regarding or on account of any variation whatever from the terms of the indent. If any such objection is taken, it must be settled by arbitration in the way subsequently provided, but the accepted drafts must be paid at matarity whether there be any objection or not. Counsel for the appellant has referred to section 43 of the Negotiable Instruments Act and has urged that either the bills of exchange were assepted without consideration or for a consideration which subsequently failed, and that, therefore, his clients were not liable. It will be open to them, of course, to show that the bills of exchange were accepted without consideration or to raise any other defence which they may be advised to do, but prima facie the plaintiff firm has a good case under section 32 of the Negotiable Instruments Act, and, in our opinion, the lower Court's order refusing to etay proceedings is correct, and we dismiss the appeal with cost.

Z. K.

Apaeal dismissed.

(1) 60 Ind. Cas. 776; 2 L. 19,

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 845 OF 1920.

December 22, 1921.

Present: -Mr. Justice Krishnan.
RAYAPATI VENKATASUBBA RAO-

PETITIONER

versus

KALAPATAPU NARAYANA RAO AND

ANOTHER-RESPONDENTS.

Civil Procedure Code (Act V of 1938), O. XXI, r. 89

—Civil Rules of Practice (Muffasil), r. 131—Payment
of money and filing of lodgment schedule without
formal application to set aside sale, effect of—Order
setting aside sale, legality of.

The mere payment of money in Court and filing of lodgment schedule without an application oral or in writing to set aside the sale under Order XXI, rule 89, Civil Procedure Code, cannot be the basis of an order cancelling the sale. The lodgment schedule cannot be treated as equivalent to the application required by rule 89. [p. 45, col. 1.]

Mariappa Annam v. Hari Hara Iyer, 22 Ind. Cas. 291; 14 M. L. T. 534; (19:4) M. W. N. 62 and Vannisami Therar v. Periayaswami Thevar, 33 Ind. Cas. 996, 19 M. L. T. 192; (1916) 1 M. W. N. 179; 3

L. W. 271, not approved.

Petition, under section 115 of Act V of 1938 and section 107 of the Government of India Act, praying the High Court to revise an order of the Subordinate Judge, Masulipatam, dated the 4th Saptember 1920, in Miscellaneous Appeal Sait No. 2 of 1920, (Miscellaneous Appeal No. 13 of 1919 on the file of the District Court, Kistna), perferred against an order of the Court of the District Munsif, Masulipatam, dated the 6th November 1919, in Execution Appeal No. 3210 of 1919, in Execution Petition No. 115 of 1919 in Original Suit No. 832 of 1915.

FACIS appear from the judgment.

Mr. K. Kamanni, for the Petitioner.—The order of the lower Appellate Court is wrong as the judgment debtor made no application to Court under Order XXI, rule 89, to set aside. No doubt he paid the money and filed the lodgment schedule, but there was no prayer to set aside the sale.

Mr. K. Krishnamachariar, for the Raspondents.—Under the circumstances an oral application might be presumed vide Mariappa Annam v. Hari Hara Iyer (1), Vannisami Thevar v. Periayaswami Thevar (2).

^{(1) 22} Ind. Cas. 291; 14 M. L. T. 534; (1914) M. W. N. 62.

^{(2) 33} Ind, Cas. 933; 19 M. L. T. 192; (1916) 1 M. W. N. 179; 3 L. W. 271,

SUNDAR SINGH &. SUNDAR SINGH,

JUDGMENT .- In this case the learned Subordinate Judge has set aside a sale under Order XXI, rule 89, of the Civil Procedure Oode though no application for it had been made by the judgment debtor to the Court in time. The money, no doubt, had been paid into Court in time but no application was made as required by rule 89, Civil Procedure Code. There was only a lodgment schedule filed into Court along with the money as required by rule 131 of the Civil Rules of Practice whenever any money is paid into Court. The learned Subordinate Judge has held that this lodgment schedule can be treated as equivalent to the application required by rule 89. I regret I am unable to accept this view. There is no prayer in the lodgment schedule to set seide the sale under rule 89 and I do not see how, without such a prayer, it can be treated as an application under the rule.

It was suggested that an oral application should be presumed to have been made to the Court under the circumstances in this ease and reliance is placed on the judgment of Tyabji, J., in Mariappa Annam v. Hari Hara Iyer (1) and on the case Vannisami Thevar v. Periagaswami Thevar (2) where the former eass is eited and its effect confess that I do not understand what is meant by presuming an oral application. If it is a presumption of fast, it is rebutted in this case, as it is found by the (District) Munsif that no oral application had been made and the Subordinate Judge has not set aside that finding. If the presumption is one of law, I do not know of any justification for such a presumption. The finding here being that no application was made in time in the present case either oral or in writing, one necessary condition for action under rule t9 fails and the order of the Subordinate Judge setting aside the same must itself be set aside. The order of the District Mansif is restored with costs here and in the Court below.

M. C. P.

Petition allowed.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 2710 OF 1917. February 9, 1922.

Present:-Mr. Justice Abdul Bacof and Mr. Justice Campbell.

SUNDAR SINGH-PLAINTIFF - APPELLANT versus

SUNDAR SINGH (APPELLANT) REPRESEN-TATIVE OF NATHA SINGH, DECRASED. AND Musammat ROOP KAUR, DAUGHTER OF NATHA SINGH-DEFENDANTS-RESPONDENTS.

Custom-Personal law-Khatris of Mauza Salina Tahsil Moga, Ferozepore District.

The initial presumption in the case of Khatris is that they follow their personal law. [p. 46, col. 2.]

The Khatris of Mauza Salina in the Moga Tahsil of the Ferozepore District follow Hindu Law in matters of alienation and succession. [p. 45, col, 2.]

Second appeal from a decree of the District Judge, at Ferozepore, dated 23rd June 1917, affirming that of the Subordinate Judge, Second Class, Ferozepore, dated the 2nd April 1917.

Dr. Gokal Chand Narang, for the Appellant.

Lala Fakir Chand, for the Respondents.

JUDGMENT .- The facts of this case are so fully given in the judgments of the two Courts below that it is not necessary to give them in any detail for the purposes of this second appeal. It is only necessary to state that the parties are by caste Khatris, and residents of Mauza Salina in the Moga Tabsil; that Natha Singh, defendant No. 1, made a gift of the land in dispute in favour of his daughter Musammat Rup Kaur, defendant No. 2, and that thereupon the plaintiff Sunder Singh instituted the present suit for a declaration to the effect that the gift dated the 19th December executed by the defendant No. 1 in favour of defendant No. 2 was without necessity and consideration and that it should not affect the plaintiff's reversionary rights after the donor's death, The plaintiff alleged that the parties were agriculturiete and were governed by agricultural enstom under which a gift could not be validly made in favour of a daughter. The plaint also aversed that Musammat Rup Kaur was a pichhlag and was not the legitimate daughter of Natha Singh. The main plea raised in defence was that the parties being Khatris were governed by Hindu Law and not by

NRIPENDRA EUMAR DUTTA U. NADIR EHAN.

agricultural costom. The main question to be decided in the case, therefore, was whether the parties were governed by agricultural custom or by their personal law. Both the Courts below have exhaustively dealt with the question in their decisions in the light of the evidence produced by the parties and of the decided cases relied upon by them, and have held that the plaintiff has failed to establish that the parties are governed by the ordinary custom of agriculturists and have dismissed the suit. The plaintiff has, therefore, preferred this second appeal.

Dr. Narang in arguing the appeal has taken us through the entire evidence on the record and has drawn our attention to certain decided cases. After considering the evidence and examining the authorities on the subject we find curselves in entire accord with the view taken by the Courts below, and we are unable to accept the contention raised by the learned Counsel before us.

As held by the lower Appellate Court, the following facts may be taken to have been established by the plaintiff, namely:—

1. That the parties are Sikhe, that they have long hairs and also wear iron kares, that they follow the "Garanth Sahib," and that possibly they have discarded the Brahmanical thread.

 That their ancestor Bagh Singh held and owned 900 kanals of land as a proprietor in the village.

3. That karewa and anand marriages were in vogue in the community.

On the findings recorded by the Courts below the plaintiff has failed to prove the following, namely:—

(a) That the families to which the parties belong formed a compact section of the village community.

(b) That the parties ploughed and tilled with their own hands; that the parties depend entirely upon agriculture and have no other occupation.

As remarked by the Court of first instance, a custom without instance is inconcievable. Not a single instance has been cited to show that the ancestors of the parties followed agricultural custom in disregard of their personal law in matters of alienation and succession.

In the case of Harnam Singh v. Hardevi (i) the following fasts were brought out, namely:—

1. That the families were established in

the village since 1823.

2. The means of subsistence agriculture,

Not shown that these Sodhis exercise priestly functions.

4. Janeo abandoned,

5. Marriage by karewa and anand practised.

In addition to these facts, there were certain instances also established and yet it was held that the initial presumption in the same of Khatris that they follow the Hindu Law was not displaced. The facts of this case were almost similar to those of the present case. The rule laid down in the reported case is fully applicable to the present case and we may take it as a gaide for our decision. There are several other cases which have been referred to and discussed in the judgments of the Courts below, but it is not necessary to cite and diseass each of them separately. It is enough to say that the Courts below have arrived at a right conclusion.

In this view the appeal is dismissed with

Z. K.

Appeal dismissel,

(1) 10 Ind. Cas. 365; 43 P. R. 1911; 137 P. L. R. 1911; 86 P. W. R. 1911.

CALCUTTA HIGH COURT, APPEAL FROM ORDER No. 311 of 1919, July 16, 1920.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

NRIPENDRA KUMAR DUTTA, RECEIVER-DECEE HOLDER-APPELLANT

versus

NADIR KHAN-JUDGMENT DEBTOR
-RESPONDENT.

Landlord and tenant—Occupancy holding, liability of, to sale in execution of decree obtained by sixteen-annas landlord for its own arrears—Landlord and Tenant Procedure Act (VIII of 1869).

An occupancy holding in Sylhet, where the Landlord and Tenant Procedure Act, VIII of 1869, is in force, is liable to be sold in execution of a decree obtained by the 16-annas landlords for its own arrears. [p. 47, col. 1.] NAJAF SHAH C. BANGU BAH.

Appeal against an order of the Additional Subordinate Judge, Sylhet, dated the 31st of July 1919, affirming that of the Munsif, Second Court, Habigunge, dated the 5th of April 1919.

Babu Gopal Chandra Das, for the Appel-

lant.

JUDGMENT.—This appeal somes from the District of Sylhet in which Bengal Act VIII of 1869 is still in force and is directed against an order of the Additional Subordinate Judge of that District by which he has held that an occupancy holding may not be sold in execution of a decree obtained by the sixteen annas landlords for its own arrears.

In the case of Chandra Benode Kundu v. Sheikh Ala Buz (1) recently decided by a Special Bench of this Court and reported as Chandra Benode Kundu v. Sheikh Ala Buz (1), it has been shown that in 1834, 1:45 and again in 1855, it was held by the Sadar Dewani Adalat that in Bengal occupancy holdings might be sold in execution of decrees for money provided that the cale was at the instance of or with the consent of the landlord.

It does not appear that this general principle was affected or modified either by Act X of 185) or Act VIII of 1869.

In the same case it has further been pointed out that, when it is said that an occupancy holding is not transferable except by custom or local usage, the true meaning of these words is that to the transfer of an occupancy holding, in the absence of custom or local usage to the contrary, the consent of the landlord is necessary.

If an occupancy holding is transferable with the content of the landlord in execution of a decree for money, a fortiori, it is transferable at the instance of the landlord in execution of a decree for its own arrears.

The allegation of the landlord that satisfaction of the decree could not be obtained by execution against the person and moveable property of the judgment-debtor was apparently not traversed in either Court below.

We, therefore, deeree this appeal and set saids the orders of both Courts below.

(1) 59 Ind. Cas. 353; 24 C. W. N. 818; 31 C. L J. 510 (F. B.); 48 C, 184,

The landlord appellant will be at liberty to proceed against the holding in question. He will also have his costs in this Court, Pleader's fee one gold mohur.

B. N.

Appeal allowed.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 2305 OF 1919. July 27, 1921.

Present: -Mr. Justice Wilberforce and Mr. Justice Martineau.

NAJAF SHAH AND ANOTHER - DEFENDANTS - APPELLANTS

versus

RANGU RAM-PLAINTIFF-RESPONDENT.

Contract Act (IX of 1872), s. 62-Novation-Failure to perform-Rescission.

Defendant executed a bond in favour of plaintiff in 1914. In 1916 he executed a lease of certain
land in favour of A. On the same day he sold to
the plaintiff and other creditors the right to recover
the lease-money from A in payment of their debts.
Defendant refused, however, to perform his contract with A and to deliver possession of the
land:

Held, that the defendant by refusing to hand over his land to A, having disabled himself from performing his promise that the plaintiff should recover his money from A, the plaintiff was entitled to rescind his sale contract and revert to his previous consideration. [p. 48, cols. 1 & 2.]

Raja Ram v. Mehar Khan, 66 P. R. 1838, followed. Bhagat Ram. Ganpat Rai v. Chhajju Ram, 44 Ind. Cas. 886; 15 P. W. R. 1918; Bhag Bhari v. Gujar Mal, 38 Ind Cas. 623; 63 P. R. 1917; 40 P. W. R. 1917; Allah Ditta v. Nazar Din, 83 Ind Cas. 474; 53 P. R. 19:6; 51 P. W. R. 1916 (F. B.), Dwarka Nath v. Priya Nath, 36 Ind. Cas. 792; 22 C. W. N. 279; 27 C. L. J. 483 and Deb Narain Dutt v. Ram Sadham Mandal [Chunilal Ghose], 20 Ind. Cas. 630; 41 C. 137 at p. 146; 17 C. W. N. 1143; 18 C. L. J. 603, distinguished.

Second appeal from a desree of the District Judge, Jhang, at Sargodha, dated the 23rd July 1919, affirming that of the Subordinate Judge, First Class, Jhang, dated the 16th May 1919.

Dr. Gokal Chand Narang, for the Appellants, Mr. Mukand Lal Puri, for the Respondent.

THACHABAKAVIL MANAVIKEABAVAN THIBUMALAPAD BAJAH AWERGAL U. NOOR MAHOMED SAIT.

JUDGMENT. - The plaintiff in this case sued for the recovery of Re. 1,500 due upon a bond. The execution of the bond was admitted, but the defence was that the bond. debt had been incorporated in a subsequent contract, and that the plaintiff's suit could lie merely upon this contract. This defence has not been assepted by the lower Courts which have held that the subsequent contract remained insemplete owing to the defendant's own action. Against this decision a second appeal has been preferred and argued by Mr.

Gokal Chand Narang.

The bond in question is dated 1914. In 1916 the defendant, Najaf Shah, exceuted a lease of land for 14 years in favour of che Amir Chand. On the same day he sold to the plaintiff and other ereditors the right to recover the lease-money from Amir Chand in payment of their debts. Najaf Shab, however, refused to perform his contract with Amir Chand and to deliver possession of the land. The whole scheme, therefore, for payment of the debts fell through. These being the facts, Mr. Gokal Chand contends that there was a novation of the original bond contract by the agreement whereby the debts were made resoverable from Amir Chand's lease-money, and that under the operation of section 62 of the Contract Act the plaintiff could not fall back upon his original sause of action. He has cited as authorities Bhagat Ram Ganpat Charju Ram (1), Bhag Bhari v. Gurar Mal (2), Allah Ditta v. Nazar Din (3). He has also referred to authorities to show that the plaintiff could have sued Amir Chand, the lessee, and have recovered his debt from him. Authorities cited on this point Dwarka Nath v. Friya Nath (4) and Deb Sadhan Mandal Narain Dutt V. Ram Ohunilal Ghose] (5). None of these. arguments or authorities applies the present case as it is clear that the defendant, Najaf Shab, by refusing to hand over his land to Amir Chand, as he promised to do, disabled himself from performing his

(1) 44 Ind. Cas, 886; 15 P. W. R. 1918.

promise that the plaintiff should recover his money from Amir Chand, The judgment which, in our opinion, applies exactly to the present ease is Raja Ram v. Mehar Khan (6) which is an authority based on similar facts that the plaintiff is entitled to reseird his sale-contract and revert to his previous consideration. We consider that the defend. ants cannot oppose the plaintiff's claim either in law or in equity and we dismiss their appeal with costs.

Z. K.

Appeal dismissed.

(6) 66 P. B. 1888.

MADRAS HIGH COURT. SECOND CIVIL APPEAL No. 2057 OF 1920. April 22, 1921.

Present :- Mr. Justice Phillips and Mr. Justice Odgers.

THACHARAKAVIL MANAVIKKA. RAVAN THIRUMALAPAD RAJAH AWERGAL-PLAINTIFF-APPELLANT

tereus NOOR MAHOMED SAIT-DEFENDANT-RESPONDENT.

Transfer of Property Act (IV of 1882', ss. 105, 108 (h), 111-Notice determining tenancy on ground of forfeiture, inadequate, whether valid-Lease-Compensation-Time for removal of superstructure-Equity -Discretion of Court.

A notice by a landlord to his tenant unequivocally expressing the intention to determine the lease on the ground of forfeiture though inadequate under section 108 of the Act, is a sufficient compliance with section 111 of the Transfer of Property Act. [p. 49, col. 1.

Whether section 103 (h) of the Transfer of Property Act is exhaustive or merely enabling the Court has a discretion, in a proper case, to allow reasonable time, to the tenant even after the expiry of the tenancy, to remove his superstructure on the land where the terms of the lease do not provide for payment of compensation to the tenant, [p. 49, col. 2.]

Thavasi Ammal v. Salai Ammal, 43 Ind. Cas, 643; 7 L. W. 178; 22 M. L. T. 530; (1918) M. W. N. 46; 35 M. L.J. 281, applied.

^{(2) 38} Ind. Cas. 623; 63 P. R. 1917; 40 P. W. R.

^{1917.} (3) 33 Ind. Cas. 474; 53 P. R. 1916; 51 P. W. R. 1916 (F. B).

^{(4) 36} Ind. Cas, 792; 22 C. W. N. 279; 27 C. L

J. 453. (5) 20 Ind. Cas. 630, 41 C. 137 at p. 146, 17 C. W. N. 1143, 13 C. F. J. 903.

SAMBRU WATH U. SATIER CHANDRA,

Second appeal against the decree of the Subordinate Judge, Nilgris, in Appeal Suit No. 2 of 1920, preferred against the deares of the District Munsif, Gadalar, in Original Suit No. 8 of 1918.

FAOTS appear from the judgment.

Mr. T. S. Naray ina Aiyar, for the Appal. lant .- The notice determined the defendant's tenancy on the ground of forfeiture. No question of the adequacy of the notice arises under section 106 of the Transfer of Prop. erly Act. The lower Court should have decreed possession to plaintiff applying section III of the Ast. Sivarima Aiyar v. Alagappi Orelly (1).

The lease deed does not provide for com. pansation to be paid to the plaintiff. Besides, the period of the lease has expired. The defendant is not entitled to ask for time to remove the saperstructure.

The respondent was not represented.

JUDGMENT .- The Sabordinate Judge has dismissed plaintiff's suit to resover posses. sion of lands leased to first defendant on the ground that the notice given by plaintiff was not an adequate notice under section 103 of the Transfer of Property Act. learned Sabordinate Jadge has, however, omitted all considerations of section 111, Transfer of Property Ast, and it appears to us that the notice, Exhibit B, was, a suffisient compliance with that section, vide Sivarama Aiyar v. Alagappa Ohetiy (1). By that notice he unequivocally expressed his intention to determine the lease on the ground of forfeiture. On this ground he is entitled to a decree for possession. It is further argued that plaintiff need pay no compensation and that first defendant is not entitled to remove his buildings after the expiry of the tenancy. The terms of the tenancy comprised in Exhibits A and I expressly preslude all compensation, for first defendant agreed that none should be elaimed. The Subordinate Judge has found that first defendant would be entitled to remove his buildings within a reasonable time and we are inclined to agree with him in the special circumstances of this case. There has been some difference of opinion in this Court as to whether section 103 (h) of the Transfer of Property Ast is exhaustive

(1) 3: Ind. Cas. 211; (1915) M. W. N. 815; 2 L. W.

or marely enabling. In Angammal v. Aslami Sah b (2) two Jadges were of one opinion and two of another, but in a more resent eass (Fall Bench) reported in Thavasi Ammil v. Salai Ammal (3) four Judges were of opinion that, in that case, the tenants should be allowed a reasonable time (six months) within which to remove the superstructure but the question was not fully discussed. The facts in that case were not entirely similar. but we are prepared to apply the decision here on equitable grounds, more especially as it is in assordance with the judgment of the lower Appellate Court. We would other. wise have referred this to a Fall Bench for an authoritative interpretation of section 103 (h), were it not also that the respondent is not represented in this Court.

The result will be that the appeal will be allowed in part, and plaintiff will have a deeres for possession of the plaint property and meene profits and costs as decreed by the Munsif, but first defendant will be allowed three months within which to remove his buildings.

Respondent will pay plaintiff's sosts of this second ar peal.

M, C. P.

J. P. & M. C. P.

Appeal partly allows 1.

(2) 21 Ind. Cas 533; 33 M 710; 11 M L. T. 413; (1913) M. W. N. 974; 25 M. L. J. 625.

(3) 43 Ind. Cas. 613; 7 L. W. 178; 22 M. L. T. 533; (1918) M. W. N. 46; 35 M. L. J. 281 (F. B.),

CALCUTTA HIGH COURT. APPEAL PROM ORIGINAL DECREE No. 51 OF 1919.

March 19, 1920.

Present:-Mr. Justise Richardson and Justice Sir Syed Shameul Hadu, Kr. SAMBHU NATH KHETRI AND OFRERS -DEFENDANTS-APPALLANTS

USTSUS

SATISH CHANDRA MITRA-PLAINTIPE - RESPONDENT.

Mesne profits-Suit for recovery of possession of lease. hold Colliery-Relinquishment-Private notice to decree-holder, effect of-Civil Procedure Code (Act Y of 1999), s. 2, O. XX, r. 12, cl. (1), sub.

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cl. (c) (ii)-Evidence recorded by Commissioner appointed for local investigation, value of -Parties agreeing to accept evidence recorded by Commissioner -Action of Judge on such agreement, if without jurisdiction.

The plaintiff after having obtained a decree in a suit for recovery of a lease-hold Colliery, claimed mesne profits and damages for malicious or negligent injury to the Colliery from the judgment-debtor. After the passing of the decree in favour of the decree-holder the judgment-debtor's Solicitor had written to the decree-holder's Attorney offering to deliver possession of the mine and requesting the decree-holder to take steps to obtain possession as early as possible Notice was given by this letter that in case of neglect the Colliery with its machinery and accessories would remain at the judgment.debtor decree-holder's risk and the stopped working the mine. The decree-holder, however, had taken no steps to obtain possession till the following year:

Held, that the decree-holder was not entitled, in respect of the period after notice, to damages in the nature of mesne profits: that as the judgment. debtor had stopped working the mine the coal which the judgment-debtor might have got was still there and belonged to the decree-holder and that the question, therefore, whether, under the provisions of the Civil Procedure Code the omission to give notice of relinquishment through the Court under Order XX, rule 12 (1) (c) (ii), Civil Procedure Code, left the judgment-debtor liable for mesce profits

The definition of mesne profits in section 2 of the Civil Procedure Code, includes profits which the defendant "might with ordinary diligence have received." But mesne profits are in the nature of damages which the Court may mould according to the justice of the case [p. 52, col. 1.]

did not arise [p. 62, cols, 1 & 2.]

For the purpose of ascertaining mesne profits mining differs from agricultural operations on the surface. [p. 52, col. 1.]

A relinquishments or stoppage of work with notice to the decree-holder is not in itself an improper or negligent act for which the judgment. debtor is liable in damages or mesne profits, [p. 52,

A charge of improper working of a Colliery should not be decided on the evidence recorded by a Commissioner appointed to make a local investigation. But where the parties agree to a decision on a point by a Judge on the evidence recorded by a Commissioner to make a local investigation the evidence must be treated as evidence recorded by a Commissioner appointed for the purpose of examining witnesses. [p. 53, col. 2; p. 54, col. 1.]

It is open to the parties to a suit to agree as to the materials to be placed before the Judge for his decision and if the Judge acts on such agreement he does not thereby delegate his functions as a

Judge. [p. 54, col. 1]

Where the gogment-debtors are in possession under a bond and claim of title and not "without any colour of citle" or "in a manner wholly un. authorised or un'swin!," they are entitled to certain allowances in the 213255ment of mesne profits and damages. [p. 55, col. 1.]

In India there is no reason why the measure of damages should depend on the nature of the remedy sought, or why any distinction should be made in this respect between a suit for damages for trespass and a suit for accounts. [p. 55, col. 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Burdwar, dated the 10th of December 1918.

Babus Samotul Chandra Dutt and Girija Frosunna Roy, for the Appellants.

Babus Lepin Behari Ghose II, Satindra Nath Mukherjee, and Harendra Kumar Sarbadhakari,

for the Respondent.

JUDGMENT.- This is an appeal from the judgment and decree of the Subordinate Judge of Burdwan, dated the 16th December 1918. The proceedings were in continuation of a suit brought by the respondent or his predecessor in interest as plaintiffs against the appellants or their predecessors as defendants for the recovery of a lease-hold Colliery known as the Chatterpathat Colliery. In the result, on the 18th May 1914, the Privy Council reversed the deeree of the High Court, dated 4th June 1912, in favour of the appellants and restored the deeree of the Trial Court, dated September 8th 1969, in favour of the respondent [Roghunath Das v. Sundar Das Khetri (1).] The question which now arises relates merely to the amount of the indemnity which the unsuccessful party in the contest should pay to the successful party.

The respondent, as decree holder, claims damages from the appellants, as judgmentdebtore, first, in the nature of mesne profits and secondly, in the nature of damages for malicious or negligent injury to the Colliery,

The application for assessment of these damages was made by the respondent on the 15th June 1915. It appears that the appellants asked for details; and in a petition filed on 19th January 1916, the respondent gave "details" of the amount of damages and wasilat damage to the Colliery by entting pillare, etc., etc." The damage as then estimated amounted to Rs. 57,577 including four items: (1) Damage to the machineries, plants, tools, etc., estimated at Re. 14,88%; (2) meene profits with interest, estimated at Rs. 29,000, (3) an item of Rs. 12,000 said to be detailed in Bankim Babu's report

(1) 24 Ind. Cas 804; 41 I. A. 251; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M L. T. 858; (1914) M. W. N. 747; 16 Bom L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72 (P. C.),

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which we have not seen; and (4) a small item of Rs 1,089 for stacked soal removed by the defendants.

The decree of the Trial Court in the suit provided for the ascertainment of wasilat or meene profits. The application of 15th June refers to section 144 of the Civil Procedure Code, no doubt on the footing that the injurious damages claimed were consequential on the working of the mine by the appellants during their period of possession under the decree of the High Court. No objection was raised on the appellants' behalf in this connection.

Sabordinate Judge has The learned awarded the respondent a sum of Rs. 14,000 on the ground of damage done by outting or robbing pillars, and a further sum of Rs. 31,400 on the ground that the appellants maliciously brought about what is called a junction between the river Noonia and the mine. He has further awarded the respondent a sum of Rs. 76,2 5 on the footing of mesne profits, the calculation being as follows:-Rs. 1,21,720 for the price of the coal extracted at the pit's mouth less a sum of Rs. 31,255 being the costs of getting the soal and raising it to the surface and less a further sum of Rs. 14,180 representing the royalties payable under the lease in respect of the period for which the appellants were in possession. amount awarded to the respondent comes to Rs. 1,21,685, made up of Rs. 76,285 for mesne profits and Rs. 45,400 as additional damagee,

A further claim by the respondent on the ground of damage to machinery and counter-claims by the appellant for compensation for the purchase of new machinery and for sinking a new pit have, in our opinion, been rightly disallowed and call for no further mention. As will appear, we shall allow the appellants some compensation for dewatering.

Mesne profits are claimed in respect of two periods, firstly, from the 2nd September 1903 inclusive, and, secondly, from the 28th July 1912 to the 22nd May 1915 inclusive. The appellants were not in possession when the respondent's suit was instituted in July 1908. Apparently, however, they had previously been in possession as purchasers of the lease-hold interest in execution of a decree which

they had obtained for their royalties and they resovered possession on the September 1908 under a decree which they obtained in a possessory suit, and held it till they were ousted under the desree of the Trial Court. The appellants, therefore, admit possession during the first of the two periods. As regards the second period, there is no dispute as to the date on which they regained possession under the decree of the High Court but they assert that, after the Privy Council delivered judgment, they relinquished possession on the 31st May 1914. As a matter of fast, they closed their workings on that date but the respondent argues that their possession must be regard. ed as baving continued until the Court formally delivered passession to him on the 23.d May 1915. The question is of some litele importanse.

It appears that, on the 4th June 1914, the respondent filed a patition in the Court below praying that, until a certified copy of the decree in Privy Council appeal was brought and possession was taken on the basis thereof, a temporary injunation might be issued on the appellants and others restraining them from doing anything detrimental to the disputed pits and disposing of the machineries, pumps, pipes, fittings, etc. On 6th June 1914, the appellants. replied by a petition denying the allegations made in the respondent's patition and disputing his right to an injunction. The order-sheet shows that on the same day, the 6th June, the appellants undertook not to remove any moveables. Then, on the 11th June, an order was made stating that the undertaking had been assepted by the respondent and that the prayer for an injune. tion was, therefore, disallowed.

Meanwhile, the appellants had been in communication with the Inspector of Mines. On 6th June 1914, the inspector addressed a letter to the respondent's Attorney enclosing a report by the Junior Inspector, Mr. Turnbull, dated 5th June, which report stated that the mine in question had been closed on let June 1914, in consequence of a decree given against the appellants by the Privy Conneil. We were not told that any reply was sent to the Inspector's letter by the respondent. On 17th June 1914, Dwarks Nath Kretry, as agent of the appellants, each to the Chief Inspector of

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Mines a notice that the workings of the Chatterpathat Colliery had been closed from the 1st instant, asking him to send the necessary forms to be filled up, and further stating that the plan would be submitted in due time.

On the 7th July 1914, the appellant's Solicitor wrote to the respondent's Attorney offering to deliver possession and requesting the respondent to take steps to obtain possession as early as possible. Notice was given by this letter that in case of neglect the Colliery with its machinery and accessories would remain at the respondent's risk; the respondent, however, took no steps to obtain possession till the following year. He waited apparently till the decree of the Privy Council or the records or both reached the Court below.

Nearly a year, therefore, elapsed between the date on which the appellants ceased to work the mine and the date on which the respondent took possession. The respondent urges that he is not responsible for the delay because the appellants did not give notice of relinquishment through the Coart under O. XX, r. 12 (1) (c) (ii), Civil Prosedure Code. It is not, however, disputed that the notice given directly by the appellants to the respondent reached him. He did not say that he would not accept notice of relinquishment unless it was sent to him through the Court. He remained inactive and did nothing. It may be strange that the appellants said nothing about relinquishment in their reply to the application for an injunction, but the facts are too slear to make that of much eignificance.

As no ccal was extracted from the mine after the 31st May 1914, we are of opinion that the respondent is not entitled in respect of the subsequent period to damages in the nature of mesne profits. The definition of mesne profits in section 2 of the Civil Procedure Code includes profits which the defendant "might with ordinary diligence have received." But "mesne profits are in the nature of damages which the Court may mould according to the justice of the ease:" Grick Chunder Lahiri v. Shoshi Shikhareswar Koy (2). Mining differs from agricultural operations on the surface. The

still there and now belongs to the respondent under the lease. The question, therefore, whether, under the provisions of the Civil Procedure Code, the omission to give notice through the Court left the appellant liable for mesne profits does not arise.

As regards the effect of the delay in taking possession on the other damages claimed, it cannot be contended with success that the delay has not prejudiced the respondent. The relinquishment or stoppage of work with notice to the respondent was not in itself an improper or negligent act and the delay has made it impossible or difficult for him to say that the condition of the mine when he took it over was due to any impropriety in the mode in which it had been worked by the appellants or to any act of intentional malice on their part.

The report of the Serishtadar who gave the respondent possession on behalf of the Court has appended to it a note signed by Sudhir Mohon Chatterjee, a First Class Colliery Manager, to the following effect:—

"There are two subsidences perhaps due to pillar robbing and the whole of the mines are now full of water".

This note seems to be attested by certain persons who were present on behalf of the appellant. But, however that may be, though Sudhir Mohon was not called as a witness, because, we are told, he was in England at the time, it may be accepted that when the Colliery was taken over on the 23rd May 1915, these two subsidences had already occurred and the working parts underground were full of water.

It is obvious, however, that a coal mine in this country which is left to look after itself for nearly a year may eadly deteriorate. The further comment must be made that as the pits were full of water no attempt seems to have been made to have them examined in detail by an expert. Such examination was probably impossible.

Now, let us turn back for a moment to January 1914. In that month the mine was visited by Mr. David—a Mining Inspector—and we have his report, dated the 17th January, to which both sides referred. He says: "This Colliery is at last working again, raising having started just about a year ago....... The coal", he goes on, "is being raised from Now. 2 and 5 pits and men enter

^{(2) 27} C. 951 at p 5 ... 27 I. A. 110, 4 C. W. N. 631; 10 M. L. J. 356; Bom. L. R. 709; 7 Ser P. C. J. 687; 14 Ind. Dec. (N. s.) 632.

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by No. 1 incline. The old workings consist of pillars now not much more than 12, 15. feet square with roads of like sizs. No frash work has been done yet, as the water has not been got out entirely, and so work has been confined to dressing pillars." Then he says about the work: "It has been carried on with practically no regard to safe'y." He adds that he is addressing the owners vary strongly on this subject. Farther on, again, he says: "The old pillars are being drassed and practically no timber is being used to support the roof either in the working places or in the travelling roads. This work is probably just as dangarous as pillars extraction and is likely to bring about a much more dangerous state of affairs and if earried too far it will be bound to bring on sreep.' All things considered, the roof has stood ramarkably wall but the travelling roads and working places should be tempered." We do not know whether the word 'temperel' is a technical term, or whether it is a misprint for 'timbered.'

Passing to another subject, the Inspector continues:—"Another danger which must be sarefully watched in the workings under the Nooniajore which are close to the outerop. A plan and section showing levels should be made to see what cover there is and no work should be done in dressing these pillars. Water is making in small quantities from the coal at this point."

The Inspector concludes as follows:—The Manager, H. H. Banerjee, was absent, he lives at Debalia Colliery and was easid to have gone to his house as Kalikapur in the morning. He holds a first class certificate and where ever he has been Manager I have always had to complain of the very bad state of affairs." The gentleman so unfavourably mentioned is Haribar Banerjee who appears to have been the Manager up to January 1914. He was not called as a witness by the appellants, but they called his successor, Nidarsan Banerjee, who was Manager till the appellants ceased working at the end of May 1914.

There are two observations which it occurs to us to make on this report. The first is that there is no mention in it of any subsidences. The respondent's application of June 1914, for an injunction is equally silent on this subject. It is probable, therefore, that the two subsidences noticed in May 1915,

ossarrad during or after the rainy season of 1914.

The second observation is that the appellants seem to have taken the Inspector's report to heart. They got rid of Harihar Banerjee of whom the Inspector had complained, and there is also the evidence of Harihar's successor that he did a certain amount of timbering as the Inspector had recommended.

The Sabordinate Judge who dealt with the present claims appointed a Commissioner to make a losal investigation. He prepared a useful plan of the surface land of the Colliery. It shows that, in addition to the larger subsidences noticed in May 1915, other subsidences of a slighter character had subsequently ossurrad. Tae Commissioner's raport, dated the 6th Novamber 1918, is of very little value except so far as it shows that the pits were not even then in a condition in which they could be examined to any purpose. The Sabordinate Judge himself made a local inspession of the Colliery on the 9th Dasamber 1918. His note of his inspeation, however, is prinsipally concerned with the insuraion of river water into the mine.

It is clear, therefore, that up to the date of the trial no proper examination of the pits had been made. The only underground plan we have is apparently the plan submitted by the appallants or their agent in parameters of the latter's letter of the 17th Jane 1914 to the Chief Inspector.

Somoattempt was male to raise a question of jariedistion in connection with the Commissioner's prosendings. The terms of his eam. mission were not plassi bafora us, but as his tacda enoitavreedo cmos et fandans si trecer the subsidences, the junction with the river, and the underground sonditions so far as they enald be observed, we can only constade that he was instructed to investigate the astual condition of the Colliery with referense to the allegations of malise and negligenes brought against the appellants. He seems, however, to have taken it upon himself to examine witnesses at langth on the whole ease. The whole of the oral evidence printed in the paper-book was resorded by him, very much as if he had been appointed an arbitrator. It is unsatisfastory that these charges of improper working should have been decided on evidence taken in

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this way. But what happened was this. The appellants made some initial objection to the witnesses being examined by the Commissioner at the Colliery and they may have subsequently repeated the objection. But when the case came before the learned Subordinate Judge he appears to have been willing to take the evidence over again himself. He states in his judgment that, at the request of the Pleaders of both parties, he "agreed to determine the amount to which the decree-holder might be entitled on the evidence recorded by the Commissioner as also on the report relating to the local inspection." The report referred to seems to be the learned Subordinate Judge's note of his own inspection. The parties having thus accepted the evidence recorded by the Commissioner as evidence duly taken in the sause, it is idle now for the appellants to take exception to that evidence. The evidence must be treated as evidence recorded by a Commissioner appointed for the purpose of examining witnesses. It is open to parties to agree as to the materials to be placed before the Judge for his decision, and if the Judge acts on such agreement, he does not thereby delegate his functions as a Judge. We accept in their entirety the principles laid down in the eases of Shadhoo Singh v. Ramancograha (3) and Ram Narain Singh v. Odindra Nath (4), but the present case is distinguishable on the facts from those cases. No question of jurisdiction or material inregularity arises here and we declined to allow the learned Vakil for the appellant to raise any objection to the proceedings of the Commissioner which were not urged in the Court below.

We come, then, to the specific awards made by the Subordinate Judge. As to the amount awarded for the ingress of river water into the mine, we are cf opinion that the evidence entirely fails to support the charge of malice or the charge of negligence on which the learned Vakil for the respondent preferred to rely before us. The existence of any channel between the river and the mine was apparently not suspected by the respondent himself till February 1918. We know nothing of the state of the mine at the spot where the water enters subsequent

to January 1914 when the Inspector of Mines noticed some reverlation of water. It is surprising that it rever seems to have occurred to the learned Subordinate Judge, that the formation or erlargement of the channel may have been due to natural causes. The Subordinate Judge seems to attribute great importance to the Commissioner's report and his own inspection note. But the fact that a bamboo can be pushed through only proves the existence of the channel. It does not prove that the channel was artificially made or that up to the time when the appellants elosed their workings they had not taken such precautions as were necessary. The result is, that we disallow the damages awarded in this connection.

As to the damages awarded for improper working by robbing pillars which is said to have led to the subsidences of the surface. the evidence may be somewhat stronger. but is still, in our opinion, insufficient to justify the award. The question was not argued with reference to any terms of the The appellants were dealing with their own property and the only clause of the lease to which reference was made was clause 13, which provides that " if there be inconvenience to your business, or if you so wish, or if the coal be exhausted, you will be able to relirquish there properties at the proper time and according to law." That clause was referred to in reply to the argument that it was not to the interest of the appellants as grantors of the lease to do anything likely to injure the Colliery. It was suggested for the respondent that they might have intended to force the respondent to surrender the We can see no sufficient reason for attributing to them any such sinister motive and we are not satisfied that the responsibility of the appellants for the subsidences has been made out. The underground workings have not been examined; at any rate, they have not been properly examined. It is not clear that the prineipal subsidences are above the area worked appellante, They may be due to old workings-or, again, they may be due to the fast that the Oclliery was left unattended after the appellants relinquished possession. In January 1914, it was, at any rate, possible to explore the interior

^{(3) 9} W. R. 83 at p. 86.

^{(4) 13} Ind. OPS 340; 17 O. W. N. 369; 15 C. L. J. 17.

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they ceased working, it is not, in our opinion, established that the appellants were guilty of any improprieties of working entitling the respondent to damages. From the respondents's evidence it would appear that no pumping was done after he re gained possession till May 1917. The award of damages under this head must also be disallowed.

As regards the mesne profits, we find in reference to the second period of possession that the appellants raised no soal before January 1913 or after the 31st May 1914. The evidence of Srikanta Banerjee as to the period before January 1913 is corroborated by Mr. David's report. In regard to the amount of coal raised, we agree with the Subordinate Judge that the average should be taken to be 600 tons a month. We are not impressed with the appellants' raising book OF accounts. The soal raised during the first period of possession may not have been much but the appellants have not given us material on which we can ray that definitely. We accept the Subordinate Judges' findings as to the price of coal at the pit's mouth and as to the cost of severing and bringing to the surface. The award on this head must be modified by the disallowance of mesne profits for the period from 28th July to the end of December 1912 and for the period after the 3!st May 1914. But, inasmuch as the time between 2cth July 1912 and the end of the year was spent in dewatering the mine and getting it into working order, the appellants are entitled to some compensation on that account. We assess that compensation at Rs. 4,000. The appellants are entitled to the deduction of the royalties due under the lease in respect of the whole of the two periods in respect of which the respondent elaims.

As the appellants were in presession under a bona fide elaim of title and not "without any colour of title" or 'in a manner wholly unauthorised and unlawfu." we are of opinion with the Subordinate Judge that they are entitled to the allowances which we have mentioned. The authorities are conveniently collected in MacSwinney on Mines (4th Edition, pages 537-540). In India there is no reason why the measure of damages bould depend, as it appears to do in

England, to some extent on the nature of the remedy sought, or why any distinction should be made in this respect between a suit for damages for trespass and a suit, for instance, for assounts.

No claim to an allowance for trade profits was made in the Court below and we can-

not allow any such claim.

The decree of the Court below will be modified in the manner indicated. The parties, we think, should pay their own costs of this appeal and of the Court below.

B. N. & J. P.

Decree molified.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 174

OF 1919.

Present: -Mr. Justice Boss and
Mr. Justice Coutes.

BALGOBIND MANDAR AND
OTHERS-DEPENDANTS FIRST PARTYAPP. LUANTS

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DWARKA PRASAD AND OTHERS—
PLAINTIFFA, AND Babu SHASI BHUSAN
KUMAR AND OTHERS—DEFENDANTS SEDOND
PARTY—RESPONDENTS.

Co.owners—Tenant inducted by one co-owner— Right of other owner—Joint possession—No presumption of creation of tenancy by long acquiescence by landlord —Landlord and tenant—Tahsildar, when can recognise tenancy.

Where a tenant has been inducted into the land only by the 1? annual landford, the 4-annual landford is entitled to get joint possession with the tenant so inducted. [p. 57, col..]

Where a Tahsildar of a landlord has no authority from his landlord to recognise a tenancy his act in granting areceipt for rent to a tenant cannot amount to recognition of the tenancy. [p. 57, col. 2.]

The fact of a tenant's occupation of a land for 9 years acquiesced in by the landlord does not lead to an inference that tenancy was created in favour of the tenant. [p. 57, col. 2.]

Appeal from a decision of the Subordinate Judge, Manbhuw.

Mesers. Sushil Madhab Mullick and Nirsu Narain Sinha, for the Appellants.

Mesers. C. C. Das, Jagarnath I rasad and Bindhesware Prasad, for the Respondents,

FALGOBIND MANDAR B. DWARKA PRASAD.

JUDGMENT.

Ross, J.—This is an appeal by the defendants first party. The plaintiffs are the owners of 4-annas share in Mouza Sarauni Kalan. The defendants second party are the owners of the remaining 12 annas and the defendants first party are said to be tenants. The suit relates to 143 bighas of land which was formerly under water but became fit for cultivation in 1314. The present plaintiffs were not then proprietors in the village. They purchased the share of two Marwaris, Kedar Mal and Nemraj, in 1321. Certain proceedings in partition were started in 1907 but were never completed. The defendants first party are said to have taken possession of the land in suit in 1317 without any legal right so far as the plaintiffs' share is concerned, and the suit has been possession or for brought for recovery of possession jointly with defendants first party or defendants second party with meene profits.

The defence of the defendants first party was that settlement of the land in suit was taken from all the proprietors at an annual rental of Re. 174-2-15 ganlas in 1316, and that since then these defendants have been in possession as tenants. It was farther alleged that the plaintiffs' predecesors had granted a receipt for rent to the defendants and that in the partition papers these defendants were recorded as tenants of the land. Of the defendants second party, the owners of 8 annas share, in their written statement, acknowledged the tenancy of the defendants first party and the owner of the remaining 4 annas did not enter appearance. It may, therefore, be taken that as regards 12-annas share the defendants first party are recognized as tenants. The learned Subordinate Judge found that there had been no settlement with the defendants first party by the plaintiffs' predecessors. He farther found that there was no proof that rent had been actually received by them and that in any case the receipt granted by their Tabsildar was not a recognition of any tenancy. He consequently held that the plaintiffs were entitled to a decree for joint possession of a 4-annas share in the land in dispute with the defendants first party and to mesne profitr.

Two main grounds have been taken in appeal. It is contended, in the first place,

that, on the facts found, the plaintiffs are not entitled to a decree for joint possession, and that their only remedy is to receive rent or a partition. Reliance is placed on the decisions in Watson and Co. v. Ramchund Dutt (1), Madan Mohan Shaha v. Rajab Ali (2), Dakhyayani Debi v. Mana Raut (3) and Sat Narayan Singh v. Anant Prosad (4). The argument briefly is, that as to the rights which one tenant-in-sommon has against another tenant-in common who has taken possession, the rule is that unless there is actual ouster, no action of trespass will lie, but only an account. The principle is that the co-tenant is doing nothing but what is lawful in putting the land to the use for which it is intended, namely, the production of crops. It is further argued that it is immaterial whether the co-tenant does this by raising the crops himself or by letting the land to a fenant.

Now, the defendants first party in this case allege that they took settlement from all the proprietors. This has been found against them. It is found that they took settlement only from the 12 annas landlords. It is not alleged that the 12-annas landlords settled the lands with them as 16 annas landlords. Consequently, as to 4 annas of the holding, they have no settlement at all and there is no authority for saying that, in such eireumstances, the 4 annas landlord, who has not made any settlement, is not entitled to a decree for joint possession. The decision in Watton's case (1) does not support any such proposition. In that ease the essential facts were that one of the tenants-in-common was in actual occupation of part of the estate and cultivating it as if it were his separate property, and that the other tenant in-sommon attempted to some upon the property in order to earry on operations it consistent with the source of cultivation in which the former had been engaged. Neither of these elements is present here. Similarly, in the case of Madan Mohun Shaha v. Rajab Ali (2) the co-sharer landlord who had made the settlement had been in exclusive possession of the tank, the subject matter of the suit, and had

^{(1) 18} C. 1C; 17 I. A. 110; 5 Sar P. C. J. 525; 9 Ind. Dec. (N. s.) 7 (P. C.).

^{(2) 28} C. 223.

^{(3) 22} Ind. Cas. 666; 19 C. L. J. 113; 19 C. W. N. 407.

^{(4) 51} Ind. C s. 31,

BALGOBIND MANDAR C. DWARKA PRASAD.

estiled it as having been in exclusive posses. sion. The same principle is to be found in Dakhyayani Debi v. Mana Raut (3) where the landlord who made the settlement had taken possession of the land, apparently without any protest by his co sharers, and, in the ordinary course of management, had made the settlement with the plaintiff. Moreover, all that was decided in that case was that the plaintiff had the status of a raiyat, and that is not disputed in the present case. On the other hand, the decision in Sat Narayan Singh v. Anant Frosad (4) is against the appellants' contention. The cases on the subject were there discussed and it was held that one remedy open to the co-tenant was a decree for joint possession. And in the case of Radha Proshad Wasti v. Esuf(5) it has been held that no man has a right to intrude upon Iimali property against the will of the co.sharers or any of them. It is argued that the defendants first party have the right to the possession of an undivided 12 annas share in the land in suit. This is true, but it is in no way inconsistent with a decree for joint possession in favour of the plaintiffs. In my opinion, therefore, the first contention fails,

The second argument is on the merits of the case. It is contended that from the conduct of the parties it should be inferred that all the proprietors consented to the settlement, especially in view of the facts that the Tabeildar of the plaintiffs' predecessors granted a receipt and that the defendants first party were in undisturbed possession for 9 years. Now, with regard to this receipt, the learned Subordinate Judge has found, in the first place, that there is no eatisfactory proof that any payment of rent was actually made, and this finding has not been attacked on appeal. The evidence is reduced to the unforroborated statement of a single witness and, in the eircumstances of this case, in view of the relations of the parties, it is difficult to assept such evidence as auffisient. But even if this receipt is taken to be a receipt for money actually paid, it does not lead, in my opinion, to any inference that a tenancy exists between the plaintiffs and the defendants first party. It is argued that the defendants do not rely upon this receipt as a recognition of their tenancy in the sense

(5) 7 C. 414; 9 C. L. R. 76; 3 Ind. Dec. (N. s.) 816.

holding is required to be resignised; but I can see no difference. The reseipt is relied upon as binding the landlord through the act of the Tahsildar and preventing him from denying the relationship of landlord and tenant. Now, the receipt granted by a Tahsildar cannot have that effect. In Debi Deyal Pandey v. Ram Sakal Pathak (6) the law on this subject was considered and the rule was deduced that, where the Tahsildar has not authority from the landlord, his act in granting a receipt cannot amount to recognition.

From the fact that the dafondants' occupa. tion of the land was acquiesced in without remonstrance for 9 years, it is argued, on the authority of Nityanund Chose v. Kissen Kishore (7), that the defendants must be treated as tenants. That was a suit by the landlord elaiming rent and the execution of a kabuliyat from a person who had occupied land within his Zemindari, and it was beld that a tenancy existed and that the tenant must comply with the requirements of the tenancy. The ground of the decision is that it is not open to a person occupying land to plead in answer to a claim for rent that he is a trespasser [See Hallett's Estate, In re. Knatchbull v. Hallett (8)]. But there is noth. ing to prevent the landlord from taking this ples. Consequently, no tenancy can be inferred here.

Much was made of the failure of the plaintiffs to produce their collection papers. Evidence was given that these papers had been stolen, and it was contended that the evidence was insufficient. That may be so, but it is for the plaintiffs to say what papers they will produce. The defendants never sought discovery of these papers and no inference can be drawn against the plaintiffs from their non-production.

The entries in the Batwara papers are referred to in the written statement and it was argued that these raise a presumption of a tenancy. But evidence has been given by plaintiffs' witness, Bechu Lal Das, Tabsildar, that the name of Balgobind Mandal is not in these papers and that the lands in suit are recorded as Guir Massua of the Maliks.

(6) 58 Ind. Cas. 544; 2 P. L. T. 4; (1921) Pat.

(7) W. R. 1864, Act X Rul. 82.

(8) (1880) 13 Ch. D. 696 at p 727; 49 L. J. Ch. 415; 42 L. T. 421; 29 W. R. 782,

SABIB DIN D. RAJA.

The Butwara Khasra itself is not produced and there is no evidence to support the allegation in the written statement. Indeed, it seems doubtful on the whole evidence whether the defendant No. 1 is a bonn fide tenant at all. He is related to one of the defendants second party, Madan Mandal. There is evidence on both sides that for all settlements made since 1314 kabuliyats have been executed; but in the present case no kabuliyat is produced. The crops are left at Madan Mandal's Cutcherry and in all probability Balgobind is merely his nominee. Therefore, on the merits also, it seems to me that the appeal must fail.

I would dismiss this appeal with costs. Court., J.-I agree.

P. D. & J. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1384 OF 1921.

December 15, 1921.

Pietent:—Mr. Justice Abdul Bacof.

SAHIB DIN—DEFENDANT—APPELLANT

versus

RAJA AND CTABES—PLAINTIFFS AND NAWAB AND ANOTHER - DEPENDANTS - RESPONDENTS.

Custom-Alienation-Necessity - Proof-Enquiry.

An alience is not bound to see to the application of the money paid by him as consideration for the alienation. But an alience who deals with a person with a limited power of alienation, must satisfy himself that, if money is required for the liquidation of an alleged debt, there is in fact such a debt in existence. [p. 59, col. 1.]

The onus of proof of the validity of an alienation of an ancestral land by a male proprietor always lies, in the first instance, on the alienee whether he be a third party or a person whose debts have been

paid off by the alienation. [p. 59, col. 2.]

Second appeal from a decree of the District Judge. Jhelum, dated the 3rd March 1921, affirming that of the Senior Subordinate Judge, Jhelum, dated the 18th October 1:20.

Lala Amar Nath Chona, for the Appel-

Dr. Nand Lal, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit for a declaration to the effect that a certain land sold by the defendant No. . by a tale-deed dated the 29th March 1920 was alienated without necessity and without consideration. The

plaintiffs elaimed to be his near collaterals. Toe emsideration resited in the sale deed consists of two items, namely, (1) Rs. 440.0 0. due on two mortgages - the dates of the two mortgages are not mentioned in the sale. deed, but the names of the mortgagess and the amount secured are mentioned. and (2) Rs. 860-0-0, said to have been paid in eash before the Sub-Registrar. The suit was resisted by the defendants. vandees on the ground that there was consideration and also nesessity for the alienation. The Court of first instance went into the evidence on the record and arrived at a decision adverse to the defend. ants-vendees. in the judgment of the First Court is to be found the following passage to which, rightly, a strong objection has been taken :-

"It is not merely existence of debt that protests a vendee but it is the discharge of the debts or payment of just antessdent

debts that protests him."

This does not appear to be a correct proposition of law. It is not the duty of an alience to see to the application of the money, but an alience, who deals with a person with a limited power of alienation, must satisfy bimself that, if money was required for the liquidation of an alleged debt, there was in fact such a debt in existence. The judgment of the Court of first instance, though somewhat involved, certainly indicates that the learned Senior Sub Judge intended to find that the consideration for which the sale was effected tad not been established. The learned Sabordinate Judge went into the evidence in detail and arrived at the following finding:-

"The conclusion I arrive at is that the sale is not probably for consideration, it

is certainly not for necessity."

In appeal the whole question was discussed again and the learned Judge of the Appellate Court laid down the following proposition in his judgment:—

'It is, however, necessary for them (vendees) to prove that genuine debts existed for the dispharge of which the

eash item was paid to the vendor."

After laying down this proposition the Court goes into the evidence and holds: "In my opinion the whole transaction is most suspicious;" and, further on, the Court

PALANIAPPA CRETTY C. BUBRAMANYAM CRETTY.

"In my opinion the vendees observes : have failed to prove that the sale was for consideration and recessity." judgment and the desree of the Court of first instance were accordingly upheld by

the lower Appellate Court.

One of the vendees has some up in second appeal to this Court, It has been contended on his behalf that the vendees were not bound to see to the actual application of the money paid as consideration for the sale deed, and this con tention, as I have already observed, is quite correct. It was, however, necessary for the vendees to prove that the debts mentioned in the sale deed actually did exist and that there was necessity for the sale. Mr. Chona in support of his argument has relied upon the case of Narain Singh v. Surmuth Singh (1). Ia the judgment of Mr. Justice Ros ceaurs the following passage :-

"A ereditor advancing the money would be justified in advancing a reasonable sum if, after due enquiry, he had a bona fide belief that it was required for, and was intended to be spent on, a necessary purpose. But...he cannot be held responsible for the expanditure of the money after

it has passed out of his own hands."

According to the rule laid down in the above case, the vendees ought to have shown in this case that, after the enquiry, they had a tong file belief that the sale was being affected for a necessary purpose. In this case it has been held that appellant has failed to establish even the existence of any debt. The two mortgagedeeds referred to in the sale-deeds have not been produced. No application is to be found on the record showing that the vendees ever applied to have those two dosuments produced.

As regards Rs. 860 0.0 Mr. Chona bas drawn my attention to the statement made by one of the plaintiffs before the framing of the issues, in which he stated that there were certain debts due by the vendor. No amount is mentioned there nor any particulars are given. Mr. Chons, however, has argued that, even if the debts did not exist and his client was

deseived in believing that certain debis did exist, he is protected under the law, There is, however, entire absence of any evidence on the record to prove the bona fides of the present vendess. In the leading Fall Bench case reported as Devi Ditta v. Saudagar Singh (2) the following rule is stated in the head-note :-

"That the onus of proof of the validity of an alienation of ancestral land by a male propriator always lies, in the first instance, on the alience, whether he be a third party or a person whose debts have

been paid off by the alienation."

The effect of the findings of the two Courts below I take to be that the defendants have not discharged the burden of proof which lay upon them according to this ruling. In this view, it is unnecessary to pursue the matter any further, In my opinion, this appeal is concluded by findings of fact and must be dismissed with costs. I order accordingly.

z, K. & J. P. Appeal dismissed.

(2) 65 P. R. 1900; P. L. R. 1900, p. 322.

MADRAS HIGH COURT. CIVIL MISCELLANBORS PATITION No. 1202 CF 1:21.

August 12, 1921. Present : - Mr. Justice Oldfield and Mr. Justice Ramesam. PALANIAPPA OHETTY-PETITIONER

U3raus

SUBRAMANYAM OBETTY AND OTHERS-RESPONDENCE.

Civil Procedure Code (Act V of 1909), O. IX, r. 18 -Ex parte decree against several defendants-Appeal by some defendants without impleading others-Application by defendant not impleaded to set aside decree - Forum - Ex parte decree affirmed by Appellate Court-Decree of Appellate Court, nature of -High Court, power of to excuse delay in filing application.

Where one of several defendants against whom an ex parte decree has been passed is not impleaded in an appeal preferred against that decree, the Appellate Court has no jurisdiction to entertain an application by that defendant to set aside the

P: LANIAPPA CHETTY U. SUBRAMANYAM CHETTY.

ex parts decree. Where he is made a party to the appeal, an application to set aside the decree made by him during the pendency of the appeal, or after it has been disposed of, should be made to the Court which passed the decree and not to the Appellate Court. [p. 60, col. 2.]

Where a defendant against whom an ex parte decree has been passed, prefers an appeal against that decree, and appears in support of the appeal, the decree of the Appellate Court affirming that decree cannot be described as an ex parte decree of

that Court. [p. 61, col. 1.]

The proper course for a defendant seeking to set aside an exparte decree against which an appeal has been preferred, is to apply to the Appellate Court for an adjournment of the hearing of the appeal to enable him to apply before the first Court to set aside the decree. [p. 61, col. 2.]

Although under O. IX, r. 13 (2) of the Civil Procedure Code, as amended by the Madras High Court, that Court has power to excuse delay in making an application to set aside an ex parte decree, that power will be exercised only when there is justification for failing to make the application in time. [p. 61, col. 2.]

Sadaya Konan v. Annamalai Udayan, 29 Ind. Cas. 458; 2 L. W. 529; and Ramachandra Mallya v. Narayana Hegade, 42 Ind. Cas. 972; 7 L. W. 10; (1917) M. W. N. 808; 22 M. L. T. 489, dissented from.

Petition praying for an order directing inter alia that the ex parte decree passed against the petitioner by the Temporary Subordinate Judge, Sivaganga, dated 8th February 1919, be set aside and directing that Original Suit No 95 of 1916, on the file of the said Court be tried and disposed of on the merits.

FACTS appear from the judgment.

Messrs. K. Ramachandra and K. S. Lakshmana Aiyar, for the Petitioner.—In Palaniappa Chetty v. Subramania Chetty (1) the High Court disallowed petitioner's application to set aside the ex parte decree while the appeal was pending. Now that the appeal has been disposed of, there is nothing to prevent the petitioner renewing his application. See Ramachandra Mallya v. Narayana Hegade (2), Sadaya Konan v. Annamalai Udayan (3).

Meeers. O. V. Anantha Krishna Iyer and O. S. Vencatachariar, for the Respondents referred to Kumud Nath Roy Chowdhury v. Jatindra Nath Chowdhury (4), Sarat Chandra

(1) 62 Ind. Cas. 755; 13 L, W. 519; (1921) M. W. N. 309; 41 M. L, J. 90; 44 M. 731; 30 M. L. T. 151.

(2) 42 Ind. Cas. 972; 7 L. W. 10; (1917) M. W. N. 808; 22 M. L. T. 480.

(3) 29 Ind Cas, 458, 2 L. W. 529.

Dhal v. Damodar Manna (5), Damodar Manna v. Sarat Chandra Dhal (6).

JUDGMENT.

OLDFIELD, J.—I agree with the judgment which my learned brother is about to deliver

and have nothing to add to it.

RAMESAM, J .- The original suit (Original Suit No. 95 of 1916) out of which the present petition arises was filed against three defend. ants. The second and third defendants not having appeared in the suit, the degree which was passed against all the defend. ants was an ex parte decree, so far as the second and third defendants were concerned. The first defendant filed an appeal to this High Court in which he impleaded the second and third defendants as respondents. While the appeal was pending, the second defendant applied in this Coart Palaniappa Obstry v. Subra. mania Chetty (1) to set aside the ex parts decree. The petition was considered along with the appeal and was dismissed by Wallie, O. J., and my learned brother. Their Lordships were of opinion that, during the pendency of an appeal, an application to set aside the ex parte decree of the First Court does not lie in the Appellate Court but ought to be filed in the First Court.

Now that the appeal is disposed of, the second defendant renews his application. The plaintiff objects on two grounds, (a) that the application does not lie here; and (b) that it is barred by limitation. (a) Taking the first point, the several possible cases that may arise may be considered in order:-(1) When the defendant who did not appear in the First Court is not impleaded in appeal. Obviously, this is a case where the Appellate Court has no jurisdiction to deal with an application to sot aside the ex parte decree: Vide Ramachandra Mallya v. Narayana Hegade (2), Indu Meah v. Darbaksh Bhuiyan (7) and Hetlot Khasia v. Karan Khasiani (8). When he is made a party to the appeal and the applisation is made while the appeal is pending. In this case, too, the First Court seems to me the proper Court in which the application has to be made. I agree with the reasoning of Wallie, C. J., and my learned brother in the

^{(4) 9} Ind, Cas. 189; 38 U. 394; 18 C. L. J. 221; 15 C. W. N. 399.

^{(5) 12} C. W. N. 895.

^{(6) 3} Ind. Cas. 468; 13 C. W. N. 846.

^{(7) 1}C Ind. Cas. 275; 14 C. L. J. 43; 15 C. W. N. 798.

^{(8) 13} Ind, Cas, 377; 15 C. L. J. 241.

BASBIBALA DESI U. AMOLA DEBI.

order already referred to [Palaniappa Oh-tty v. Subramania Chelly (1)]. Of the cases now mentioned by the petitioner, Sadaya Konan v. Annamalai Udayan (3) and Ramachandra Mallya v. Narayana Hegade (2) were not then sited and Mathura Prasad v. Ramcharan Lal (9) was sited and considered. I am unable to agree with the two former desisions. The desisions in Kumud Nath Roy Chowdhury v. Jatindra Nath Chowdhury (4) (eited in the former order) and Sarat Chandra Dhal v. Damolar Manna (5) affirmed in Letters Patent Appeal in Damolar Manna V. Sarat Chandra Dhal (6) also support this view. Where he is made a party to the appeal but the application is made after the appeal is disposed of, even in such a case, the language of O. IX, r. 13, would point to the First Court as the proper Court for making the application, a consideration adverted to, but to which, I think, with due deference, sufficient weight has not been given in Sadaya Konan v. Annamalai Udayan (3). The weight of the desisions in Sankara Bhatta v. Subrayar Bhatta (10) and Dhonai Sardar v. Tarak Nath Chowdhury (11) has been considerably weakened by the eritieism of the former in the prior order by Wallis, C. J., and my learned brother. We must remember that in the discussion of this question, it must be assumed that the defendant who was absent in the First Court appeared in the Appellate Court, for, if he was absent in the Appellate Court also [O. XLI, r. 17 (2)] an application to set aside the appellate ex parts decree would lie under O. XLI, r. 21 and Article 169 (not Article 164) of the Limitation Act would apply. On this assumption it is diffioult to describe the appellate decree as an ex parts decree of the Appellate Court except by a straining of language which is not justified; and, if it can be so described, the petitioner would have a second period of limitation under Article 164 starting from the appellate decree, an anomalous result which could hardly have been intended by the Legislature. It may be urged by the petitioner that it is equally anomalous if the First Court has jurisdiction to set aside an ex parte decree after it is affirmed by the Appellate Court. But, in reply to this apparent anomaly, I would

August 27, 1920.

Present:—Mr. Justice Walmsley and
Mr. Justice Cuming.

Srimati SASHIBALA DEBI—

DEPENDANT—APPELLANT

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Srimati AMOLA DEBI

Srimati AMOLA DEBI AND OTHERS.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1418

or 1919.

Landlord and tenant—Residential holding—Portion planted with fruit-bearing trees, if alters character of holding—Presumption of permanency—Statement in dakhilas, evidentiary value of.

The whole area of a residential holding caunot ordinarily be covered with buildings; the fact, therefore, that the surplus land is planted with fruit-bearing trees does not alter the character of the holding. [p. 62, col. 1.]

urgs two considerations, (1) an application after the disposal of the appeal, to set aside the ex parte decree of the First Court can hardly be in time and can arise very rarely. The Legislature might well have been content not to anticipate and provide for a case which is most unlikely; (2) in such cases, the proper source of the applicant would be not to wait till the disposal of the appeal but to get an adjournment of the hearing of the appeal to enable him to apply before the First Court to set aside the ex parle decree. Such an application for adjournment might well be granted if he is in time [which is not the case with the former petition, Palaniappa Ohetty v. Subramania Ohetty (1)]. These remarks lead me to the next point, tiz, limitation.

The present petition is clearly barred by limitation. No doubt, under O. IX, r. 13 (2), (as amended by the Madras High Court) we have power to excuse the delay. But even the former petition filed during the pendency of the appeal was out of time. The petitioner failed to apply in time in any Court and no justification has been attempted before us for such failure. The petition is, therefore, clearly barred and is dismissed with the sosts of the plaintiff.

M. C. P.

Petition dismissed.

^{(9) 28} Ind. Cas. 26: 37 A. 233; 13 A. L. J. 283.

^{(10) 30} M. 535; 17 M. L. J. 438. (11) 5 Ind. Ous. 525; 13 O. L. J. 5).

MARAIN SINGH C. RAJ KUMAR SINGH.

The evidence afforded by the dakhilas (rent receipts) as to the nature (non-permanency) of a tenancy is not to be regarded as conclusive. [p. 62, col. 2.]

Appeal against a decree of the Additional District Judge, Houghly, at Howrah, dated the 4th of April 1919, reversing that of the Munsif, First Court, at Howrah, dated the 18th of March 1915.

Babus Shib Ch Palit, Hari Ch. Ganguly and Manmatha Nath Pal, for the poellant.

Babus Surendra Charan Sen and Hemendra Oh. Sen, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment, and it is preferred by the defendant. The suit was dismissed in the First Court, but decreed on appeal.

The plaintiff's case is that defendant is in occupation of a plot measuring about two cottahs, as a tenant-at-will.

The defendant raised several pleas in her written statement but we are only concerned with two. The first is, that the holding of the plaintiffs in which the two cottah plot is comprised is an agricultural holding in the sense that it is, used for horticultural purposes, and the second is, that the tenancy was created before the Transfer of Property Act came into force, and that a presumption of permanency ought to be drawn.

In regard to the first contention, it is admitted that the two cottah plot is used by the defendant solely for residential purposes. The rest of the holding in which it is comprised has a number of houses on it, and also has several fruit trees growing on it. The learned Judge has held that the plaintiffs' holding is mainly used for residential purposes, and that the evidence does not justify the finding that their holding is a horticultural holding; granted that this finding of the lower Appellate Court is one that can be challenged in second appeal, I think it is obviously correct. The whole area of a residential holding cannot, ordinarily, be covered with buildings, and the fact that the surplus land is planted with fruitbearing trees does not alter the character of the holding.

The learned Judge's finding on the second point is that there is no proof that plaintiffs' tenancy, or the tenancy of defendant's precessor, was created before the passing of the Transfer Property Act. All that is known of the defendant's tenancy is that

Rebaki Dasi held the land in 1291 B. S., that is, in 1884, and there is nothing to show. that the tenancy existed before that year. It is urged that, under the circumstacce. there is a presumption that the tenancy is much older, and that in its origin it was intended to be permanent, and attention is drawn to the ease of Surenira Nath Roy v. Dwarka Nath Chakravarty (1) in regard to the remarks made by the lower Courts about the dakhilas. In view of this authority, I think that the evidence afforded by the dakhilas is not to be regarded as conclusive, but both the Courts hold that, quite apart from the entries in the dakhilas, the circumstances do not warrant the presumption of parmaueney. They point out that the sireamstances are different from those in the case of Mohoram Sheikh Chaprasi v. Telamuddin Khan (2), and I think they are right, for in that case the defendants were able to earry their tenancy back to a very early date.

I think, therefore, that the learned Judge was right in holding that the defendant's tentacty was created after the passing of the Transfer of Property Act, and also in holding that the circumstances do not warrant the presumption that the tenancy was in its origin of a permanent character.

In my opinion, the appellant has failed to show that the judgment of the lower Appellate Court is wrong, and I think that the appeal should be dismissed with costs.

CUMING, J.-I agree.

B. N. Appeal dismissed.

(1) 50 Ind. Cas. 856; 24 C. W. N. 1; (1919) M. W. N. 811 (P C.).

(2) 13 Ind. Cas. 606; 16 C. W. N. 567; 15 C. L. J. 220.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 457 OF 1923.
February 2, 1922.

Present: Mr. Justice Syes and

Mr. Justice Gokul Prasad.
NARAIN SINGH AN ANOTHER - DEFENDANTS
-APPELLANTS

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RAJ KUMAR SINGH AND OTHERS—
PLAINT FES AND MUSAM nat JAGIA
KUAR AND OCHERS—

DEF D NTS-RESPO DENTS.

Hindu Law-Woman's estate-Daughter, right of, to

MABAIN SINGH D. BAJ KUMAR SINGH.

bargain away her son's estate—Minor party to suit— (fuardian not appointed—Compromise, effect of—Res judicata.

A Hindu daughter in possession of a daughter's estate cannot bargain away her son's right which

is only a spes successionis. [p. 64, col. 2.]

A minor cannot be considered a party to a suit so long as a guardian for him has not been appointed in the case and cannot be personally bound as a party by any compromise decree arrived at before the appointment of a guardian. [p. 64, col. 2.]

A compromise entered into by a Hindu daughter in possession of the whole property by inheritance to her father, the last male-holder, whereby a certain portion of the property is given to the daughters of a predeceased member of the family with the full knowledge that they have no right to it is not a family arrangement binding on her son, [p. 64, col 2]

The mere fact that a Hindu daughter joins her minor son who is quite an unnecessary party to suit, will not make the decision against her in that suit res judicata against her son, [p 64, col. 2.]

Second appeal from a decree of the District Judge, Azamgarb, confirming that of the Subordinate Judge.

Mr. Iqbal Ahmad, for the Appellants.

Mr. Peary Lal Banerji, for the Respondents. JUUGMENT .- The following facts are admitted. Dawan and Budhan Singh were brothers. Dawan died leaving him surviving a widow, Musammat Khaira, and two daughtere, the Musammats Kalwanta and Maktola. On his death his widow's name was recorded against half the property that had originally belonged to Ranjit Singh, the father of the above mentioned brothers. Budhan had two wiver, Musammats Palti and Samarkba, and by the latter a daughter Musammat Jagta who was the mother of Raj Kumar Singb, plaintiff No. 1, and two other sons who are now dead, who were also plaintiffe.

plaintiffs (who are all minors) brought this suit on the allegation that the two brothers, Dawan and Budhan, were joint, and that on the death of Dawan, Budhan succeeded to the whole property by right of survivorship, and that Musammat Khaira's (Dawan's window's) name was recorded against half only for her consolation. After her death, and Budhan's death, the names of his widows were recorded against the entire family property. On their death Musammat Jagta Kuar susseeded to a daughter's estate and the name of the plaintiff was recorded against the whole property. Then Musammats Kalwanta and Maktola brought a suit against Musammat Jagta, elaiming the property, and

on the 20th June 1911 "deseived her, and saused her to file a compromise" by which she admitted their right to half the property, which is now the subject of dispute. The suit was decreed according to the compromise and their names were recorded against half. On 10th September 1912 these ladies executed a mortgage, which was "fictitious and without consideratior," in the name of Narain Singh. The relief claimed in this suit was a declaration that on the death of Jagta, plaintiffs are owners of the property in dispute, and prayed that the mortgage be "cancelled" as against the plaintiffs.

They made Musammat Kalwanta (Maktola being dead) defendant first party, Musammat Jagta, defendant second party, and Narain Singh and his sone, defendants third

party.

The main defence to the suit was that Dawan Singh and Budhan were separate, and his widow's name was entered against her late husband's own share as his beir; that on her death, the widows of Bhudhan wrongfully got possession of this property; that Musammat Maktola and Kalwanta then brought their suit against Jagta and plaintiff No. 1, Raj Kumar Singh ; the suit was properly compromised and the right of Maktola and Kalwanta was admitted and decreed. Then same the mortgage to Narain Singh, whereupon Musammat Jagia brought a suit, in which she joined Raj Kumar Singh as co-plaintiff, to have the compromiss she had entered into set aside on the ground that it was induced by fraud, but the suit was dismissed. In short, they pleaded that the compromise was valid, and bound the plaintiffs, and that the plaintiff's suit was barred by the rule of res sudicata.

On these pleadings the parties went to trial. The Trial Court found on the clearest possible evidence, chiefly documentary, that the brothers, Dawan and Badhan, were joint and that on the death of Dawan, his widow and daughters had no right whatever to succeed to any property.

It held the compromise was not binding on the plaintiffs as 'there was no real trial of the case and Jagta was not entitled in this way to compromise the future claims of her issue," Maktola and Kalwanta had no interest in the property, and so the compromise was 'fully injurious to reversioners,"

NABAIN SINGE C. BAJ KUMAR SINGE,

On the plea of res judicata, it held that Raj Kumar Singh was an unnessessary party to Jagta's suit, and so was not bound by the decision. It decreed the suit. On appeal, the evidence as to jointness was so overwhelming, that the plea of separation was abandoned, and the two remaining pleas only were pressed.

On the first point the lower Appellate Court neld, that (1) Jagta had no power to bargain away the rights of her son, following the recent Privy Council case Amrit Narayan Singh v. Gaya Singh (1) and it further held (2) that Jagta had "entered into the compromise resklessly without protesting the interests of her minor son." On the third point it held that " as the compromise itself is not binding on the plaintiffs," the dismissal does not affect the plaintiffe, who "cannot forfeit their right to inherit the property after the death of their mother on account of her reekless conduct ". It upheld the decree. The defendants come here in second appeal. We note that plaintiffs Nos. 2 and 3 and Jagta are now all dead.

An elaborate argument has been addressed to us on both sides and a large number of eases nave been quoted, some of which may not be easily reconcilable; but having regard to the findings of the lower Appellate Court we have no difficulty in deciding the appeal and do not propose to discuss these rulings.

(1) the compromise was bona fide, and until it could be proved that it had been obtained by fraud, it could not be set side. Fraud had not been proved, (2) The compromise may be regarded "as a family settlement" within the meaning of the well-known Privy Council cases, and, as such, was binding. It is said there was a bona fide dispute between the members of the family. Jagta represented the estate and this was a reasonable settlement by her by which each branch of the family got a half.

Now, what are the facts? The brothers were joint. On the death of Dawan, Budban succeeded to the whole of the property. On his death his widows were entitled to a life estate, after them the daughter of Budban

came into a life estate and on the birth of Raj Kumar Singh, plaintiff No. 1, he was sole reversioner to the whole. This state of things depended on whether Dawan and Bud. han were separate or joint. In was admitted in the lower Appellate Court that they were joint when Dawan died. It follows that his daughters, Maktola and Kalwanta had no shadow of claim to any of the property when they filed their suit against Jagta and the infant Raj Kumar Singh. Soon after the filing of the plaint in that suit, the 27th June 1911, was fixed for the appointment of Jagta as gurdian ad litem to her infant son, then a baby in arms. On the 20th June Jagta filed her compromise. No written statement had been put in, issues had not been fixed, nor was any order appointing guardian al litem for These facts speak for them. the minor. selves. There was no contest, and the conduct of Jagta, who was in possession of the whole property and who should have known that the plaintiffs had no sort of elaim, was so precipitate, (although the Courts below have held it to be "reckless" only), that the inference that the compromise was obtained improperly, is almost irresistible. But, in any case, as held by the Privy Conneil in the ease relied on by the lower Court, Jagta could not bargain away her son's right which was only a sres successionis. It was not a settlement of a bona fide family dispute such as has been recognised by the Privy Counsil,

The minor himself cannot be considered a party to the suit, as no guardian had been appointed. He, therefore, cannot be personally bound as a praty to the compromise and decree.

With regard to the last point, the mere fact that Jagta joined her minor son, who was quite an unnecessary party, in her suit, will not, we think, make the decision against her res judicata against her son.

In the result, the appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

J. P.

Appeal dismissed.

^{(1) 44} Ind. Cas. 408; 16 A. L. J. 265; 23 M. L. T. 142; 22 C. W. N. 402; 27 C. L. J. 286; 34 M. L. J. 298; 4 P. L. W. 221; (1918) M. W. N. 308; 7 L. W. 581; 20 Bom, L. P. C. 560; 45 I. A. 35 (P. C.).

ABBUL JABBAR U. EMPEROR.

CALCUTTA HIGH COURT. ORIMINAL REVISION CASE No. 628 OF 1920. November 30, 1920.

Present: - Mr. Justice Richardson and Mr. Justice Shamsul Huda. ABDUL JABBAR AND OTHERS-PRTITIONERS

versus

EMPEROR-OPPORITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 35, cl. (3)-Conviction by First Class Magistrate of several offences-Concurrent non-appealable sentence for each offence-Appeal to Sessions Judge, competency of.

An appeal does not lie to the Sessions Judge when a Magistrate of the First Class has convicted an accused person of more offences than one and has sentenced him for each offence to a term of imprisonment, which by itself is not appealable, but the sentences are directed to run concurrently.

Mr. M. A. K. Faelul Huq and Babu Santosh Coomar Eose, for the Petitioners.

Babu Birbhushan Dutt for Babu Gopal Chunder Das, for the Opposite Party.

JUDGMENT.—The only question raised in this case is, whether an appeal lies to the Sessions Court when a Magistrate of the First Class has convicted an accused person of more offences than one and has sentenced him for each offence to imprisonment for one month directing, at the same time, that the sentences should run: concurrently. This question has been before this Court before. In the case of Bepin Behary Dey v. Emperor (1) Mr. Justice Holmwood and Mr. Justice Sharfuddin held that the sentences must be taken in the aggregate or added together and that an appeal lay. A similar desigion was arrived at by Mr. Justice Holmwood and Mr. Justice Imam in the ease of Abdul Khalek v. Emperor (2). In a later ease, however, Suknanden Singh v. Emperor (3) Mr. Justice Carndoff and Mr. Justice Imam came to a different conclusion and the construction which they placed on the words of clause (3) of section 35 of the Criminal Procedure Code, on which the point turns, was subsequently adopted by Mr. Justice Coxe and Mr. Justice Nalini

(2) 17 Ind. Cas. 812; 17 C. W. N. 72; 13 Cr. L. J. 877.

(8) 17 Ind. Cas. 531; 17 O. L. J. 392; 18 Cr. L. J. 787,

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Ranjan Chatterjes in the ease of Acis Sheikh v Emperor (4). Those learned Judges express. ly stated that they did not think that the matter need be referred to a Fall Bench. because it appeared that Mr. Justice Imam, who was a party to the decision in Abiul Khalek's case (2), was also a party to the desision in Suknandan Singh's case (3).

We may add a reference to the cases of Tulsi Ram v. Emperor (5) and Gurusahay' Ram v. Emperor (6) in both of which the decision in Abdul Khaisks cass (2) was dissented from.

Our view accords with the present current. of authority.

The result is that this Rule must be discharged. The petitioners who have been admitted to bail must surrender and serve out the remaining portions of their senteness. J. P. Rule discharged.

(4) 19 Ind. Cas. 610, 40 C. 631; 14 Cr. L. J. 254; 17 C. W. N. 825.

(5) 18 Ind. Cas. 679; 35 A. 154; 11 A. L. J. 111; 14 Cr. L. J. 119.

(6) 43 Ind. Cas. 250; 8 P. L. J. 183; 3 P. L. W. 249; 19 Cr. L. J. 9).

LAHORE HIGH COURT. CRIMINAL REVISION PETITION No. 925 or 1921.

November 19, 1921, Present: - Mr. Justice Broadway. Musammat MALAN-OOMPLAINANT PETITIONER

MAKHAN SINGH AND OTHERS -ACCUSED -RESPONDENTS.

Oriminal Procedure Code (Act V of 1998), ss. 145, 439-Dispute concerning land-Magistrate, duty of-Co-sharers-Failure to make enquiry-Refusal to exercise jurisdiction - Revision.

Where a person makes an application under section 145 of the Criminal Procedure Code alleging that he is in possession of the land in question it is the duty of the Magistrate to decide whether or not he is or has been recently in actual passession. The more fact that the revenue records show that the holding is joint is not sufficient to stop the enquiry contemplated by section 145 of the Code. In proceedings under this section it is incumbent on the

^{(1) 11} Ind. Cas. 255; 15 C. W. N. 734; 15 C. L. J. ·82; 12 Cr. L. J. 89!.

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Magistrate to examine the parties and to take evidence. [p. 65, col 2.]

Section 145, Criminal Procedure Code, applies to a case where the dispute is between co-sharers, each claiming to be in possession of the disputed land to the exclusion of the others; sub-section b) does not render the section inapplicable to a case in which the parties are jointly entitled to the land in question. [p. 66, col. 2]

Where a Magistrate refuses to take action under section 145 of the Criminal Procedure Code, merely on the ground that the parties are jointly entitled to the land in question a High Court has jurisdiction to interfere in revision where such irregularity has

been committed.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Magistrate, First Class, Kasur, District Labore, dated the 11th June 1921.

Lala Daulat Ram, for the Petitioner.

JUDGMENT .- On the 25th of April 1921 Musammat Malan, widow of Thakar Singh. filed an application in the Court of a Magistrate, First Class, Kasur, under section 145, Criminal Procedure Ccde. She alleged that ber husband had died some three years ago leaving him surviving a son and herself; that since the death of her busband she had been in possession of her husband's property and that her son had died about 14 years ago. She further alleged that certain reversioners of her husband were interfering with her and that they had foreibly taken possession of her husband's property, and that she feared for her life. The Magistrate made a summary erquiry and then passed an order on the 10th May 1921, holding that the dispute between the parties was as to certain joint lands left by the husband of Musammat Malan who would not allow the opposite party to cultivate, and that this dispute had assumed such proportions that a breach of the peace was imminent. He accordingly directed the issue of notices to the opposite party salling upon them to file their written statements with regard to the actual possession of the land. On the 11th June 1921 written statements were put in cy four of the opposite party. In these statements they elaimed to be entitled to the land in question, alleging that Musammot Malan had re married and further alleging that the khota was joint. Upon this the Magistrate recorded the statement of Musammat Malan who stated that she had been in possession of the land in question for ms - years and that she did not know whether there had been any partition of the

joint holding but that the various joint owners had held separate portions of the joint holding for themselves, each one being in actual possession of a definite portion. Without any further enquiry and without taking the statements of the opposite party, the Magistrate dismissed the application, holding that section 145, Criminal Procedure Code, was not applicable to disputes for possession of joint land. Against this order Musammat Malan has some up to this Court under section 439, Criminal Procedure Code, through Mr. Daulat Ram.

It has been contended that the order of the Magistrate is entirely wrong and that he has failed in the exercise of his jurisdiction. After hearing Counsel I am of opinion that this contention is correct. Musammat Malan clearly alleged that she was in posses. sion of the land in question and the object of the proceeding was, or ought to have been, to ascertain how far her allegations were correct. ie., to decide whether or not she was or had been recently in actual possession. The mere fact that the Revenue Records showed that, the holding was joint was not sufficient to stop the enquiry contemplated by section-145, Criminal Procedure Code. In Dyawappa Besgunda Patil, In re (1) it was held that, in proseedings under this section, it was incumbent on the Magistrate to examine the parties and to take evidence. In Baijnath Marwari v. W. S. Street (2), it was held that the mere fact that there may be a joint title to land would not prevent the application of section 145. To the same effect is the decision in Basanta Kumari Dasi v. Mohesh Chandra Laha (3), where it was held that section 145, Criminal Procedure Code, applied to a case where the dispute is between so sharers, each elaiming to be in possession of the disputed land, to the exclusion of the others and that subsection (b) to section 145 did not render that section inapplicable to a case in which the parties are jointly entitled to the land in question, In Dhani Eam v. Bhola Nath (4) it was held that, although the provisions of this Chapter could not be applied to joint

(1) 29 Ind. Cas. 66; 17 Bom. L. R. 352; 16 Cr. L. J. 484.

(2) 34 Ind. Cas. 971; 20 C. W. N. 5:8; 17 Cr. L. J. 251.

(3) 19 Ind. Cas. 541; 17 C. W. N. 944; 14 Cr. L. J., 269; 40 C. 982.

(4) 23 P. R. 1902 Cr.; 135 P. L. R. 1902,

JIGADISH CHANDRA POSE D. EMPEROR.

possession of joint property, the Magistrate had seted with grave irregularity in not ecquiring into the question of possession. In the present ease the Magistrate has some to no finding on the question of actual possession, but, merely because the Revenue Resords showed the holding to be joint, has refrained from exercising his jurisdiction in this matter. Velayudz Kone v. Narayana Kone (5) and Marudanayakam Pillai v. Mohammad Rowthen (6) are authorities for holding that this Coart has jurisdiction to interfere in a case where such irregularity has been committed.

I accordingly set aside the order of the Magistrate and direct him to take up these proceedings anew, to examine the parties as required by law and to allow Musammat Malan to prove her allegation that she had been in actual possession of the land.

Z. K.

Order set aside.

(5) 31 Ind. Cas. 645; 2 L. W. 1203; 16 Cr. L. J. 789. (6) 31 Ind. Cas. 323; 17 Cr. L. J. 217.

CALCUTTA HIGH COURT.

CHIMINAL REV. SION CASE No. 712 OF 1927.

August 31, 1921.

Present: -- Justice Sir N. R. Chatterjea, Kr.,

JAGADISH CHANDRA BOSE—
PETITIONES

versus

Police Act (V of 1861), s. 29—Overstaying leave by Police Officer—Reasonable cause.

A police constable after the expiry of the period of his leave applied for an extension of his leave on which he was asked to submit a medical certificate. He represented that he was not ill but was detained to settle his affairs in a Bank. He was then called upon to join his appointment, and went back. He was, thereafter, convicted under section 29 of the Police Act for overstaying his leave:

Held, that, in the circumstances of the case, the petitioner did not fail without reasonable cause to report himself to duty on the expiration of his leave and that the conviction was not sustainable.

Mr. K. N. Chaudhury and Babn Probadh Oh, Chatteris, for the Petitioner. . JUDGMENT.—The petitioner—a writer constable at Darjeeling—was convicted under section 29 of the Police Act (V of 1851).

He obtained leave for six months and it is said that a year's leave was due to him, After the expiry of the period of his leave, he applied for an extension. He came down to Calcutta to get money from a Bank in which he had deposited his savings. He had to wait here for the Director's meeting which was put off from time to time and he accordingly applied for an extension of his leave. He was asked to submit a medical certificate. He represented that he was not ill but was detained in Calcutta for the business mentioned above. He was then called upon to join his appointment, and went back.

He had to settle his affairs in the Bank at a considerable sacrifice. It is stated that he had Rs. 2,000 due to him and he had to settle it for Rs. 1,100. For a person in his position it was, no doubt, a great hardship.

The question is, whether the petitioner had reasonable cause for overstaying his leave.

Without laying down what constitutes reasonable cause under section 29 of the Act, it cannot be said that in this case the petitioner failed without reasonable cause to report himself to duty on the expiration of his leave.

In these circumstances, we think that the conviction of the petitioner under section 29 of the Police Act and the centence passed upon him must accordingly be set aside. The petitioner will be discharged from his bail-bond.

J. P.

Conviction est aside.

EJAZ ALI KHAN U. EMPEROR.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 135 OF 1921.

September 5, 1921.

Present:— Mr. Daniels, J. C.

Quei EJAZ ALI KHAN—Accised

versus

EMPEROR THOUGH PRATAB CHAND

—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 476 — Order under, whether open to revision—Order against witness, whether can be passed—Penal Code (Act XLV of 1860), ss. 185, 465.

F An order passed under section 476, Criminal Procedure Code, by a Civil Court is not appealable and is not open to revision under sections 4:5, 438 of the Criminal Procedure Code.

Thakur Dass v. Emperor, 22 Ind. Cas. 1001; 17 O. C. 25; 15 Cr L. J. 217, followed.

No revision lies against an order of a Civil Court directing a prosecution for an offence under section 195, Indian Penal Code.

An order under section 476, Criminal Procedure Code, for prosecution for an offence under section 465, Indian Penal Code, can be passed also against a person who is not a party to the civil suit, e. g., a witness.

Ganga Ram v. Emperor, 42 Ind. Cas. 927: 40 A. 24; 15 A L. J 817; 19 Cr. L. J. 15; Waman Dinkar Kelkar v. Emperor, 51 Ind Cas. 257: 43 B. 300 at p. 810, 20 Bom. L. R. 998; 20 Cr. L. J. 438; Rajkumar Singh v. Emperor, 87 Ind Cas. 487: 1 P. L. J. 298; 18 Cr. L. J. 35; 3 P. L. W. 32, followed

Govinda Iyer v. Rex, 50 Ind. Cas. 824: 42 M 540; 9 L. W. 422: 86 M. L. J. 448: 20 Cr. L. J. 244: (1919) M. W. N. 459; 26 M. L. T. 92 (F. B.), not followed.

Revision against an order of the Subordinate Judge, Mohanlalganj, Lucknow, dated the 26th July 1921.

Mr. H. O. Dutt, for the Applicant.

JUDGMENT .- This is an application for revision of an order passed by a Civil Court under section 476 of the Code of Orimical Procedure, directing the proceention of the applicant for offences under sections 195 and 465 of the Indian Penal Code. I should, in any case, be reluctant to interfere in this case as, although the order complained of was passed on the 26th July last, this application is not presented until the last working day before the vacation when its admission would involve the proseedings in the lower Courts being stayed for at least a month and a half. I have also no materials on which to act as the application is not accompanied by a certified

copy of the order complained of as required by Rule XXIX B of the Rules of Practice of this Court. No explanation of this fact is given in this application, but it is stated by the applicant's Counsel that he presented an appeal to the District Judge which was rejected on September 3rd. The applicant's legal adviser should have known that no appeal lay to the District Judge from an order passed under section 476 of the Code of Criminal Procedure, and in any case there was nothing to prevent his obtaining a copy of the order passed by the learned Subordi. nate Judge. Even an application for revision is not entertainable under the provisions of sections 435 and 438 of the Code of Criminal Procedure. [Thakur Dass v. E nperor (1)].

Even assuming the correctness of the uncertified copy put in by the applicant, no revision sould possibly lie against the order directing a prosecution for an offence under section 195, Indian Penal Code. ground on which the application is pressed in regard to the offence under section 465 of the Indian Penal Code is that the applicant was not a party to the civil suit, but only a witness, and reliance is placed on a Fall Bench ruling of the Madras High Court in Gouinda Iper v. Rex (2). The VIEW taken by the Madras High Court is not accepted either in Allahabad, Bombay or Patna, as may be seen from the following cthers :- Ganga Rom V. among Emperor (3). Waman Dinkir Kelkar v. Emperor (4), Raskumar Singh v. Emperor (5). The last decision was that of a Bench prasided over by Sir Edward Chamier, who was then Chief Justice. I agree with the view taken in these cases as against the view taken in Madras. I accordingly reject the present application.

Application rejected.

J, P.

(1) 22 Ind. Cas. 1001; 17 O. C. 25; 15 Cr. L. J.

217.
(2) 56 Jnd. Cas. 824: 42 M. 540; 9 L. W. 422; 36
M. L. J. 448; 20 Cr. L. J. 344; (1919) M. W. N. 459;

26 M. L. T. 92 (F. B.) 3: 42 Ind. Cas, 927; 40 A. 24; 15 A. L. J. 817;

19 Cr. L. J. 15. (4) 51 Ind. Cas. 257; 43 B. 300 at p. 310; 20 Bom.

L. R. 9:8; 10 Cr. L. J. 43!. (5) 37 Ind Cas. 437; 1 P. L. J. 298; 18 Cr. L. J. 135; 3 P. L. W. 33, MOHENDRA BHUM! J C. EMPEROR.

CALCUTTA HIGH COURT. CRIMINAL REVISION CASE No. 977 OF 1920. January 5, 1-21,

Present:-Mr. Justice Beacheroft and Mr. Justice Ghose.

MOHENDRA BHUMIJ AND OTHERS-PETITIONESS.

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EMPEROR-OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 118, 496-Order of Additional District Magistrate, nohether appealable to District Magistrate.

An appeal lies under section 406 of the Criminal Procedure Code to the District Magistrate against an order of an Additional District Magistrate under section 118 of the Code, made in a proceeding under section 110 of the Code, [p. 70, col. 1.]

Revision against an order of the Additional District Magistrate, Midnapore, dated the 6th Ostober 1920.

Babu Bir Bhusan Dutt, for the Petitioners. Babu Manmatha Nath Mukheres, for the Crown.

JUDGMENT.

BEACECROFF, J .- The petitioners before us were directed to give security for their good beheaviour under section 118, Criminal Procedure Code, by Mr. Mannoosb, the Additional District Magistrate of Midnapore. Mr. Mannooch had been duly appointed, under section 10 (2), Oriminal Procedure Code, to be Additional District Magistrate with all the powers of a District Magisrate under the Code. The patitioners appealed to the District Magistrate who refused to hear the appeals on the ground that they lay to the Sessions Judge. The petitioners then obtained the present Rule calling on the District Magistrate to show cause why he should not hear the appeals.

There is no question that the District Magistrate was mistaken in saying an appeal lay to the Sessions Judge. The Sessions Judge, of course, has no appellate powers in the case of a person ordered to give security for good behaviour. The only appellate authority is the District Magistrate. The question is, whether seetion 406, Oriminal Procedure Uode gives him appellate powers in the case of an order made by an Additional District Magistrate, In terms it undoubtedly dose, unless an Additional District Magistrate is included in the words "the District Magistrate,"

For the petitioners it has been argued that the District Magistrate is a distinct person with spesial powers given by the Code, whereas an Additional District Magistrate is merely a Magistrate of the first class on whom the special powers of a District Magistrate have been conferred by the Local Government,

We have been referred to various seetions of the Code having reference to the powers and duties of a District Magistrate. from which, it has been argued, the conelusion is to be drawn that the term "District Magistrate" does not in all cases include an Additional District Magistrate. I do not think any useful purpose will be served by referring to those sections as in many of them it is an open question whether the provisions of section 10 (2) would not make the particular section applicable to an Additional District Magietrate, and, farther, sestions which deal with the administrative or executive duties of the District Magistrate will not ba any sure guide to the solution of the question before us.

An argument for the patitioners which may be noticed is that the words 'other than the District Magistrate" were inserted in section 406 expressly to cover the case of an Additional District Magistrate, otherwise they are unnecessary, for, on general pricciples, a District Magistrate could not hear an appeal from his own order. is, at the same, time conceded that Additional District Magistrate may exercise appellate powers under this section. I do not think this argument conslusive, for even if the words "other than the Distriot Magistrate" were omitted, the same difficulty might arise, though the argument against the petitioners would possibly be strengthened by the omission.

Oa the other hand, it is argued that the Additional District Magistrate has coneurrent jurisdiction with the District Ma. gistrate and it is contrary to fundamental principles for one Court to sit in appeal over a Court of consurrent jurisdiction. and that sestion 435 gives us a guide, as by that sestion the District Magistrate has revisional powers only in the ease of orders of an inferior Court, which term could not include the Court of the Additional District Magistrate.

RAM CHAND &. EMPEROR.

The latter argument does not belp us. for appellate powers are not necessarily subject to the same limitations as revisional powers. The former argument is attractive, but not conclusive: appellate power must depend on the words of the Statute. which being plain in themselves must be held to have their ordinary significance unless such a construction leads to a result clearly contrary to the intention of the Legislature. Now, it eannot be said that it would do so in view of the Foll Bench desision in Nabu Sardar v. Emperor (1). It was there decided that the powers given by section 125 were not limited in any way, and though the correstness of that desision may be open to doubt, it interprets the law for this Province. and if, by the operation of that section, a listrict Magistrate can question on the merits an order of the Additional District Magistrate, being a Court not superior to his. there is nothing anomalous in his being empowered to sit in appeal over that officer.

It might seem unnecessary for the petitioners to press their point in view of the fact that the District Magistrate can interfere under section 125. But the fact that the District Magistrate has the power does not dispose of the matter, for, under section 125, it is a matter within his discretion, whereas if an appeal lies under section 406, the District Magistrate is bound to hear it.

In my opinion, there is only one person who can be the District Magistrate. Consequently, though an Additional District Magistrate may have all his powers he is a "Magistrate other than the District Magistrate" within the meaning of section 406 of the Code, and consequently an appeal lay to the District Magistrate. I would make the Rule absolute and direct the District Magistrate to hear the appeals.

GHOSE, J.- I agree.

J. P. & B. N.

Rule made obsolute.

(1) 34 C. 1; 11 C. W. N. 25; 4 C. L. J. 428; 4 Cr. L. J. 899; 1 M. L. T. 268 (F. B.).

LAHORE HIGH COURT.

CRIMINAL REVISION No. 909 OF 1921.

December 3, 1921.

Fresent: -Mr. Just on Abdul Qudir.

RAM CHAND-ACCUSED-PETITIONER

tereus

EMPEROR-RESPONDENT.

Penal Code (Act XLV of 1860), s. 174—Failure to attend in obedience to order of public servant—Order by Cantonment Magistrate requiring agent of bungalow to attend before him, whether offence.

Petitioner, who was the agent of a bungalow in a Cantonment, was, by a verbal order, required by the Cantonment Magistrate to attend his office in connection with the acquisition of bungalows for military purposes. Petitioner failed to obey this order and was convicted under section 174 of the Penal Code:

Held that there was nothing to show that the order was one which the Magistrate issued in his capacity as a Magistrate, or which he was legally empowered to issue or which the petitioner was legally bound to obey, and that, therefore, the petitioner could not be convicted of an offence under section 174 of the Penal Code [p. 71, col. 2.]

Oase reported by the Sessions Judge, Jullander, with his No. 100 G of the 13th June 1920.

FACTS.—The petitioner, Ram Chand, is an agent of bungalow No. 10 in Jullundur Cantonment. The Cantonment Magistrate wished to see the agents of various bungalows in connection with the proposed acquisition of bungalows for military purposes in accordance with orders reseived from Brigade Head-quarters. He accordingly ordered the petitioner to attend his office on 30th June last. This order was given by the Captonment Magistrate to the Bezar Chowdhary, Abdul Ghafur. The stated that, in obedience to this order, be went to call the petitioner, who, bowever, told him that he could not attend the Cantonment Magistrate's office that day but would do so the following day, petitioner admitted baving received the order but stated that he understood it was in connection with bungalow No. 10 and he had to go and see some repairs in burgalow No. 21. The Cantonment Magistrate in his judgment stated that his order was a verbal one, but it would appear that he wrote on a slip of paper and ordered the Chewdhary to produce before him at once the agents of burgalows Nos. 9 and 10, and on this elip of paper the Chowdhary

LAKSHAN BOR U. NABANABAIN HAZRAH.

reported that the petitioner stated that he could not come that day, but would do so the following day. The Cantonment Magistrate's order was, therefore, communicated verbally. The Cantonment Magistrate thereupon wrote an order on the same slip of paper directing that summons should issue on the petitioner under section 174, Indian Penal Code, to attend at once. The summons was accordingly issued on the petitioner, with the result that he was convicted and sentenced.

The Cantonment Magistrate in awarding the sentence considered that "an exemplary punishment was called for as the lanlords in Jullundur Cantonment were a most truenlent lot and required a few lessons to teach them the error of their ways."

GROUNDS .- Though, in my opinion, the petitioner may have been very remiss and wanting in courtesy by not complying at ones with the order of the Cantonment Magistrate, I cannot see that he has committed any offence under section 174, Indian Penal Code. The question is, whether the Cantonment Magistrate, not sitting as a Magistrate, was legally competent to order the petitioner to attend his office and whether the petitioner was legally bound to attend in obedience to that order. proceedings of the Cantonment Magistrate appear to have been comewhat irregular and I do not think that he was legally empetent to require the atterdance of the petitioner on a matter which had nothing to do with him as a Magistrate. From his judgment it would appear that he sent for the petitioner because it was essential that he should see at ones the agents of various bungalows in connection with the proposed acquisition of bungalows for military purposes in accordance with the orders received from Brigade Head. quarters. He was presumably acting in his capacity as the Secretary of the Cantonment Committee when he issued the order to the petitioner to attend at once, but I greatly doubt whether he was legally competent to issue such an order and whether the petitioner was legally bound to attend his office in chedience to that order.

I, therefore, forward the case to the High Court with the recommendation that the conviction and sentence be set aside as illegal. The fine has been realized.

Lala Fakir Chand, for the Petitioner.

ORDER.—I entirely agree with the view taken by the learned Sessions Judge. It is certainly to shown that the verbal order emmunicated to the petitioner through Abdul Ghafur was an order which the Magistrate issued in his espacity as a Magistrate, or which he was legally empowered to issue or which the petitioner was legally bound to obey. The conviction of the petitioner under section 174, Indian Penal Code is, therefore, set aside and he is acquitted. The fine, if already paid, will be refunded.

Z. K.

Consiction est aside.

OALCUTTA HIGH COURT.

ORIMINAL REVISION No. 3 of 1921.

March 10, 1921.

Fresent:—Mr. Justice Tennon and

Mr. Justice Ghose.

LAKSHAN BOR AND OTHERS—2ND

PARTY—PETITIONERS

versus

NARANARAIN HAZRAH AND OTHERE-

Bengal Tenancy Act (VIII of 1885), s 69, sub-sec. (3)—Disobedience of order of Collector—Collector, whether competent to direct prosecution—Penal Code (Act XLV of 1861), s. 155—Criminal Procedure Code (Act V of 1893), ss. 195, 476, order for prosecution under.

Where a Collector, acting under the provisions of section 69, sub-section (8), of the Bergal Tenancy Act, makes an order prohibiting the removal of certain crops and the order is disobeyed it is competent to him to act under the provisions of section 195 or section 476 of the Criminal Procedure Code, and to direct a prosecution under section 188 of the Indian Penal Code in respect of the disobedience to his order. [p. 72, col. 1.]

B.ba Sitaram Baner, es, for the Peti-

JUDGMENT.—In this case it appears that the Sab-Divisional Officer of Contai, as a Collector, acting under the provisions of section 69 of the Bengal Tenancy Act, sab-section (3), made an order prohibiting the removal of certain crops. The case against

MAHAJANAM VENCATRAYAR D. KODI VENEATRAYAR.

the petitioners is that they disobeyed the said order and their prosecution under the provisions of section 188 of the Indian Penal Cod has accordingly been directed.

The contention of the retitioners is that section 188 of the Indian Penal Code is not applicable to the facts alleged and that they

should be dealt with, if at all, under the Code of Civil Procedure, Order XXXIX,

rule 2.

In the case reported in Chandi Charan Giri v. Gadadhar Prodhan (1) it has been held that the proceedings of a Collector acting under the provisions of sections 69 and 70 of the Bengal Tenency Act are of a Civil nature. His Court is, therefore, one of civil jurisdiction and, in the absence of any special bar, by virtue of section 141 of the Code of Civil Procedure, the procedure provided in that Code would appear to become applicable. In support of the contention advanced on behalf of the petitioners stress is then laid on the decision of this Court reported in Chandrakanta De, In the matter of (2).

But, as is apparent from sub-section (2) of section 69 of the Bengal Tenancy Act, the primary purpose of orders made under that section is to prevent breaches of the peace and we cannot suppose that for the earction to such orders the Legislature intended to rely or solely to rely on the provisions of the Code of Civil Procedure. Without, therefore, seeking to lay down that the provisions of the Code of Civil Procedure, Order XXXIX, are inapplicable, we must hold that it is competent to the Collector in such esses to aet under the provisions of section 195 or section 476 of the Code of Criminal Procedure and to direct a prosecution under section 188 of the Indian Penal Code in respect of alleged disobedience to his order.

The Rule is assordingly discharged.

B. N.

Rule discharged.

(1) 44 Jnd. Cas. 177; 45 C. 336; 22 C. W. N. 165; 27 C. L. J. 316; 19 Cr. L. J. 273.

(2) 6 C. 445; 7 C. L. J. 150; 5 Ind. Jur. 412; 3 Ind. Dec. (N. s.) 259.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 775 OF 1920.

(CRIMINAL REVISION PETITION No. 648

OF 1920.)

July 26, 192!.

Present:—Sir William Ayling, Kr., Officating Chief Justice, and Krishnaswami Rao.

MAHAJANAM VENCATRAYAR—
COMPLAINANT—PETITIONER

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KODI VENKATRAYAR AND CTHERS-

Criminal Procedure Code (Act V of 1898), Ch. XXI, s. 250—Facts disclosing offence triable by Sessions— Trial by Magistrate for lesser offence—Dismissal of complaint—Compensation, grant of, legality of.

The facts appearing in evidence constituted an offence under section 467 but the Magistrate, regarding it as one under section 465, Indian Penal Code, proceeded under Chapter XXI of the Criminal Procedure Code and not under Chapter XVIII and dismissed the complaint awarding compensation to the accused under section 250 of the Code:

Held, that as the Magistrate did not proceed illegally in trying the accused for the lesser offence, he did not acting illegally in awarding compensation, when he found the accusation to be frivolous or veratious. [p. 73, col. 1.]

Petition, under sections 435 and 439, Criminal Procedure Code, and section 107, Government of India Act, praying the High Court to revise the order of the Court of Sessior, North Arcot Division, in Criminal Revision Petition No. 18 of 1920, presented against an order of the Sub-Divisional First Class Magistrate, Tiruvannamalai, in C. C. No. 12 of 1920.

Mr. S. E. Sankara Aiyar, for the Peti-

Mr. T. Narasimha Aiyangar, for the Assused.

Mr. J. O. Adam, Public Prosecutor, for the Crown.

ORDER.—In this ease a compensation order under section 250, Oriminal Procedure Code, is attacked as illegal.

It is argued that the facts appearing in evidence constitute an offence under section 467, Indian Penal Code, which is triable only by a Sessions Court, and that, in consequence, the Magistrate had no jurisdiction to act under section 250, Criminal Procedure Code. In our opinion, the

PANORU CHOUDHRY &, EMPEROR.

offenes; disclosed was one under section 467, but the Magistrate undoubtedly regarded it as one under section 465, Indian Penal Code, (which he had jurisdiction to try), and spesifically refers to the latter section in his order. Does the former fact affect the legality of his order of compensation? We think not. The Magistrate undoubtedly proceeded under Chapter XXI, Criminal Procedure Code, and not under Chapter XVIII and King-Emperor v. Ayyan (1) is clear authority for holding that if the case had ended in a conviction, that conviction would not be illegal merely because the offence committed really fell under a more serious section and was not one which the Magistrate was competent to try. Applying the line of reasoning adopted in that judgment to the present ease, we think it must be held that, as the Magistrate was not proceeding illegally in trying the accused for the lesser offence, he was not acting illegally in awarding compensation when he found the accusation to be frivolous or vexatious. Two eases have been cited for the petitioner. Of these Emperor v. Ohhaba Dolsang (2) is easily distinguishable, for, in that ease, the Magistrate was certainly acting under Chapter XVIII and passed his order of discharge under section 209. The other Hait (Het) Ram v. Ganga Sahai (3) is the decision of a Single Judge and the judgment leaves it doubtful which offence the Magistrate conseived himself to be enquiring into. We do not think there are any grounds for interference and we dismiss this petition.

M. C. P.

. J. P.

Petition dismissed.

(1) 24 M. 675; 2 Weir 699.

(2) 39 Ind. Cas, 303; 19 Bom. L. R. 60; 18 Cr. L.

(8) 46 Ind. Cas. 290; 40 A. 615; 16 A. L. J. 496; 19 Cr. L. J. 708.

PATNA HIGH COURT. ORIMINAL BEVISION No. 353 or 1921. Ostober 28, 1921. Fresent :- Justice Sir John Bucknill, Kr. PANCHU CHOUDHRY-PETIT:ONER

tersus

EMPEROR-OPPOSITE PARIT.

Evidence Act (I of 1872), s. 118-Examination of child witness-Mode of testing its capacity-Criminal Procedure Code (Act V of 1898), s. 342-Procedure.

When the evidence of a child of tender years is adduced the Judicial Officer should, for the sake of precantion, ascertain, as a preliminary measure, by means of a few simple questions, whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony which is patent of credit, and it is desirable that something should, at the commencement of the record of the evidence of a witness of this character, be entered to show that such a test has been in fact made, although it is not obligatory under the law to do so. [p 75, col. 2.]

Where an accused is undefended the Tribunal may point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation, but where an accused is defended by a legal practitioner a Tribunal ought not to enter upon a lengthy examination of an accused person. [p. 75, col. 2.]

Criminal revision against an order of the Sessions Judge, Monghyr, dismissing the appeal of the petitioner against an order of the Assistant Sessions Judge, Monghyr.

Mr. K. P. Jayaswal, for the Petitioner. The Assistant Government Advocate, for the Crown.

JUDGMENT,-This was an application in Oriminal Revisional Jurisdiction made by one Panchu Chaudhry who was convicted of rape by the Assistant Sessions Judge of Monghyr on the 25th of April of this year. and was sentenced to two years' rigorous imprisonment. An attempt was made to raise before me arguments based upon the general merits of the case and also as to the nature of the sentence. I have read through very earefully all the evidence and the learned Judge's judgment and, although the Assessors did not think that the evidence for the proseention was altogether reliable, I am bound to say that I cannot see any ground for thinking that the learned Judge has come to wrong decision, por do I think that, assuming as I do, his decision was right, the sentence was in any way too severe.

PANCHU CHOUDERY U. BEPEROR.

The points, however, upon which I was particularly addressed were two in number. The first of these was with regard to the procedure adopted by the Judge in connection with the reception by him of the evidence of a small girl who, it is said, was an eye witness of the occurrence. In order to understand this point which has been urged, it is necessary, very shortly, to refer to the ciraumstances under which, it is said, that the offence took place.

The complainant was a young married woman about 18 or 20 years old who was engaged in company with two little girls, aged about 11 and 7 respectively, in scraping up grass in a glade in the middle of a thick field of Rabar, she was seized by the accused, a young man of about 20 or 22, who, pushing her on the ground, had connection with her notwithstanding her attempts to push him off. The two little girls stood by frightened and in tears, and saw it all. need not detail what took place afterwards or the circumstances under which the complainant told what had taken place to persons whom she subsequently encountered, because those circumstances are not really material with regard to the immediate point under The consideration. Assistant Sessions Judge, in coming to the decision which he did, relied very materially upon the evidence of these two children as corrobora. tion of the story which was told in Court by the complainant herself. In the case of the elder girl he writes at the foot of her deposition: "Explained to the witness in Hindi and admitted by her to be correct. I believe this witness understood what was asked of her and gave the answers recorded fairly intelligently," With regard to the younger girl, however, he does not make any comment beyond the formal one: "Explained to the witness in Hindi and admitted by her to be correct." It is clear from the judgment that the Judge does rely upon the evidence of both these shildren and, therefore, I think, it must be presumed that, in doing so, he must have felt satisfied that both the children were capable of giving intelligent and intelligible evidence, although they were of tender years. It is admitted that what he wrote at the foot of the deposition of the elder shild was sufficient to indicate that her evidence was capable of being received and that it was adequate for any purposes neess.

sary. Whether or not he assidently omitted to make a similar entry on the deposition of the younger shild I do not know; but I am inclined to think that it was probably ace dental. However, it is argued before me: that the omission to record any statement of the kind indicated is one which vitiates the proceedings and makes it necessary that there should be a new trial. I have been unable to find any authority, nor has any elear authority been pointed out to me, which would justify me in coming to any such conclusion. I should like, however, to point out that it is undoubtedly of very great import. anse that when the evidence of a shild of tender years is addaged the Judicial Officer should, for the sake of precaution, ascertain, as a preliminary measure, by means of a few simple questions, whether the intelligence of the shild is such that (whether sworn or not) it is capable of giving testimony which is patent of eradit; and it is certainly desirable that something should, at the commencement of the record of the evidence of the witness of this character, be entered to show that such a test has been in fact made. It may, of course, turn out in the course of the examination at the trial that the test has been a fallacious one and that the evidense which the child gives is not intelligible, and in sush a case, of course, it is always: open to the Judicial Officer to say, at any stage, that he caunct ascept the evidence which the child is giving. On the ctier hand, I do not find that there is any thing obligatory imposed by law upon a Judge definitely to make on the record any endorse. ment of his own view as to a child's capa. eity, and when, as in this case, he has clearly relied upon the evidence giver, it would be absurd to suggest that he could have been other than thoroughly satisfied as to the eapacity of the child to give intelligible testimony. I observe that in these depositions there seems no clear indication as to whether either of the children was sworn or affirmed or neither. Bat it esems to be a common practice to omit to note what his taken place with regard to the taking of an oath or the making of an affirmation. I eannot, therefore, think that, under the eirenmstances shown in this case, there is any ground for interference in Revisional Jurisdiction on this point. I have been referred to the cases of Sheikh Bakir V.

ABDUL KADER U. MON MOHAN GOPE.

Emperor (1), Dhani Kam v. Emperor (2), Fin Santal v. Emperor (3) and Queen. Empress v. Lat Sahai (4). But all that they may, in my opinion, seem substantially to show is that it is important that, in some way or other, it should be clear that the Judge has satisfied himself that the child whose evidence has been taken before him is eapable of giving evidence of an intelligible nature.

The second point is a very small one. It is suggested that the examination which was made of the assused in the Sessions Court after the close of the prosecution under the provisions of section 312 of the Code of Criminal Procedure was not in accordance with law. On the ground that it was inadequate, I am not prepared, without very convincing authority, to say that it is well open in Revisional Jurisdiction of this Court to enquire into the sufficiency of the examination which has been made under the section. Indeed, it is freely admitted that it is impossible to lay down any very definite bard and fast rule and my own view is that this Court would not enquire, in Revisional Jurisdiction, into any such sufficiency, except possibly in very exceptional and special circumstances. Here I have looked at the examination which was made both in the Committing and in the Trial Courts. It must be remembered that the accused was defended by a legal practitioner and that every thing which could be przed on his behalf was urged. In the Committing Court, the accused was only asked one question which was as follows: "Did you foreibly outrage Rudia Chamarin in the Rahar field"? The answer was, "No. I did not do any thing." In the Trial Court this statement was read over to him and he was then asked if he wished to add any thing to that statement. His answer was that he would file a written statement. I cannot, I think, in these sirenmetances say that in this case this was insufficient or

that it showed any special circumstance which would justify any interference by easily be seen that if it me. It can is to be said that a Judicial Officer must ask this or that question or this or that series of questions under the provisions of section 342 of the Code of Crimical Prosedure, the practical effect of the working of that section could be criticised in ravisional applications on every possible coession. I can well understand that, where an accused is undefended, the Tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation but where an accused is defended by a legal practitioner it would be, I think, altogether impossible to expect or desirable to contemplate a Tribunal entering upon a lengthy examination of an accused person which might easily develope into a recount. ing of the history of the whole case or into, what would be far worse, some sort of eross-examination.

For these reasons, I, therefore, think that this point must also fail and that the applieation must be rejected.

J. P. & P. D.

Application rejected.

CALCUTTA HIGH COURT.

CHIMINAL REVISION CASE No. 574

OF 1520.

July 14, 1920.

Fresent:—Justice Sir N. R. Chatterjea, Kr., and Mr. Justice Cuming. ABDUL KADER—PETITIONER

ver sus

MON MOHAN GOPE - OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1894), ss. 489,

582-First youthful offender - Release on probation of
good conduct - Revision.

Accused, a young man of 20 years, who was said to be of good character by one of the witnesses, was for the first time convicted of theft and sentenced to two months' rigorous imprisonment:

Held, on revision, that having regard to his yout hand character he might be dealt with under the provisions of section 562, Oriminal Procedure Code.

^{(1) 11} C. W. N. 51: 4 Cr L. J. 412.

^{(2) 31} lnd Cas. 1005; 33 A. 49; 13 A. L. J. 1072; 16 Cr L. J. 529.

^{(3) 61} Ind. Cas. 705; 6 P. L. J. 147; 2 P. L. T. 268; 22 Cr. L. J. 417.

^{(4) 11} A. 183; A. W. N. (1839) 65; 6 Ind. Dec.

BEVISION BISO RAM &. EMPEROR.

Revision.

Mr. Md. Nurul Huq Chowdhury, for the Petititioner.

JUDGMENT.—The petitioner has been convicted under section 379, Indian Penal Code, and sentenced to rigorous imprisonment for two months.

The accused is a young man of 2) years of age; and evidently this is the first time that he has been brought to the Criminal Court. One of the witnesses for the defence, a Civil Court Mukhtear, gives him a good character.

Having regard to his youth and character, we think he may be dealt with under the provisions of section 562, Criminal Procedure Code.

The learned District Magistrate says that no application was made to him during the hearing of the appeal that the accused should be dealt with under the provisions of section 562. He has no objection, however, to action being taken under that section if that course commends itself to this Court.

Under the eirenmetancer, in lieu of the sentence passed upon the petitioner, we direct that he be released on his entering into a bond of Rs. 100 (Rupees one hundred) with two sureties for Rs. 100 (one hundred) each, for one year, to appear and receive sentence when called for and in the meantime keep the peace and be of good tehaviour.

This must be done within one fortnight after the arrival of this order in the Court below. Failing that, the petitioner must surrender to his bail and serve the remainder of the sentence and, in that event, the Rule will stand discharged.

J. P.

Letition accepted conditionally.

PATNA HIGH COURT.
CRIMINAL REVISION No. 520 of 1921.
December 14, 1921.
Present:—Mr. Justice Jwala Prasad.
BISO RAM AND OTHERS—ACCUSED—
PERITIONERS

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EMPEROR—Opposite Party.

Criminal Procedure Code (Act V of 1898), ss. 145,
253, 494 a'—Warrant-case—Discharge—Fresh complaint--Succession (Property Protection) Act (XIX of
1841)—Disputes as to succession of large estates—
Remedy

An accused person cannot be tried in several Courts on the same facts, although the complainants in the several cases may be different. [p. 70, col. 2.]

An order of discharge under section 494 (a or under section 253 of the Criminal Procedure Code in a warrant-case does not prevent the Magistrate from taking cognisance of a complaint on the same facts if there are new materials before the Magistrate which were not before him formerly. [p. 79, col. 2.]

The Succession (Froperty Protection) Act, XIX of 1841, has a larger scope than section 145 of the Criminal Procedure Code and is a more appropriate remedy in cases involving disputes as to succession in large estates involving breaches of the peace. [p. &O, col. 1.]

Oriminal revision against an order of the Sub-Divisional Officer, Nawadab, dated 29th September 1921.

Messrs. C. C. Das and S. S. Bose, for the Petitioner.

JUDGMENT.—This is an application against the order of the Sub-Divisional Magistrate of Nawadab, dated the 29th keptember 1921, directing the petitioners to be summoned under sections 454, 380, Indian Penal Code upon the complaint of one Bundi Lal, dated the 2rd of September 1921.

Bundi Lal was a servant of the late Raja of Singer, in the District of Gays, who died in the month of September 192). The petitioners are the servants of the sister's son of the late Raja, except petitioner No. 2, who disclaims all concern and is described as the nephew of Geno Singh and petitioner No. 3 is the brother of petitioner No. 1 Biso Ram.

It is undisputed that the petitioners' master, Raja Kesho Prasad Narain Sahi, is the legal heir of the deceased and is now living in Singer.

The opposite party, Bundi Lal and others, claim to be trustees of an idol, to whom it is alleged all the properties of the Raj have

BISO RAM U. BMPEROR.

been bequeathed by a Will executed by the late Raja. Probate of the Will has been applied for and the proceedings in connection therewith are still pending, Raja Kesho Prasad Narain Sabi has entered saveat in those proceedings and disputes the Will. The dispute between the parties has naturally led to an attempt on their behalf to seize possession of the properties, and consequently the several usual criminal proceedings under the preventive sections of the Code of Criminal Procedure, namely, 107, 144, etc., have been instituted. Papers of some of these proceedings have been handed over to me by the learned Counsel on behalf of the petitioners:-

(1) the complaint lodged by one Mathura Prasad, servant, of the trustees, against the petitioner Biso Modi and others which was disposed of by the order of the Sub-Divisional Magistrate of Nawadab, dated the 17th May 1921. That order is in the following

words;-

"Mistake of law. Section 448." On the 27th of May 1921 the Magistrate ordered "to return the keys to Biso Modi the person from

whom they were taken."

(2) On a complaint of Bundi Lal, the present complainant, against Raja Kesho Prasad Narain Sahi and others, the order of the Magistrate of the 1st of February 1921 was: "I do not think that there is a fear of the breach of the peace now."

(3) In a case instituted under section 107 of the Code of Criminal Procedure, at the instance of Bundi Lal, complainant v. Raja Kesho Prasad Narain Sahi, on the 1st of April 1921 the Magistrate passed the

following order:-

"The main reason for apprehending a breach of the peace was the continuance of the sollections on behalf of the 1st party and (Bundi Lal) and attempts on their behalf to possess themselves of the Kutcherry. to the collection, as I have remarked another order, they are only authorised to represent the estate in pending suits, and on these grounds I have refused to return the Zemindari papers to them. As to the Kutcherry and its contents it has been attached for the purposes of the case into which I inquired on the 1st January. There is, therefore, no fear of a breach of the peace, Proceedings dropped and assused

discharged under sestion 119, Oriminal Procedure Code,"

(4) In a proceeding started at the instance cf Raja Kesho Prasad Narain Sahi as petitioner, the Magistrate recorded the following order on the 17th of January 1921: "There are two portions in the order complained against (1) with regard to the Kutsherry, and (2) with regard to the residential portion. With regard to (1) the let party (Bundi Lal and other tenants) are said to have instituted a probate case and the opposite party have entered a eavest. This matter might, therefore, await disposal of the probate application and both parties prevented from doing anything with regard to the Kutcherry until that application is decided. As regards the second point, the Sub-Divisional Officer cays that the second party are at present in actual possession of the inner apartments and so may be left in possession until the District Judge on the probate application otherwise holds. Call upon the first party to appear on the 25th January why an order in the above terms should not be passed; sall for record and ask Sub-Divisional Officer to state whatever observations he has to make on the grounds of motions and on the above remarks. 8d. B. N. Roy, A. D. M."

The parties were heard Magistrate recorded his order on the 25th January 1921. That order gives history of the dispute between the parties, and it is needless to quote the entire order, except the concluding paragraph, which runs as follows :- "As the District Judge's decision in the probate case will settle the dispute, the petitioner elearing ont if probate is granted on proof of the Will or the opposite party elearing out if the Will be not proved to be genuine, it is best for the Criminal Court to await such decision and not disturb the status quo ante. I accordingly set aside the Sub-Divisional Offiser's order and direct, under section 144, that the petitioner be permitted to live in the inner apartment which has been found to be in his possession, that the Kutcherry be kept locked and both parties be prevented from having assess to anything contained in any of the apartments appertaining to it, that the Thakurghar or temple in the outer court. yard be kept open only for any one to worship BISO RAM C. EMPEROR.

and that a Police constable be deputed at the expense of the petitioner to see that the above order is given effect to until the decision of the probate matter, on receipt of which the Magistrate will cause compliance with such decision. It is expected that such decision will be given within two months. Return records at once to Sab Divisional Officer."

So far back as the 1st of January 1921, a complaint was lodged by one Raj Karan Singh, servant of Bundi Lal, the person complaining against the present petitioners, charging them with having entered the courtyard of the Thakurghar at Singer and of having broken open the look of the room in which were kept the collection papers belonging to Patwari Beni Lal and of having removed the articles belonging to the complainant's master from other rooms of the building. The accused were summoned under sections 454 and 380, Indian Penal Code. As the Sab-Divisional Officer of Nawadah had held local enquiry into the case, be reported to the District Magistrate to have the case made over to some other Magistrate for trial. Accordingly, the case was made over to the Sub-Divisional Officer of Gaya.

On the 19th July 1921 a petition was filed on behalf of the then complainant, Raj Karan Singh, detailing the several criminal cases which arose between Raja Kesho Prasad Narain Sahi and the trustees and the complaints relating to the properties of Raja and stating that deseased those eases were all decided in favour of Raja Kesho Prasad Narain Sahi, and that there was no likelihood of the witnesses deposing in favour of the complainant. Consequently, he sought permissicn to withdraw from the prosecution. The Sub-Divisional Officer refused to act upon it on the ground that he had no power to permit withdrawal of a warrantcase under sections 350 and 454, Indian Penal Code. He, however, granted time to the petitioner to move the District Magistrate for withdrawing the Accordingly, the complainant, Raj Karan Singh, filed a petition next day in the Court of the Sub Divisional Magistrate repeating what he had said in the first petition and adding that the accused opposite party (petitioners) "have come

into possession of the entire Singer estate and all the raiyots are on their side," and that the charge against the petitioners was brought at the instance of Bundi Lal who "it seems has no concern with the estate and has been trying to oust the real maliks from the possession," and that the case was of a civil nature. The petition was directed to be put up before the latter officer who recorded the following order: "This is a complaint case. The petition is allowed. To the Sub Divisional Officer for disposal."

On receipt of the order of the District Magistrate, the Sub Divisional Magistrate recorded the following order on the 2nd of Angust: Seen the patition filed before the District Magistrate and the latter's order dated the 25th July 1921 passed therein. A warrant-case cannot be withdrawn without the permission of the District Magistrate. The case will proceed. Summon

witnesses for 18th August 1921."

On the 29th August 1921 the Sub-Divisional Officer of Gaya examined three witnesses: (1) Mr. Reuben, the Divisional Officer of Nawadah, (2) Rai Karan Singh and (3) Beni Lal, adjourned the case to the 1st of September, on which date a petition was filed by Ganga Prasad, Bundi Lal and others, who elaimed to be the trustees of the properties and master of the complainant Raja Kesho Prasad Narain Sahi, alleging the complainant was gained over praying that they may be allowed to step in his shoes and continue the prosecution. This petition was naturally rejected, as third parties could not be allowed to intervene. The Magistrate observed that the applicants may file a pecition of complaint of their own if they like before a proper Court. Further hearing of the case then took place, and on the next day the Magistrate passed an order discharging the accused on ground that the complainant had gone back upon his deposition which he had made before the Sub-Divisional Magietrate of Nawadah and now stated that he had no personal knowledge of the facts. The case was not likely to result in a conviction. He, however, remarked that the trustees might, if they like, file a fresh petition of complaint. The case was accordingly withdrawn and the accused persons disBISO RAM U. EMPEROR.

charged under section 53, Oriminal Procedure Code.

Acting upon the suggestion cf the Magistrate, Bundi Lal, one of the trustees, filed a fresh complaint before the Sub-Divisional Officer of Nawadah, giving the eirsumstances in which the first prosecution failed and the assused were discharged. The Magistrate heard both the parties upon the question as to whether this was a proper case in which the complaint sould be entertained. He passed his order, overruling the objections of the accused petitioners, and directing them summoned under sections 454 and 380, The main ground Indian Penal Code. upon which the Magistrate has passed his order summoning the accused is, that the order of discharge passed by him in former case dated the 2nd of September 1921, did not debar him from summoning the accused, and that section 403 of the Code of Criminal Procedure does not apply to it inasmuch as the explanation to that section saves an order of discharge of the assused The complainant, Raj Karan Singh, applied to withdraw the case but the Magistrate would not permit the complainant to withdraw the case until he was directed by the District Magistrate to do so. District Magistrate's order of the July was obviously a permission to withdraw the complaint and whatever the views of the Magistrate might have been on the 29th of August that he was not bound to earry out his order, he did assept it on the 2nd of September when he astually permitted the complainant to withdraw the prosecution.

Now, if the order of the Magistrate was wrong, the first complaint has not been properly withdrawn, and in that case he should have proceeded upon the complaint the seizin whereof had been withdrawn from him and was handed over to the Sub-Divisional Magistrate of Gaya. If, on the other hand, the order of withdrawal is a valid one, it could only be passed under section 494, read with section 495, of the Code of Oriminal Procedure, for so long as the first case did not validly terminate the Magistrate had no right to start prosecution on the same facts at the instance of any other per-

son. An accused person cannot be summarily tried in several Courts on the same facts, although the complainants in the several eases may be different. I will, therefore, assume, for the purposes of this case, that the order of discharge of the 2nd of September passed by the Magistrate was a valid one. True it is that an order of discharge under section 494 (a) or under section 233 in a warrant case does not necessarily prevent the Magistrate from taking cognizance of a com. plaint on the same fasts, but an order of disaharge sannot be set aside and prossention started afresh unless there are new materials before the Magistrate which were not before him formerly, upon those materials there is a possibility of a conviction of the absused persons,

I have, therefore, earefully considered the history of the litigation and the complaint petitions which virtually are based upon the same facts. The Sub-Divisional Magistrate of Gaya had already examined three witnesses on bahalf of the prosecution. Only a few more witnesses out of those named in the complaint petition were not examined. Beni Lal, Patwari, whose bastas containing collection papers were said to have been looted by the petitioners, was already before the Magietrate. Now, examined having the evidence before him, the Magistrate was of opinion that there was no likelihood of the prosecution resulting in the conviction of the assused. The fact that the complainant was won over did not prevent the Magistrate from going on with the prosecution in a warrant-case, but the Magistrate was evidently of opinion that the evidence laid by the prosecution was not to convict the accused persons. The opinion of the Sab-Divisional Officer of Gaya, expressed on the 2nd of September, was one formed upon the estimate of the evidence then produced before him. In the present complaint before the Magistrate nothing has been said in the complaint petition that there is a chance of giving batter evidence. On the other hand, the present complainant, Bandi Lal, has definitely stated that he was not an eye witness to the occurrence. Therefore, upon the complaint has now been lodged before the Magistrate it was obvious that the Magistrate was not justified in summoning the accused NGA ON THE C. EMPEROR.

persons. The statement of Raj Karan Singh, contained in the petition of the 20th of July filed before the District Magistrate, that all the properties appertaining to the Raj is in possession of the petitioners' master, Raja Kesho Prasad Narain Sahi, has not been controverted in the present complaint petition. If that is so, it is impossible to conceive that a case under section 380, read with section 454. Indian Penal Code would lie. The dispute between the parties is one relating to the succession of the estate of the late Raja of Singer. The proceedings under the preventive sections of the Code of Criminal Procedure all terminated in favour of the master of the petitioners and these proceedings arose out of a dispute as to the possession of the Garh and the Thakurgarh which is the subject matter of the present complaint. The District Magistrate more than once has held that the Criminal Court is not the proper forum where the dispute of such a nature between the parties can be desided. No breach of peace has oscurred, nor was it ever apprehended. No riot has taken place. Baja Kesho Prasad Narain Sahi has managed somehow or the other to be in possession of the properties and he can be ousted only in the course of law. This was pre-eminently a fit case for invoking the aid of the salutary provisions of Act XIX of 1841, known as the Act for the protection of moveable and immoveable property against wrongful possession in eases of successions, and which I for brevity sake call the Curator's Act. The title of the Act is significant, that is, the object of it is to protect the property appertaining to an estate of this kind in case of a dispute as to succession. The death of the Raja took place only three months ago, and an application under the Curator's Act could be made within six months of the death of the late Raja. That Act in some respects stands in a similar position to section 145 of the Code of Criminal Procedure with respect to certain specified properties, whereas its scope is larger, inasmuch as it all properties, moveable and embraces immoveable, and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in a proper Court, and unless that were done the danger to a breach of the peace will not be satisfactorily solved with respect to the estate in question.

The proceedings are, therefore, quashed, and I recommend that an action under that Act be taken.

P. D.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 315 B or 1921.

November 24, 1921.

Present:—Mr. Justice Pratt.

NGA ON THI—PETITIONER

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EMPEROR—OPPCSITE PARTY.

Penal Code (Act XLV of 1867), s. 500—Defamation

—Eoycott resolution for good reasons.

For a number of persons to meet and resolve not to associate with a person for good reasons is not defamation nor does the sending a copy of the resolution to the person in question make it defamation. It would be a different matter if a copy of the resolution is published.

Revision.

ORDER.—Ninety villagers held a meeting and resolved to have no religious association in future with Moung Bya because he had been exemmunicated by the Yegu Pongyi and the "Sangha" of his gaing. A copy of the resolution was sent to Moung Bya. It was not denied that the complainant had been excommunicated and it seems clear he had been.

The Magistrate convicted the participants in the meeting of defamation on the ground that laymen had no right of excommunication. The learned Sessions Judge was of opinion that the fact that outsiders were sure to hear what took place at the meeting would amount to publication.

It eannot be assumed that the passing of a resolution must be heard by others unless this is proved. It seems to me that, for a number of persons to meet and resolve not to associate with a person for reasons which I consider good, is not defamation, nor does the sending a copy to the person in question make it defamation. It would be a different matter if a copy of the resolution had been published. There appears to have been no intention to defame complainant. On the evidence, I am of opinion no offence was proved. I set aside the conviction and sentences.

J. P.

SHEO PRASAD &. Ski PAL.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 25 of 1920.
March 2, 1922.

Present:—Mr. Justice Rafique and

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.
SHEO PRASAD—PLAINTIFF
—APPELLANT

SRI PAL-DEFENDANT-RESPONDENT.

Fraud-Collusion-Suit to recover money paid in satisfaction of fraudulent decree, when maintainable.

A suit for refund of money paid to the defendant in satisfaction of a decree on the ground that the suit in which the decree was obtained was a false suit and was supported by false evidence, is not maintainable in the absence of evidence in support of the collusion. [p 8], col. 2.]

First appeal from a decree of the First Additional Subordinate Judge, Aligarb.

Mesers. M. L. Agarwala and Panna Lal, for the Appellant.

Mr. Girdhari Lal Agarwala, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff appellant for the recovery of Rs 9.500, principal and interest, on the following facts:—

It appears that one Musarmat Sons, the widow of Girdbari Lal, was in possession of her busband's estate after his death, consisting of certain shares in two villages called Nagla Ashal and Nagla Pachauni. On the 13th September 1888 she executed a deed of mortgage in respect of the share in Nagla Ashal in lieu of Rs. 600 in favour of Si Pal. She died in 1889. On the 21st July 1650 Megh Raj and Sant Lal, the reversioners of Girdbari Lal, executed a simple mortgage for Re. 2,000 in favour of Ganga Ram. property hypothecated in the said deed was the share in Nagla Pashauni. The mortgagors left Rs. 692 with Ganga Ram, the mortgages, for payment to Sri Pal. On the 4th August. 1909 Sri Pal sued to resover his mortgagemoney. He brought a suit against Megh Rajand the heirs of Sant Lal, the latter having died. Banarsi Lal had, prior to the suit of Sri Pal, purchased the share of Girdhari Lal in Nagla Ashal. He died, however, prior to the institution of the suit of Sri Pal. Tota Ram and shee Prased, as his legal representatives, were impleaded as defendants by Sri Pal in his mortgage-suit. The purchasers contested the suit on the ground, among others, that the mortgage.

money claimed by Sri Pal had been left with Ganga Ram and Ginga Ram should have been made a party and should be made to pay. The contesting defendants did not say in so many words that Ganga Ram had paid off the mortgage but they implied by their pleas in their written statement that, probably, the money had been paid. On the 7th July 1910 a decree was passed in favour of Sci Pal. The contesting defendants preferred an appeal which was compromised on the 13th F.bruary, 1911. The decree of Sci Pal was satisfied. In 1914 Sheo Prasad sued the beirs of Ganga Ram for the recovery of R: 4,000 which he had paid in satisfaction of the decree of Sri Pal. . The heirs of Ganga Ram pleaded payment to Sri Pal. and their plea was successful. The slaim of Sheo Prasad was dismissed on the 2nd August 1915. The appeal of Sheo Prasad was also unsusessful. On the 17th June 1919 the suit out of which this appeal has arisen was brought by Sheo Prasad for the recovery of Rs. 4,000, together with interest, on the allegation that Sri Pal and the heirs of Ganga Ram had colladed to defraud him and hence the money that he had to pay to Sri Pal should be refunded to him. allegation of collasion was denied by Sri Pal as also the statement that the heirs of Ganga Ram had paid him any money due on his mortgage.

Tas learned Subordinate Judge decided against the plaintiff, holding that there was no priof to his satisfaction that Ganga Ram or his heirs had paid off the mortgage of Sci Pal prior to the institution of the suit of Sci. Pal, He was also of opinion that no collasion had been made out in the

We think that, on the facts as stated above and in the absence of evidence in support of the alleged collusion, the suit of the plaintiff is not maintainable. It seems to us that the plaintiff has been the victim of circumstances and bad management of his case in the former litigation. The fact, however, remains that as the collusion alleged in the plaint has not been established the mortgage decree of Sri Pal against the appellant cannot be ignored or set aside and relief granted to the plaintiff on the ground that Sri Pal brought a false suit and gave false evidence in support of his case. The view that we have taken is supported by the case

BISHUN PRIGISH NARAYAN C. ACHAIS DUBADH.

of Janki Kuar v. Lachmi Narain (1). The learned Vakil for the appellant has referred to the case of Tika Ram v. Daulat Rim (2). were quite The fasts of that case different to those of the appeal before us. In that ease it was held that if the non-service on the defendant is due to the fraudulent conduct of the plaintiff in the suit and others acting for him which has led to a decree against the defendant, such decree may be set aside on the ground of fraud. That, however, is a very different ease to the one before us.

The appeal, therefore, fails and is dismissed with costs, including fees in this Court on the higher scale.

. J. P.

Appeal dismissed.

- (1) 80 Ind. Cas. 787; 37 A, 535; 13 A. L. J. 753.
- (2) 4 Ind. Cas 536; 32 A. 145; 7 A. L. J. 74.

PATNA HIGH COURT. LETTERS PATENT APPEAL No 24 of 1921. March 27, 1922.

Fresent: - Sir Dawson Miller, Kr, Chief Justice, and Mr. Justice Adami. Babu BISHUN PRAGASH NARAYAN SINGH-APPELLANT

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ACHAIB DUSADH AND OTHERS-RESPONDENTS.

Bengal Tenancy Act (VIII of '885', s. 52 (a) - Enhancement of rent-Excess area-Intermediate Survey Settlement of land by scientific measurement-Excess area over area found in Intermediate Settlement-Presumption - Onus-Landlord and tenant.

The area of a holding was determined by scientific measurement at the Settlement of 1-98, and was accepted by the tenant who paid rent according to that area. At the subsequent Settlement the area was again measured and was found to be in excess of that found at that of 1894.

Held, that the presumption was that the area found at the previous Settlement was the accurate area for which the tenant was paying rent and that under section 2 of the Bengal Tenaucy Act the landlord was entitled to the additional rent such as may be just and equitable upon the excess area. [p. 84, col. 2; p. 86, col. 2]

Letters Patent Appeal from a decision of Mr. Justice Boss.

Mesers. Sultan Ahmad and Hurnarayan Presad, for the Aprellant.

Mr. Syed Mohamed Tahir, for the Respond.

ente.

JUDGMETT.

MILLER, C. J .- This is an appeal under the Letters Patent from the decision of a Single Judge of the Court overruling the decision of the Special Judge who had affirmed that of the Assistant Settlement Officer.

The appellant took proseedings section 105 of the Bengal Tenancy Act as landlord against a large number of tenants elaiming in some eases enhancement of rent under Section 30 of the Ast, and in other eases additional rent under section

52 (a).

The present appeal is concerned only with the claims under the latter section in respect of land held by the tenants in excess of the area for which rent had been previously paid by them. In certain cases it was found that the tenants had been in occupation of their holdings since before the Survey and Settlement operations of 1898 and paying rent therefor to the land. lord, and that the Settlement and Record of Rights finally published in March 1917 showed that, although the rent remained the same, the area of their holdings was in excess of that for which they had been paying rent according to the previous Settlement. The Assistant Settlement Officer before whom the case came, held that in the eases mentioned the landlord was entitled to an additional fair rent for the excess areas after making an allowance of 5 per cent. for probable difference in area extraction. An appeal by the tenants to the Special Judge was dismissed. On second appeal to this Court the case came before Mr. Justice Ross who took the view that in all such eases, in order to prove that the lands in respect of which an additional rent is elsimed are in excess of the area for which rent was previously paid, the landlord must show that the area included in the tenancy at its inception was less than that subsequently shown by measurement to be in ossupation of the tenant. It followed from this, in his view, that although the tenants' holdings were proved by scientific measure. ment at the previous Survey and Settlement operations made some twenty years earlier, to have been less than that for which they BISHNU PRIGASH NEBAYAN U. ACHARI DUSADH.

were still paying the same rent as shown by the subsequent Survey, the landlord could not recover any additional rent in respect of the excess area. For this finding he relied upon the decisions in the following eases, Gouri Pattra v. H. R. Reily (1), Razendra Lal Goswami v. Chunder Bhusan Goswami (2) and Rajkumar tratap Sahay v. Ram Lal Singh (3).

With great respect to the learned Judge I am unable to concur in the view taken by him; on referring to section 52 (a) of the Bangal Tenancy Act it does not appear that the tenants' liability to pay additional rent is limited to cases where the area is in excess of that comprised in the Settlement at its inception, but merely to cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid by him. The section provides as follows:

"52 (1) Every tenant shall-

"(a) be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise without any reduction of the rent being made."

The exception in the latter part of this section does not apply to the present case. By elause (b) of the section the tenant is entitled to a reduction of rent in similar eircumstances where the measurement shows a deficiency in the area of his tenure or holding as compared with the area for which rent has been previously paid by him. And in the case of some of the tenants the Assistant Settlement Officer allowed such reductions but we are not concerned with them in the present appeal. Where no previous measurement has been made upon a scientific basis from which the actual area of the land held by the tenant can be securately determined and compared with the area proved to be held at the date of the claim, no doubt the landlord is confronted with a more serious problem in proving

an excess of area, and, generally speaking, he sould only discharge the burden of proof in the case supposed by showing that the area of the tenure or holding at its inception was less than that subsequently shown by proper measurement to be in occupation of the tenant. Consequently, it was held in Gouri Pattra v. H. R. Reily (1) that the mere fact that a measurement made under Chapter X of the Bengal Tenancy Act, 1885, showed the tenants to be in occupation of lands in excess of the areas shown in the Zemindary papers and rent-receipts did not necessarily prove that the landlord was entitled to an additional rent. It is important to bear in mind that in that case it was found that at no previous time had there been a measurement of the lands in suit, and that the actual areas let out were originally assertained by guess work without any accurate Survey, and it was the areas so arrived at that were entered in the landlord's paper. The Court thought it would be impossible, in these sirsumstances, to find that the areas were accurately stated in the landlord's papers. They added that it was for the Zemindar to show that the lands were in excess of those for which rents were being paid and that to do this it was for him to show what those lands are and what were the terms of the Original Settlement and what was the process of measurement, if any, adopted. This has been relied on for the proposition that in all cases, even if there has been an Intermediate Settlement, the landlord must go back to the inception of the tenancy and prove what area was then settled. I do not think the decision can be held to support this view. In dealing with the object of Chapter X of the Bengal Tenancy Act the jadgment states that it is to enable the landlords and tenants to know their relative positions towards one another and not to disturb previously existing relations unless it can be shown that they have terminated, and adds: "The Zemindar in this case is bound to show how the areas in the last Settlement with the raigats were ascertained and that the raigats are now in possession of exsess lands and consequently liable to pay additional rent therefor." The Settlement and Record of Rights defines the relationship between landlord and tenant in various respects including the area of the holdings

^{(1) 20} C. 579, 10 Ind. Dec. (N. s.) 892.

^{(2) 6} C. W. N. 318,

^{(8) 5} C. L. J. 588.

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for which rent is paid and is presumed to represent what is the relationship between them until the contriry is proved. The Settlement in 1898 was made in the preserve of both parties and ascepted without objection as representing the area for which rent is paid. The effect of such a Settlement would be to throw the onus upon the party questioning it, in this case the tenant, to show that it did not accurately represent the true state of affairs. In the present case, therefore, it must be presumed that the Setilement of 1898 was correct and the initial onus east upon the landlord is discharged. The subsequent Settlement shows an area arrived at by the same process of measurement to be in excess of that for which rent has been previously paid.

The later decisions which have been referred to are based upon the decision in Gouri Pattra's case (1) and do not earry the matter any further in so far as the general principle is concerned. In none of them was there an Intermediate Settlement by which the area could be definitely ascertained. Raendra Lal Goswami v. Chunder Bhusan Goswami (2) was complicated by the fact that the excess claimed by the landlord was alleged by the tenant to be due to the addition of land previously belonging to the tenure but lost by diluvion which is not the case here. In Rakumar Fratap San y v. Ram Lal Singh (3), there was leter-Sattlement and, therefore, the Original Settlement had to be proved before it could be shown that the lands were in excess of those for which rent was previously paid. In the later case of Durga Friya Ohoudhury v. Haera Gain (4), it was definitel, held that it is not in all sases neces. sary for the landlord to prove the area of the holding at the time of the incertion of the tenancy. It is sufficient for the land lord to establish that sixes the icception of the tenancy rent has been as essed on the basis of a certain area and that the tenant is in possession of lands not included in that area and on which no rent was assessed.

In the present case the previous Survey and Settlement khatiyan were produced and proved and from these it appears on comparison with the recent Survey, in which

the method of measurement was the same, that the tenants are holding lands in excess of those for which they were paying the same rent since 1898. The only point which appears to have been urged by the tenants on appeal to the Special Judge was that the Survey measurements must have been inaccurate, an argument which did not commend itself to the Special Judge. In this respect I concur with his view. On the facts proved, I think the appellant has satis. fied the barden of proof required by section 52 of the Act and is entitled to the additional rents such as may be just ar dequitable upon the excess areas found by the Assistant Sattlement Officer. The appeal is allowed. The decree of Ross, J., is set aside and that of the Assistant Settlement Officer restored. The appellant is entitled to his costs here and before Rose, J.

ADAMI, J.—The appellant in applications or der section 105 read with section 52 (1) (a) of the Lengal Tenency Act claimed additional rent in respect of lands in the holdings of the respondents his tenants in village Hiramni, which, according to his allegation, were shown by the measurement entered in the Record of Rights to be in excess of the area for which rent had been previously paid by them. He asserted in the application that at their inception of the tenancies the area of the holdings had been determined by measurement with a pole of ten cubits.

The Assistant Settlement Officer decided that the appellant had failed to prove either actual enercachment or that there was a practice of Settlement of land by measurement in the estate, and, if there was such a practice, how the measure adopted for the purpose compared with the present Survey measure. He found, however, that the respondents had held the tenancies from the time of the previous Settlement, the Record of Rights of which was finally published in 18.8, and that there had been no alteration of rent since that year, and beld that the appellant landlord was entitled to additional rent for any excess area found on comparison of the Survey area of 1898 with the area shown in the Record of Rights published in 1917. Therefore, after making an allowance of 5 per cent, for probable difference in the area extraction of the came field by different persons at differen BIGHUN PRAGASH NABAYAN U. ACHAIB DUSADH.

times, he assessed a fair rent in respect of the excess area so found, and granted the applications to that extent.

The Special Judgs, on appeal by the present respondents, upheld the decision of the Assistant Settlement Officer, finding that at each Survey the area was determined by a scientific process and that the comparison gave sufficient evidence of an excess.

On second appeal the learned Judge of this Court has disagreed with the lower Courts and has held, basing his decision on Gouri Pattra v. H. R. Reily (1), Raiendra Lal Goswams v. Chunder Bhusan Goszami (2) and Rojkumar Pratap Sahay v. Ram Lal Singh (3), that in order to show that the lands in respect of which an additional rent is elaimed are lands beld in excess of those for which rent was paid, the landlord must prove an excess over the quantity of land included in the tenancy at its inception, and that the criterion is the area of the holding at the inception of the tenancy and not any intermediate measurement. learned Judge refused to accept the argument that the present case should be differentiated from the cases on which he relies because in the present case there were two Survey measurements in both of which the same seientific standard was employed, as be finds that there is no authority to support the view. and no justification in principle to support the argument.

Now, section 52 (1) (a) is perfectly clear in its terms; it provides that "every tenant chall be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him" and sub-section (2) runs: "In determining the area for which rent has been previously paid; the Court shall, if so required by any party to the suit, have regard to —

"(a) the origin and conditions of the tenancy, for instance, whether the reut was a consolidated rent for the entire tenure or holding......

"(d) the length of the measure used or in local use at the time of the origin of the tenancy, as compared with that used or in local use at the time of the institution of the suit,"

In the case of Gouri Pattra v. H. R. Reily (1) the landlord sought to prove the area for which rent had been previously paid by the tenants by entries of area in his Zamindari papers and in rent receipt. There was no evidence in that ease that there had been any measurement of the lands assording to any actual standard and it was found that the areas shown in the Zamindari papers were arrived at by guess work. The Court rightly held that the areas shown in the papers sould not be accepted. The judgment shows that it was assumed that the tenants had required the Assistant Settlement Officer to have regard to the points mentioned in sub-section (2). In absence of other evidence of measurement, the Court decided that it was for the landlord to show what were the terms of the Original Settlement and whether it was by any, and if so by what, process of measurement.

In the case of Rajendra Lal Goswami v. Ohunder Bhusan Goswami (2) the landlord sought to base the comparison on the area shown in the Revenue Survey papers of 1854. The learned Judges appear to have considered that sub-section (2) of section 52 was mandatory, whether the tenants required the Court to have regard to the origin of the tenancy or not, and held that the landlord must show that the alleged excess is really an excess over the area of the tenure as originally created. They state: "We think the language of sub-section (2), elause (a), by referring to the origin and conditions of the tenancy as some of the eircumstances which the Court is required to have regard to, shows that the expression the area for which rent has been previously paid' must be understood to mean the area with reference to which the rent previously paid had been assessed or adjusted."

The decision in Rukumar Pratap Sahay v. Ram Lal Singh (3) followed that in Gouri Pattra v. H. R. Reily (1) as did the decision in Ratan Lall Birwas v. Jadu Halsana (5) but in both of these cases the landlord cought to base the comparison on entries in Zamindari papers and receipts, no scientific previous measurement was shown.

The above eases are authorities for the principle that where there is no good

CHANDRA KUNWAR U. LUKMIN.

evidence of rejentific measurement, assessment or adjustment since the inception of the tenancy the landlord will have to prove what was the area at the origin of the tenancy, or that the lands criginally settled were defined by boundaries which have been encroached upon or that rent was settled at a certain rent per bigha.

In Ra endra Lal Goswami v. Chunder Bhusan Goswami (2) and in Akbar Ali Mian v. Hira Bibi (6) it has been held that the words "the area for which rent has been previously paid" in section 52, mean "the area with reference to which the rent previously paid has been assessed or adjusted," and lin the case of Durga Priya Choudhury v. Hazra Gain (4), where the District Judge has held that it was necessary for the plaintiff to prove the area of the holding at the time of the inception of the tenancy, Sir Asutosh Mukerjee, Acting C. J., beld that the view taken by the District Judge was erroneous and that it was sufficient for the landlord to prove that since the creation of the tenancy rent had been assessed, that when rent was last assessed the assessment was on the basis of a certain area and that the defendants were in possession of land on which no rent was assessed at the time.

Now, in the present ease, there is nothing to show when the tenancies were created, or how rent was assessed, whether the rent was a consolidated rent, or was assessed, at a certain rate per bigha or whether there was any measurement of the holdings at the inception. We have the evidence, however, of the Record of Rights published in 1893 that a certain rent was then being paid for a holding of a certain area. During the preparation of the Record of Rights the holding was measured scientific. ally and the area shown in the record was the result of the measurement, the Settlement proceedings were carried on publicly and the parties may be presumed to have been present and to have had every opportunity of object. The rent payable by the tenants was ascertained and recorded and it must be presumed that the tenants accepted that reit as the rent payable for the area as recorded. They did not come forward and prove that the area recorded was less than the area of the holding at its inception The entry shows that the rent entered there was either the rent for the area which the tenants had been paying previous to 1898 or was the rent assessed or adjusted after dispute during the Settlement proceedings between the parties as to the amount payable. In my opinion, the area shown in the Record of 1898 was the area with reference to which the rent previously paid by the respondents was assessed or adjusted. The respondents continued to pay the same rent for nearly twenty years and at the end of that time in the Settlement of 1917 it was found after scientific measurement by the same standard that the area of the holding for which that rent was being paid had increased. I am of opinion that, according to the clear wording of section 52 (1) (a), the landlord was entitled to additional rent for the land in the holdings which was not covered by the area entered in the Record of Rights of 1898.

I would, therefore, allow the appeal with costs and set aside the decree now appealed against.

P. D.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 202 of 1:21. October 28, 1921.

Present :- Mr. Daniele, A. J. C.

Musammat OHANDRA KUNWAR
DIFFENDANT-APPELLANT

t. Tsus

Musammat RUKMIN-PLAINTIFF-

Hindu Law-Concubine-Widow-Maintenance-Adulterous connection, effect of-Agreement between concubine and widow, whether can be enforced-Consideration, none, effect of.

A concubine who lives with a Hindu up to the time of his death is in general entitled to maintenance from his estate in the hands of his widow, but this right does not extend to the case of an adulterous connection, [p. 87, col, 2.]

CHANDRA KONWAR D. BUKMIN,

Khemkor v. Umiashankar Ranchhor, 10 B. H. C. R. 38, Ningaraddi v Lakshmana, 26 B. 163; 8 Rom L. R. 617 and Vrandavandas Randas v. Yamunabai, 1" B. H. C R 2:9, considered

If a conoubine's claim for maintenance under Hindu Law fails she cannot fall back on any agreement between her and the widow with regard to the maintenance, inasmuch as the agreement is a

mere promise to pay unsupported by consideration. [p. 88, col. 1.]

Appeal from a decree of the Third Additional District Judge, Lucknow, (at Sitapur), dated 14th March 1921, affirming that of the Subordinate Judge, Kheti, dated 29th January 1921.

Mesers. A. P. Sen and Basudeo Lal, for the

Appellant.

Mesers. St. G. Jackson, Satyanand Roy and Girdhari Lal, for the Respondent.

JUDGMENT.—The question for decision in this appeal is, whether a woman who was living in adultery with a deceased Hindu up to the time of his death is entitled to maintenance from his estate in the hands of The plaintiff, Musommat his widow. Rukmin, is the wife of one Bahore Singh who is still alive. She lived for a number of years as the conenbine of Amer Singh and was so living at his death. On Amar Singh's death bis widow, Musammat Chandra Kunwar, the defendant appellant, succeeded to his estate. Musammat Rokmin brought the suit out of which this appeal arises, claiming to be entitled to maintenance under Hindu Law and also asserting that the amount of that maintenance was fixed at Rs. 30 a month by agreement with the defendant. Both the Courts below have decided in favour of her right to maintenance The learned Subordinate Judge disbelieved the story of the argeement and fixed the maintenance at Rs. 20 a month. She accepted this desision and did not appeal. Noth withstanding this, the learned Additional Judge held that the agreement was proved, though, as she had not appealed, he could not increase the amount allowed by the Trial Court. In this Court the learned Counsel for the respondent has argued that the connection of his elient with the deceased sannot propsalled adulterous pecause erly be husband Bahore Singh consented to her being taken into the keeping of the deceased. This, however, did not have the effect of dissolving the marriage and the lower Appellate Court has expressly found that her

connection with Amir Singh was an adulter-

There is considerable authority for the view that a concubine who lives with a man up to the time of his death is in general entitled to maintenance from his estate but the only authority for extending this right to the case of an adulterous connection is to be found in two Bombay eases, Khemkor v. Umiashankar Ranchhor (1) and Ningaraddi v. Lakshmawa (2). In the former ease the plaintiff had actually contracted a marriage with the person with whom she was living but it was found that the marriage was invalid. The judgment is a very brief one and the 'point that the connection was adulterous was not really considered. The only authorities referred to by the Court were two passages in Strange's Hinda Law and West and Buhler's Digest, respectively. naither of which touch the point here in dispute. In the case of Ningaraddi v. Lakehmaka (2) the only passage in which this point is referred to is a sentence in the judgment of Mr. Justice Crowe which 8ay8 : -

"There can be no doubt on the authorities that a concubine is entitled to maintenance though the connection was an adulterous one, provided that it was of a permanent

nature."

No authorities are referred to and the only authorities refereed to in the judgment of the Court below were the case of Khemkor v. Umiashankar Ranchhor (1) already referred to and a case in 12 Bombay High Court Raports, page 229 [Vrandavanias Ramdis v. Yamunabai (3), in which there is nothing in the report to show that the concubine in question was a married woman. Oartain at stements in modern English commentaries have been sited for the respondent, but these state. ments are all based on the foundation of the two Bombay eases referred to above. Mayne, Eighth Elition, page 620, reproduces the statement of Mr. Justice Crowe in Ningaraddi v. Laksimawa (2) and supports it in a footnote by reference to the eases in 10 and 12 Bombay High Court Reports . Khemkor v. Umiashankar Hanchhor (1) and Vrandavindas Rundas v. Yamunabai (31) and to the Mitakshara, ii, 1, section 28, 1 Strange's Hinda

^{(1) 10} B H. O. R. 881.

^{(2) 26} B 168; 8 Bom. L. R. 647.

^{(3) 12} B. H. C. R. 229.

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Law, page 174, 2 Macnaughten, page 119, and West and Buhler, page 164. (Lomit references to the Dayabhaga and the Mayukha as irrelevant in this case where the parties are governed by Mitakshara Law). None of these authorities enpport the statement in the text. The only one on which the respondent's Connsel was prepared to rely was the passage in the Mitakabara, Chapter II, section 1, paragraphs 27 and 28. This contains a quotation from Katyayana who, after saying that heirless property goes to the King, says that a deduction must be made for subsistence for the females. The commentator expounds this 88 kept in concubinage. is also a reference to maintenance to concubines in a passage cited from Narada in paragraph 7 of the same Chapter. In neither of these passages is any reference made to the case of a concubine living in adultery. Now, it is cartainly highly repugnant to natural feeling that a widow should be under an obligation to provide out of her busband's estate for a woman whose connection with her husband amounted to a criminal offence and was a continuing injury to herself; and some clear authority in the Hindu texts would be required to justify it. No such authority can be found. It is argued by the respondent that the fact of adultery being an offence under the Criminal Law is irrelevant inasmuch as the Indian Penal Code is a modern enastment, but adultery by a married woman is at least as grave an offence under the Hindu system of law as it is under any modern system. In my opinion, the two Bombay cases relied on by the respondent are not supported by the authorities on which they profess to rely and have given an extension to the right of maintenance which is not warranted by the original authorities. If the plaintiff's claim under Hindu Law fails she cannot fall back on the agreement. which was a mere promise to pay unsupported by consideration. If the agreement had been made by Amar Singh in his lifetime it might be suggested that there was consideration for it in the fact of past cohabitation, but such an argument cannot be advanced in the case of a promise made by the widow. It has also been suggested that the promise might be regarded as a compromise of a disputed slaim, but there is no evidence to support this view nor has this been found by the Court below.

For the above reasons, I allow the appeal and dismiss the suit with costs in all Courts.
J. P.

Appeal allowed.

PATNA HIGH COURT.
PRIVE COUNCIL APPEAL No. 54 of 1921.
March 16, 1922.

Present: - Sir Dawson Miller, Kr., Chief Justice, and Mr. Justice Ross. MAHABIR PRASAD TEWARI

-APPELLANT

versus

JAMINA SINGH AND ANOTHER

- RESPONDENTS.

Limitation Act (IX of 1904), s. 12 (3), Sch. I, Art 179-Application for leave to appeal to His Majesty in Council-Time requisite in obtaining copy of judgment, exclusion of.

In computing the period of limitation under Article 174 of the Limitation Act in a case of application for leave to appeal to His Majesty in Council the applicant is entitled, under section 12 (3) of the Limitation Act. to deduct the time requisite for obtaining a copy of the judgment. [p. 29, col. 2.]

Appeal from a decision of Mr. Justice B. K. Mullick, and Mr. Justice Bucknill, dated the 21st April 1921, reversing that of the Sub Judge, Third Court, Patna, dated the 31st Ostober 1917.

Mr. R. Irasad, for the Appellant, Mr. P. N. Sinha, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an application for leave to appeal to his Majesty in Council from a decision of this Court dated the 12th April 1921. The judgment which it is sought to appeal from is a judgment of reversal and the value of the matter in dispute is over Rs. 10,000, but the respondents contend that

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the application for leave to appeal was out of time. The period of limitation under Article 179 of the Limitation Act, as now amended, is 90 days for a person desiring to appeal under the Civil Procedure Code to His Majesty in Council. The judgment of this Court was dated the 12th April 1921 and the 90 days allowed would expire on the 11th July. The petitioner applied for a sopy of the judgment appealed from on the 9th July and did not obtain that until the 25th and two days later, on the 27th, the application for leave to appeal was filed. It is quite obvious that, if the period occupied in obtaining a copy of the judgment is excluded, the application is in time. Even if one only excludes the two days of that period from the 9th to the 11th July still as the application was filed two days after the copy was obtained, Ithink that the application was clearly in time. It has been contended, however, by the learned Vakil who appears for the respondents that we ought to exclude the period which was not occupied in obtaining a copy of the judgment and that sestion 12 of the Limitation Ast does not apply to eases of appeals to His Majesty in Council. In my opinion this contention is not well founded. The question of whether section 12 applies to applications for leave to appeal to His Majesty in Council has no doubt been the subject of somewhat ecflicting decisions in the different High Courts in India but the matter was considered by the Chief Justice and Mr. Justice Rafique in the Allahabad High Court in the case of Ram Sarup v. Jasuant Rai (1), and the learned Judges in that case came to the conclusion that in computing the period of limitation under Article 179 of the Limitation Act the applicant was entitled, under section 12, clause (2), of the Limitation Act, to exclude the day on which the judgment complained of was pronounced end the time requisite for obtaining a copy of the decree. They atrived at this conclusion on the ground that section 12, sub section (2) of the Limitation Ast was general in its terms and arplied to all applications for leave to appeal, whereas, formerly, under the previous Act, it had been restricted to appli-

eations for leave to appeal as a pauper. opinion that desision expresses la my properly the interpretation of section 12 Sub-clause (2), however, of section 12 only deals with obtaining copies of the decree, sentence, or order appealed from and, therefore, does not in terms cover the present case where the time sought to be deducted is the time occupied in obtain. ing a copy of the judgment. A copy of the deeree was applied for sometime between the 9th July and the 25th July and it does not appear that any further time was occupied in applying for a copy of the decree. I think, however, that subsection (3) of section 12 of the Limitation Act applies to the present case and that the time requisite for obtaining a copy of the judgment ought also to be deducted in eases of application for leave to appeal to His Majesty in Council. I think that the provisions of sub-section (3) are meant to apply generally to cases covered by sub-section (2) and the reason seems to me to be this that if the appeal in question is from a decree then it is generally nessessary that the judgment on which that decree is based should also be obtained in order that the parties may satisfy themselves by reference o it exactly what its terms are and, further, in order that they may, as is provided in the Civil Procedure Code and under the rules of most High Courts, file a copy of the judgment with the application for leave to appeal. Under the practice in this Court it is necessary that a copy of the judgment from which it is sought to appeal should always be filed with the petition applying for leave. The Court insists upon that, because in some cases it is absolutely necessary that the judgment itself should be considered, notably in cases where the question is whether a substantial question of law arises for consideration by their Lordships of the Judicial Committee. In my opinion, therefore, the time occupied in obtaining a copy of the judgment ought to be dedusted in this case. If that is done, then the application for leave to appeal was in time and I think a certificate should issue that the case complies with the provisions of section 110 of the Civil Procedure Code. As this application has been opposed by the reSADIQ BUSAIN C. NAZIR BUSAIN EHAN.

spondents, I think the petitioner is entitled to his costs of the application. Hearing fee 5 gold mohurs.

Ross, J .- l agree.

J. P.

Order accordingly.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 26 of 1919. February 23, 1922. Tresent:-Pandit Kanhaiya Lal. J. C., and Mr. Daniels, A J. C. SADIQ HUSAIN-DEFENDANT-APPELLANT

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Khan Bahadur Hakim Mirea NAZIR HUSAIN KHAN AND OTHERS-PLAINT, FFA - RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8-Members, some, of community, suit by, if maintainable-Muhammadan Law-Shia sect-Dedication, proof of- User, evidence as to, effect of-Origin of dedication unknown, effect of-Wakf-Dedication, partial and complete Construction of document-Trust-Charge -Religious purposes, dedication for.

Where the plaintiffs in virtue of the fact that they belong to the Shia sect and perform religious ceremonies and other practices on a certain property and the graves of their relations also stand on that property seek for a daclaration that the said property is walf property and the defendants have no proprietary right over any part of that property or its income, they are entitled to maintain the suit irrespective of the provisions of O. I, r. 8, Civil Procedure Code. [p 92, col. 1.]

Case-law considered.

In order to ascertain whether a property is wakf, user may be evidence of a dedication the origin of which is unknown, but it cannot be substituted for it. What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of the waky. Besides cases of complete endowment there may be instances of less complete dedication, in which, notwithstanding a religious d. dication, property descends and descends

beneficially to heirs subject to a trust or charge for the purpose of religion. [p. 5t, cols. 1 & 2.] Case-law considered.

Appeal from a decree of the Subordinate Judge, Lucknow, dated the 15th February 1919.

Mr. Mohammad Ayub, for the Appellant.

Mr. Haider Huszin, for the Respondents.

JUDGMENT .- The suit out of which this appeal arises was brought for a declaration that an area of 23 bighas 12 bismas. known as the Talkatora Karbala in the City of Lucknow, is walf property, and that the defendants have no proprietary right over any part of the property or its income. and for any other relief which the Court might think just. The Karbala in disoute is the principal Karbala of the Shia Community in Lucknow, being the place where all but a few of their tazias are buried in the Muharram of each year. It contains a large pakka mausoleum containing a representation of the tomb of Imam Hasain. it also includes two morques. To the south of these buildings is an area of grove and culturable land, Burials take place by permission of the so-sharers on payment of a substantial sam, both incide and outsite the enclosure containing the mausoleum. The whole compound is regarded with reverence by the Shia Community.

The defendants are the successors of Khuda Bakheb, who built and founded the Karbala in question in 1817 (1232 Hijri). They have defined shares in the property. The case of those of them who resisted the suit was that they were its owners. Four defendants admitted the plaintiffs' elaim and several others put in no appearance. For one reason or another the litigation has been going on since the year 1915. On February 15th 1919 the Trial Judge held the property to be wakf and passed a decree in favour of the plaintiffs. The only defendant who has appealed against the decree is Sadiq Husain who owns a three-annas share in the property. The learned Subordinate Judge decided the case without hearing any of the defendants' evidence and this necessitated a remand. Bat for this eireumstance the appeal would have ben decided a year and nine months ago. The SADIQ HUSAIN U. NaZIR HUSAIN KHAN.

appeal has been pressed on two grounds only. The first is, that the suit as brought was not maintainable except by permission of the Court obtained in accordance with O. I, r. &, Civil Procedure Code. It is common ground that no such permission was obtained. The second plea is, that the property is not wakf.

The rights in virtue of which the plaintiffs have brought their suit are stated in paragraph 13 of the plaint, which runs as

follows : -

"That the plaintiffs beiong to the Shia sect and perform religious ecremonies and other practices in the kham and pukia compounds of the said Karbala, and the graves of their relations also stand there."

The first ground is common to the whole Shia Community of Lucknow. The second ground may be described as personal but the appellant contends that it is not sufficient to give a right of suit. He urges.—

vague and that there is no evidence in support of it except the equally vague statement of the first plaintiff in his evidence:—

"some deceased relations of mine are buried there."

(2) that it is admitted on both sides that no one can claim as of right to be buried in this plot.

Burials are only made by permission of

the defendants on payment of a fee.

(3) that it is not suggested that the defendants have ever done any act which might amount to a desceration of graves or that they had any intention of committing such an act.

As regards the right claimed in common with the other Shias, the appellant's contention is, that in a case to which O. I. r. 2, applies no suit can be brought except in accordance with the provisions of that rule.

Sub rule (1) of O. I, r. 8, which is the rule relied on, provides that where there are numerous persons having the same interest in a suit one or more of them may with the permission of the Court sue or be sued on behalf of all of them. The Court is required in any such ease to give notice of the suit to all the persons interested, and under sub rule (2) any such person may apply to be made a party. Sub-rule (2)

was enacted for the first time in the Ocde of 1:08, but sub-rule (1) re produces slucet without change the provisions of section 30 of the Code of 1882. It was at one time doubted whether section 30 of the Code of 1882 applied to a right such as the right to worship in a mosque which is common to a large number of persons, and there is at least one decision, e.g., Jawahra v. Akbar Bussin (1) in which it was held that the section applied only to a joint right. Later decisione, such as that in Dasondhay v. Mohammad Abu Nasar (2), have not taken this view but have at the same time established that in such cases the plaintiffs need not resort to the provisions of the section but are entitled to sue on the ground of the infringement of their personal right. The claim in the last mentioned case was for a declaration that the property containing a mosque, a graveyard and the shrine of a eaint was wakf property. It was held that the plaintiffs sould have brought a suit under section 3C on behalf of the whole Muhammadan Community of the town but that their suit should not be dismissed on the ground that they had failed to do so. A similar decision was arrived at in Muhammad Alam v. Akbor Husain (3) with reference to the right to use an Idgah. In the ease of Baiju Lat Parbatia v. Bulak Lal Pathuk (4) it was held that the section was only an enabling section and did not debar the plaintiffs from suing in their individual right. This was a case in which the right elaimed was common to a limited community of Hindu priests. Whether in a case like the present, in which the provisions of O. I, r. 8 are not invoked the desision would be binding on other members of the community under Explanation VI of section 11 of the Code is a matter which we need not here consider. It was no doubt answered in the negative in Ram Chandar v. Ali Muhammad (5), but the language of Explanation VI is very wide and. as a matter of public policy, if a claim

^{(1) 7} A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. s.) 390.

^{(2) &#}x27;1 Ind. Cas. 36; 33 A. 660; 8 A. L. J. 710.
(3) 6 Ind Cas. 535; 32 A. 631; 7 A. L. J. 797.

^{(4, 24} C. 385. 12 Ind. Dec. . N. s.) 924.

^{(51.18} Ind. Cas. 797; 85 A. 197; 11 A. L. J. 288.

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that property is wakf is fought out on the merits and decided in the negative, it appears to be to the public interest that the persons in possession should not be liable to be harrassed by successive suits at the instance of other persons making a similar claim. As regards the point actually at issue there is a large consensus of authority for the view that the plaintiffs are entitled to maintain the suit irrespective of the provisions of O. 1, r. 8 and we decide accordingly.

accordingly. The ease set up by the plaintiffs and accepted by the Judge of the Court below is, that the character of the property as wakf is established by user, which the Sabordinate Judge erroneously learned imagines to operate by way of estoppel. There is very little room for dispute as to the facts. It is clear from the evidence on both sides that the Karbala is regarded as a very sacred spot by the Shia Community. When Shias enter the compound they frequently take off their hats and raise the dust to their foreleads. Besides the burial of tazias at Moharram, people go there for prayer, to visit the tomb, and to read portions of the Kuran. The defendant admits the right of the public to do these things and disclaims any right or desire to prevent them. He also admits that the mausoleum and Khemagah are treated as sacred. Sajjad Mirz), one of the defendants' witnesses himself a so sharer in the property, goes so far as to admit that the mausoleum is walf. The other witness, Agha Ali, also a cc-sharer, denies this, but he also admits that any Shia can visit the premises at any time he likes to see the grave of the Imam, to observe religious ceremonies, say prayers and hold a maglis (religious assembly), and that no one has any right to prohibit him. On the other hand, it is equally clear that the property has been treated and dealt with as the property of the co-sharers and that interments within the area in suit can only take place by their permission. The khewats also support this. It is in evidence that on one occasion burials were stopped for a whole year owing to a dispute between the so-sharers. All the witnesses are agreed that, in the words of the plaintiffs' first witness, "if any one is buried on the Karbala land his heirs pay some money for the use of such land." He speaks of it as being paid to the manager

of the Karbala, but this is because he regards the co sharers as being merely mutawallis. It is, however, perfectly clear and has been admitted that they have never been appointed as mutawallis. Several of them are women who would be most unlikely to be appointed mutawallis of a sacred shripe and who have in fact acquired their shares by transfer or inheritance. The learned Subordinate Judge unfortunately construed the order of remand as prohibiting him from examining the appellant as a witness, but of the two co-sharers in the property, who were examined, Sajjad Mirza inherited most of his share from his father who had acquired it by purchase, while he himself purchased the remaining one anna from the wife of Hamid Ali Khan, Barrister, He has not made it wakf al al aulad i.e., wakf in favour of his descendants. He has given two different reasons for doing sc. In examination in chief he stated that it was to avoid the expense of defending this suit. Considering the length of time that the litigation has been going on the expense must certainly have been considerable. In cross-examination he stated that it was to prevent the property being sold or mortgaged in future. Possibly. both motives may have it fluenced him. The other witness, Agha Ali, inherited his share through his father's eister. who was the wife of Zain-ul Abdin, son of Khuda Bakhsh, the original founder. Khuda Bakhsh in his life-time made a gift of the property to Zain-ul Abdin. The property was recorded as held in the proprietary right in defined shares both at the First and Second Regular Settlements, and various transfers have been proved covering a period from the year 1887 down to the present time.

The position of the defendant appellant is that, while he fully admits the obligation to allow Shias to use the Karbala for Muharram ceremonies and other religious acts and an obligation on his part to maintain the tomb (which obligation is expressed in the title deed under which he holds the property), there is nothing in these obligations inconsistent with the proprietary right which he and his co-sharers have, and have always had, in the property. It is a case of a property burdened with a trust and not a case of property which has ceased to be the subject of private ownership at all. While he admits an

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obligation to maintain the mansoleum be does not admit that he and his so-sharers are obliged to spend the whole income of the property on this purpose. The plaintiffs' witnesses have made vague statements as to the income being employed in the upkeep of the property, but in reality not one of the witnesses was in a position to prove that the whole income was spent on this purpose. Of the five witnesses whose statements appear in the appellant's paper book three are public officers, the City Magistrate and two Police Officers, whose only knowledge of the property was derived from their duty of seeing that no disturbance of the peace occurred at time of the Muharram. None of the witnesses have ever seen any assounts of income and expenditure. The appellant summoned a witness to produce the accounts, but this witness, Sajjad Mirze, the same man who made a walf al-al oulad, stated that when he made this wakf he made over the accounts to the mutawalli appointed under it. The Subordinate Judge, again unfortunately, refused permission to allow another witness to be called to put in the accounts: Vide proceedings of 18th June 1921. On the other hand, we have the positive evidence of Saiyed Agha Ali that the income from burials, which sometimes amounts to as much as Re. 40, for a single interment, is divided between the ec-sharers. This is in accordance with the probabilities of the esse. The defendant's two witnesses, Sajjad Mirza and Agha Ali, though they are ec-sharers in the property, are highly respectable witnesses who are not contesting the case in this Court and whose evidence there is no reason for discrediting.

As regards the two morques, the appellant's Counsel has stated that he has no objection to their being declared wakf. His position is that it is impossible that a building once used as a public mosque can ever again be diverted to secular uses, and as a mosque yields no income there is nothing to which private ownership can attach. The position with regard to the mansoleum is different. The mansoleum does yield a substantial income from offerings and from burials made for the inside and outside the walled enclosure which surrounds it.

The recorded eases in which wakf has been proved by user have all been cases in which no direct evidence of the origin of the trust was available. In this case the origin of the buildings is known and the intentions of the founder, Khuda Bakhab. are recorded in a deed which he excented in favour of his son, Zain al Abdin. The original of this document is not forthcoming and it may be presumed that it was lost in the Mutiny. The defendant filed in Court below a sopy purporting to be a true copy attested by the Assistant Resident at the Court of Ondb. This sopy was torn at the place where the attestation appeared and for this reason the learned Subordinate Judge to whom the ease was remanded considered that this fact precluded him from applying the presumption of section 90 of the Evidence Act and presuming it to be a true copy of the genuine original. The learned Subordinate Judge says in his report to this Court that he is sorry he could not treat it as proved because it would have thrown a flood of light upon the question of wakf. The appellant was subsequently able to obtain from another defendant and put in before this Court another certified copy which is not torn and which bears endorsement as a true copy purporting to be signed by the Assistant Resident of the time Mr. A. Loskett, It also bears the initials "A. L." in the same handwriting both at the foot of the page and on the reverse. This doonment is of vital importance, and as the appellant was unaware until after the remand hearing that the Court would not accept it we considered that there were sufficient reasons for allowing it to be tendered in the Appellate Court, and have admitted it under O. XLI, rule 27, of the Code of Civil Procedure. The remand evidence was heard on 2nd and 18th June 1921, but the endorsement on the document as unproved was only made on 30th November 1921, the day after the learned Subordinate Judge submitted his report. The respondents' Counsel when asked whether he admitted it, at first said that it did not much matter whether he admitted it or not as the Court would probably, in any case, presume its genuireness. Ultimately, he desided to deny it. We have no doubt whatever that it is, to use the words of the learned . Subordinate

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Judge, a true copy of the genuine original, and as both the original and the copy are more than thirty years old we presume its genuineness under section 90 of the Evidence Aet. The original purports to have been executed in the Hijri year 1232, the year when the Karbala was built, and the copy must, from the very fact of its being certified by the Assistant Resident, have been given at some time before the annexation of Oadh. This copy also goes to prove the genuineness of the copy previously tendered as the two copies are word for word the same, and in one instance where the handwriting of the latter copy is not quite clear we are enabled to make use of the former copy as a check on the latter.

The document is in the form of a petition presented to one Muhammad Afrin Ali Khan, evidently an official at the Court of the King of Oudb, in whose service Khuda Bakbsh was. It shows that both Knuda Bakhsh and his master were at the time in disfavour at Court and their lives were not safe. It is said that "there appears to be no likelihood of the continuance of our honour and good name" and that "owing to the implacable enmity of the Government officials I am entirely in despair of my life." The document further states that the writer has only one son, Mir Zain ul-Abdin, who has been brought up under the kind protestion of Muhammad Afrin Ali to whom the letter is addressed and who has no experience of the ups and downs of the times. It is mentioned, as a fact well known to Afrin Ali, that the writer's children and his family (apparently this description is not intended to include his son) are of bad disposition and not likely to remain in union with each other. Directions are given for the marriage and dower of the writer's unmarried daughter. The document then continues: -

The sum and substance is, that it is well-known to you that whatever I have earned by my exertions through your kindness. I spent the whole on building a copy of the Mausoleum of the Holy Karbala, considering it as a provision for the benefit of my soul for the next world, and it is my desire that the said mausoleum be illuminated and adorned in perpetuity without failure, diminution or disturbance, and that pilgrimage and weeping and mourning should be

performed and that believers male and fe nale should mourn there, because this is the best object of desire in this world, and it is my further desire that there should not ossur any quarrel and disturbance such as took place among the mujawiran, managers and trustees of the Mausoleum of Hazat Abbas where every thing was destroy. ed. Therefore, while in the enjoyment of sound health and unimpaired intellect, of my own desire and free will, without reluct. anse and coercion, I have given and bestow. ed on my said son Mir Zain ul Abdin the said baildings of the mansoleum with pakka and kachcha compounds, mosques, watertanks (banz), etc., fourteen standard bighas of land whereon the said building stands with all the appurtenant rights, together with the old and new mango trees and Rs. 30,000 current coin cut of Rs. 52,000 which is held in deposit with you by way of trust and made him the proprietor thereof (dadam wa hiba wa tamlik namudam) without co-parcenership of any one else and having taken it out of my own possession have delivered it into his possession and control"

Then follows a sentence as to the exact reading of which the parties are in dispute. The appellant reads it, "If afterwards any of my relations slaim the property against the said donee, i. e., my son, for any reason or any ground it shall be deemed in law false and wrong," The plaintiffs would read it, "If afterwards any of my relations or those of my said son claim the property, ets" The partiels which preceds the words "mahublahu" is read by the appellant as "ba" and by the plaintiffs "ya." In favour of the former reading is the fact that in the copy first filed the word is clearly written as "ba." In the former reading two different prepositions are used express the same relation. According to the plaintiffe' reading, words have to be supplied which are not in the text. The official translator of the Court renders the passage thus :-

"If in future at any time, any one connected with me brings forward in any way any claim and dispute against the said dones (ba mahublahu maskur), i. e., the said son, the same would be false and wrong before God and under the Muhammadan Law."

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In view of the preceding and succeeding context the general result of the deed is quite clear. The property is referred to in the succeeding sentence as property bestowed by gift in contradictinction to the remaining property which the writer directs to be divided amongst all his heirs after payment of debts. He then concludes:—

This petition of mine, which is in fact a deed of gift, is quite sufficient in my life and after my death and there is no need for a fresh document. Should I survive, I having taken this petition from you shall make it over myself to the said son; otherwise you will kindly deliver it with the aforesaid sum to my son, so that he, my children, wife and servants, who have no other patron and master than your blessed personality in their state of helplesness, despair and fear, be not in need of daily bread."

The thought in the doncr's mind seems to have been that as in the case of Hazrat Abbae's Mausoleum which had been made wakf and made over to trustees disputes among the latter had led to the ruin of the entire foundation, he thought it heat to give the property to his son and trust the latter to see that the buildings were properly kept up. The words which he uses clearly indicate an intention to confer proprietary right on the sen and the last centence, with its reference to his not being in need of daily bread, suggests strongly that he did not contemplate the upkeep of the buildings absorbing the entire revenue.

The certified copies of the above document produced in Court include also a copy of a retition presented by Khuda Bakhsh to the Resident at the Court of Oudh in the year 1235 Hijri, i.e., three years later. From this it appears that his patron had in the meantime died; while Khuda Bakhsh himself had only escaped through the intervention of the Hon'ble East India Company. He, therefore, encloses his deed of gift to the Resident with a request that it may be kept in deposit and acted on in due course.

The Subordinate Judge's finding regarding the question of wakf is contained in the following passage from his judgment:—

"I have given my best consideration to the evidence address by the plaintiffs and have no hesitation to hold that the whole plot

No. 18 (old) constitutes Kerbala and that it has ever been treated as wakf by the Shia public. The very form and title of the edifice leads to the constraint that in building the Karbala the founder, Khuda Bakhab, intends that it should be devoted exclusively to purposes of public worship. No portion of the Karbala is the private property of any person. The whole of it is wakf. Being wakf, it is neither heritable nor transferable."

The position as it appeared to the learned Subordinate Judge is radically modified by the deed executed by Khuda Bakhsh which we have received in evidence. This deed shows that Khuda Bakbeh did not intend, as the learned Subordinate Judge thought, that the property should cease to be the private property of any person. The only new development since his time has been the use of the property for Muharram selebrations and it is clear that though this was acquiesced in by the owners, indeed they have welcomed it as it has brought them increased revenue. they had never up to the time of suit abandoned their claim to private ownership. The desision of the ease cannot be affected by the fast that four of the defendants in their written statement have admitted the property to be wakf while others have not joined in the appeal. The fling of this suit by four leading Shias is an indication of the existence of a strong local opinion among the Shia Community in favour of making the property wakf. The appellant, Sadiq Husain, is a resident of Ajudhia and, therefore, probably less inflaenced by local opinion than most of his o defendants.

On the state of facts found by us, the plaintiffs could only succeed in the suit by showing that it is impossible in the Muhammadan Law for property made use of for religious purposes to be the subject of private ownership. There is no authority which goes this length. The property is elaimed primarily on behalf of the Shia Community, and the case is admittedly governed by Shia law. In the leading Shia authority, the Sharaya ul-Islam, as translated in Baillie's Digest, Volume II. Blok V. wakf is discussed under four heads, namely:—

Conditions relating to the maukuf or dedicated property.

Conditions relating to the wataf or dedicator.

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Conditions relating to the maukuf aichi or bereficiary.

Conditions relating to the wakf itself.

It is only under the four heads that any reference is made to the effect of user. The conditions relating to the wakf are four in number, one of which is that possession must be given of the thing appropriated. Under the head of 'possession' it is laid down (page 219) that the seizin will ordinarily be that of the maukuf alchi but that in the case of an appropriation for a maslahat or useful purpose, acceptance is dispensed with and as to possession that of the Nazir or Saperintendent is sufficient. Then follows the only passage dealing with user with reference to wakf:—

"If one should appropriate a masjid or place of worship, it is valid though only one person should pray in it. So, also, if the appropriation is of a semetery, it becomes a wakf by the interment in it of a single corpse. But though people should pray in a masid or bury in a semetery, without the formal words being pronounced; neither would pass out of the property of

the original owner."

This passage presupposes an original dedication. User may be evidence of a dedication the origin of which is unknown, but it cannot be substituted for it. This is also clear from Ameer Ali's Muhammadan Law, 4th Edition, page 500, where it is said.—

"What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of the

wahf."

A brief reference to the most important cases cited at the bar will suffice to conclude this judgment. The appellant has relied on the Privy Council judgment in Konwar Doorganath Roy v. Ram Chunder Sen (6), and on other cases in which this judgment has been followed, for the proposition that a person who disputes a right to alienate land on the ground that it is endowed property must give strong and clear evidence of the endowment and that the fact that the rents of the property have been applied for a considerable period to the support of a religious institution is not

(6) 2 C. 341; 4 I. A. 52; 1 Ind. Dec. (N. s.) 503.

by itself sufficient. Kontear Doorganath Roy v. Ram Chunder Sen (6) is a case of a Hindu endomment but Abdul Grifur v. Mahant Shiam Sundar Das (7) and Mahmud v. Muhammad Hamid (8)ere cases in which the property was claimed as wakf under Muhammadan Law. He has cited Fakhr ud din Shah v. Kifayat-ul lah (9) as an instance to show that where user has been relied on in support of a walf it has been treated as evidence from which a dedication sould, in the sireumstances of the case, be inferred. He has relied on the judgment of the Privy Council in Jagadindra Nath Roy v. Hamenta Kamari Debi (10) for the proposition laid down therein that besides eases of complete endowment there may be-

"Instances of less complete dedications, in which not withstanding a religious dedication, property descends (and descends beneficially) to heirs subject to a trust or charge for

the purpose of religion "

"desire to speak with caution, but it seems possible that there may be other cases of partial or qualified dedication, not quite so simple as those to which reference has been made." This, again, was the case of a Hindu endowment but a similar doctrine has been applied to a Muhammadan trust in the case of Quasim Ali Khan [Syed Azam thah v. Syet Ahmad Shah (11).

The Privy Council judgment in Romanandan Chettiar v. Vava Levyai Marakayar
(12) has been cited by the respondents. The
dead in this case was intended as a
wakf al al aulad which at that time was
regarded as invalid. Their Lordships held,
however, that, having regard to the terms
of the deed which contained active trusts in
fayour of the charities, the deed was a valid
deed of wakf although the word wakf was

^{(7) 17} Ind. Cas. 303; 16 O. C. 76.

^{(8) 38} Ind. Cas. 387; 33 P. R. 1917; 11 P. W. R, 1917.

^{(9) 8} Ind. as. 579; 7 A. L. J. 1095.

^{(10) 32} C. 129; 31 T. A. 203; 3 C. W. N. 809; 6 Bom, L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.). (11) 32 Ind. Cas 516; 2 O. L. J 758.

^{(12) 89} Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101, 15 A. L. J. 139; 5 L. W. 293; (1917) M W.N. 180; 25 C L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. B. 401; 44 I. A. 21 (P. C.).

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not used in it and although the trust did not exhaust the entire property. The deed was one which in terms made over the entire property to trusts reserving no proprietary interest to the beneficiaries as such. The deed in that case cannot be used as a guide to the construction of the deed executed by Khuda Bakhsh. They also rely on the Privy Conneil case of Court of Wards v. Ilahi Bakhsh (13). This was a case in which a certain plot of land in the City of Multan had been publicly thrown open for the purpose of a graveyard for the Muhammadan Community. Their Lordships upheld the elaim that the land was walf in the following terms:-

"Their Lordships agree with the Chief Court in thinking that the land in suit forms part of a graveyard set apart for the Musalman Community, and that by user, if not by dedication, the land is wakf."

It is possible to read the sentence quoted as implying that user may be a substitute for dedication but on a perusal of the entire judgment we do not think that this was their Lordships' meaning.

As some of the defendants have admitted the property to be wakf while others acqueiseed in the decree of the Court below we do not think it necessary to disturb the degree so far as it affects them. So far as the appellant's share is concerned, we uphold the decree as regards the two mosques but set it aside as regards the remaining property and substitute therefor a decree in terms of paragraph 16 (c) of the plaint declaring,—

(a) that the appellant has no right to interfere with the use of the property for Muharram ceremonies, prayer, majlis, recitation of Kurav, visits to the tomb and similar religious acts and that he has no right to make any use of the property which is inconsistent with its use for the aforesaid purposes, and—

(b) that he is liable from the income of the property to defray his share of costs of maintaining the buildings which stand on

the land.

(18) 17 Ind. Cas. 744; 40 C. 297; 1 P. W. R. 1918; 11 A. L. J. 265; 13 M. L. T. 318; (1913) M. W. N. 270; 17 O. L. J. 860; 27 P. R. 1918; 83 P. L. R. 1918; 15 Bom. L. R. 486; 25 M. L. J. 61; 40 A. 18 (P. C.). As the suit has partly succeeded and partly failed, the parties will bear their own costs throughout.

J. P.

Appeal partly allowed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 5

OF 1919.

March 22, 1922.

Present:—Mr. Justice Das and Mr.

Justice Adami.

Rai Kumar Babu CHHOTEY

NARAIN SINGH AND OTHERS—

APPELLANTS

Babu KEDAR NATH SINGH AND OTHERS-

versus

Limitation Act (IX of 1908), s. 15, Sch. I, Art. 181 - Foreclosure decree nisi-Application to make decree absolute-Limitation.

An application to make a foreclosure decree final is governed in matter of limitation by Article 181 of the Limitation Act. [p. 99, col. 1.]

A preliminary decree for foreclosure was passed by the High Court on the 3rd of July 1912, but the mortgagor preferred an appeal to His Majesty in Council which was ultimately dismissed for non-prosecution on the 9th October 1916:

Held, that the limitation for applying for making the decree final began to run from the 8rd July 1913 inasmuch as the result of the dismissal of the appeal for non-prosecution was to place the parties in the same position as if there was no appeal [p. 99, col. 2]

Where during the pendency of an appeal to the Privy Council in a suit on a mortgage an order is made for the appointment of a Receiver with a direction upon him to pay the interest due to the mortgage, it operates in substance as an order staying further proceedings in the suit until the disposal of the appeal by the Privy Council and the period during which such order subsists should be excluded within section 15 of the Limitation Act in computing the period of limitation for making an application for a foreclosure decree. [p. 101, col. 1.]

Appeal from a desision of the Subordinate Judge, Gaya.

Mesers. Hasan Imam, Sultan Ahmad, A. N. Das and D. N. Das, for the Appellants.

Messre. P. O. Manuk, H. L. Nandkeolyar and Rai T. N. Sahay, for the Respondents. JUDGMENT.

Das, J.—This appeal is directed against the final decree for foreslosure passed by the Jearned Subordinate Judge of Gaya

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under the provision of Order XXXIV, rule 3, of the Code; and the only question which we have to determine in this appeal is, whether the application of the plaintiff was

barred by limitation.

On the 3rd of July 1913 the Calcutta High Court, modifying the decree of the learned Subordinate Judge which was a desree for sale, passed a foreelosure decree nisi in favour of the plaintiffs whereby it fixed the 3rd of January 1914 as the date for payment of the mortgaga-money by the defendants to the plaintiffs. On the 22ad Desember 1921 defendants Nos. 1 and 2 presented an application and in due course obtained a certificate for lasve to appeal to His Majesty in Council. On the 9th January 1914 defendants Nos. 1 and 2 presented another application to the Calcutta High Court. They stated in that petition that they were negotiating for a loan to pay off the mortgage and had also preferred an appeal to His Majesty in Counsil from the decree passed by the High Court. They asserted that the opposite parties were "contemplating to apply for the final decree of foreelosure and for the delivery of posseseion of the property to them" and they asked as follows: "It is, therefore, prayed that your Lordships will be pleased to stay the passing of the final decree for forcelosure for such period as to your Lordships appear proper, and, in the alternative, to stay the delivery of possession over the said mortgage property on your petitioner's furnishing security, and in case of their being unable to do so, to appoint a Receiver for the management of the property and to pass such order or orders as to your Lordships appear just and proper." On the 20th January 1914 the High Court appointed Babu Siva Nandan Roy, pending the disposal of the appeal to His Majesty in Council, Reseiver of the disputed mortgaged properties in suit, and directed the Receiver to pay all the rents as they fell due and also the interest on the mortgage debt. On the let of June the Reseiver was discharged as he deslined to act on the remuneration fixed for him. On the 1st of September 1914 some of the mortgagees applied for an order that, as there was no fresh order for the appointment of a Receiver, they were at liberty to apply for the final decree for foreclosure and delivery of passession of the mortgaged

properties in accordance with the decree of the High Court dated the 3rd July 1913. This application had the effect of compelling the defendants to make another application for the appointment of a Receiver, and this they did on the 2nd September 1914. On the 3rd September 1914 the High Court made an order on the Subordinate Judge to appoint a fit and proper person as the Reseiver of the mortgaged properties. It is not disputed that, in pursuance of this order, the Subordinate Judge appointed a person the Receiver of the properties and directed the Receiver to pay the interest on the mortgage debt. The next date of importance is the 9th of October 1916, when the Judicial Committee dismissed the appeal of the mortgagors for non prosecution of the appeal. On the 20th December 1917 the plaintiffs applied to the High Court for the discharge of the Reseiver and for an order on the Reseiver to make over mortgaged properties to them. On this application the High Court passed the following order: "We direct that the Receiver do forthwith pass his assounts, but that he be not discharged until a further application. mortgagees will be at liberty to proceed with a view to obtaining a final decree notwithstanding the fact that the Receiver is in possession". This order was passed on the 18th March 1918, and on the 3rd April 1918, the mortgagees presented their application out of which the present appeal arises for a final decree in the foreelosure action under the provision of Order XXXIV, rule 3 of the Code. It is to be remembered that the preliminary decree for foreelosure was passed on the 3rd July 1913; and the fact that the present application was presented on the 3rd of April 1918 encouraged the mortgagors to raise plea of limitation. The learned Subordinate Judge has rejected the plea; and the only question which we have to determine in this appeal is, whether the plea put forward on behalf of the mortgagors was a good plea.

Mr. Manuk on behalf of the respondents argues that his right to apply for a final decree in a foreslosure action accrues from day to day and that the Statute of Limitation is inapplicable to such an application and he relies on Madhab Moni Dasi v. Pamela Lambert (1). As has been pointed out more

(1) & Ind. Cas. 587; 37 C. 796, 12 C. L. J. 828.

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than once, that was not a decision on the question which we have now to determine, for the learned Judges in that case held that the Code of Civil Procedure, 1908, did not apply to the case at all. It is conceded that the Code of Civil Procedure, 1908, does apply to the present case, and I have no doubt whatever that the question, as it has now arisen, is comewhat different from the question which the learned Judges in Madhao Moni Dasi v. Pamela Lambert (1) had to try. Now, there was considerable difference of opinion at one time on the question as to whether orders under sections 87 and 89 of the Transfer of Property Act were orders in the suit itself or in execution, and whether the Limitation Ast, and, if so, whether Article 178 or 179 of the old Limitation Act governed an application for obtaining such orders. It was with a view to put an end to the corflict of decisions that provisions as to mortgage suits have been removed from the Transfer of Property Act to the Code of Civil Procedure and applications which follow preliminary decrees either for eale or for foreslosure are now described as applications for a decree for sale and a decree for foreelegare and not applications for an order for sale or for an order for foreslosure. It is impossible now to contend that these applications are not applications under the provisions of the Code of Civil Procedure. If that be so, Article 181 of the Limitation Act elearly governs such an application and the period of limitation is three years from the time when the right to apply accrues. This was the view which was taken by this Court in Bala Ram Naik v. Kanhai Bharan (2).

The next question is when did the right to apply accrue? It will be remembered that the preliminary decree was passed on the 3rd July 1913 and that, though the mort-gagors carried an appeal to His Majesty in Council that appeal was dismissed on the 9th October 1916, not on merits, but for non-prosecution of the appeal. Mr. Hasan Imam on behalf of the appealants contends that the result of the dismissal of the appeal for non prosecution was to place the parties in the same position as if there was no appeal and that, accordingly, the right to apply

asserted on the 3rd July 1913. That was certainly the view which was taken by the Judicial Committee in Abdul Majid v. Jawahir Lal (3). That ease was decided under the Transfer of Property Ast and the old Limitation Act before the new Civil Procedure Code made a change in the relating to mortgage actions. procedure In that case the Court of first instance passed a decree in favour of the mertgagee on the 12th May 1890 for the sale of the mortgage property unless payment was made on or before the 12th August 1890. There was an appeal to the Allahabad High Court and that appeal was dismissed on the 8th April 1893. The mortgagor obtained leave to appeal to the Privy Council, but did not prosecute his appeal, and on the 13th May 1901 the appeal was dismissed for want of prosecution. The Judicial Committee held that Article 179 of the Limitation Act governed the application which was then presented by the decree-holder for an order absolute for sale and that limitation began to run, not from the dismissal of the appeal for want of prosecution, but from the order of the High Court confirming the deares. The Judicial Committee in the course of its judgment said as follows:-- The dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised anthoritatively that the appellant had not somplied with the conditions under which the appeal was open to him, and that, therefore, he was in the same position as if he had not appealed at all. To put it shortly, the only decree for sale that exists is the decree, dated . the 8th April 1893, and that is a decree of the High Court of Allahabad." That case was of sourse decided on the view that an application for an order absolute for sale under the Transfer of Property Act was an application in execution of the decree. The position now is different but we are entitled to hold by analogy that the right to apply in the present case accrued on the 3rd July 1913, and that the application is accordingly

^{(2) 88} Ind. Cas, 985; 1 P. L. J. 364; 8 P. L.

^{(3) 28} Ind. Cas. e49; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 895; 18 C. W. N. 968; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 486; 16 M. L. T. 44; 1 L. W. 483 (P. C.).

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barred by limitation unless the operation of the preliminary decree was stayed by an order and injunction of the Court.

Mr. Manuk contends that the order for the appointment of a Receiver coupled with the direction upon the Receiver to pay the interest on the mortgage-money operated in effect as an order staying further proceedings and that he is, accordingly, under section 15 of the Limitation Act, entitled to exclude the period between the 3rd September 1914 and the 18th March 1918 on which date the High Court gave him liberty to apply for the final decree notwithstanding the fact that the Receiver was not discharged. The argument involves an examination of the nature of a final decree in a forcelosure action. Order XXXIV, rule 3, of the Code, after dealing with the case where the defendant pays into Court the amount declared due to the plaintiff, provides as follows: - "Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons elaiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property". The form of a final decree for forcelosure is to be found in Appendix D to the Code of Civil Procedure .and is No. 10. Under that form the decree which the plaintiff is entitled is to follows :- "That 88 the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and deseribed in the Schedule hereunto annexed. (Where the defendant is in possession add and shall put the plaintiff in possession of the said property)". There is no doubt at all, on a perusal of the form as provided by the Legislature in No. 10 of Appendix D, that the words, "if necessary" in Order XXXIV, rule 3 (2), refer to a ease where the defendant is in possession and that the plaintiff is entitled to a decree first debarring the defendant and all persons claiming through or under him from all right to redeem the mort. gaged property; and, secondly, ordering the defendant to put the plaintiff in possession of the property. Mr. Manuk contends that, in the events which have

happened, he was not entitled to either of these orders until the 18th March 1918.

I will first consider the question whether the plaintiffs were, in the events which happened, entitled to an order debarring the defendants from the right to redeem the mortgaged property. Now, it will be remembered that the Receiver was appointed on an application by the defendants in which they stated that they were negotiating for a loan in order to pay off the mortgage money and that they were confident that they would be able to raise such a loan within two months from the date of that application. The appointed a Receiver and directed the Receiver to pay the interest due on the mortgage money to the plaintiffs. In my opinion, so long as the order of the High Court stood, the defendants had the right not only to pay the interest on the mortgage-money to the plaintiffs but also, to quote their own words, 'to pay off the decree". In other words, the appointment of a Receiver and direction upon him to pay the interest due to the plaintiffs operated in substance, though not form, as an order staying further proceed. ings in the suit until the disposal of the appeal by the Privy Council.

In the next place, so long as the Receiver was in possession of the mortgaged properties, it was elearly incompetent to the plaintiffs to ask for an order that the ec.defendants do put the plaintiffs in posses. sion of the property. The Code of Civil Procedure recognizes the right of the plaintiff who is out of possession to be put in possession of the mortgaged properties; in other words, he is in the same action entitled not only to a decree for foreslosure, but also to a decree for possession. At one time it was doubted in England whether a Court of Equity could grant the mortgagee leave to join an action for the recovery of land with the action for foreclosure. See Sutcliffe v. Wood (4). It was in order to remove the difficulty raised by such cases as Sutcliffe v. Wood (4) that a proviso was added to Order XVIII, rule 2 of the Rules of the Supreme Court in December 1885. That

^{(4) (1884) 53} L, J. Ch, 970; 50 L. T. 705,

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proviso now permits a plaintiff to join a elaim for possession in an action for foreslosure or redemption. There is no doubt at all that an order for foreslosure absolute in a foreelosure action may now include an order for delivery of possession by the defendant to the plaintiff: Best v. Applegate (5). It is quite true that an order for delivery of possession may be given after the final decree. This was established in Keith v. Day (6), though the proposition was not accepted in Wells v. Luff (7). It may be assumed, however, that the plaintiffs were entitled to have an order as to delivery of possession not as part of the foreslosure decree, but after the decree; but the fact that the plaintiffe may obtain such an order after the final decree does not take away their right to elsim such an order as part of the foreclosure decree. That order they could not have obtained so long as the Receiver was in possession of the mortgaged properties. The Calcutta High Court removed the bar on the 18th March 1918 and, in my opinion, the plaintiffs became entitled to apply for the final decree on the 18th March 1918.

In my opinion the conclusion at which the learned Subordinate Judge has arrived is right and I would dismis this appeal with costs.

ADAMI, J .- I agree.

J. P. & P. D.

Appeal dismissed.

(6) (1888) 37 Ch. D. 42; 57 L.J. Ch. 506; 57 L. T. 599, 86 W. H. 897. (6) (18881 39 Ch. D. 452; 58 L. J. Ch. 118; 60 L. T, 126; 37 W. R, 242.

(7) (1388) 88 Ch. D. 197; 57 L. J. Ch. 563; 38

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 227 AND 231 or 1921.

November 9, 1921.

Present: - Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

MUHAMMAD NUR KHAN AND ANOTHER-DEFENDANTS-APPELLANTS

versus

LACHHMI NARAYAN AND ANOTHER-PLAINTIFFS - RESPONDENTS LACHHMI NARAYAN AND ANOTHER-PLAINTIPPS - APPELLANTS

cersur

MUHAMMAD NUR KHAN AND ANOTHER-DEFENDANTS-RESPONDENTS.

Limitation Act (IX of 1909), s. 6-Minor, transfer by-Transferee, position of-Suit by transferee, whether maintainable.

A transferee from a minor (cannot, under any circumstances, claim the benefit of section 6 of the Limitation Act, inasmuch as as soon as the transfer is made the special privilege which is vested in the minor is extinguished, so that the transferee cannot maintain a suit even if he brings it on the same date on which the transfer takes place, if it is otherwise not maintainable. [p. 102, col. 2.]

Ruira Kant Surma Sircar v. Nobo Kishore Surma Biswas, 9 C. 663; 12 C. L. R. 269; 4 Ind. Dec (N. 8) 1031, Rangasami Chetti v. Thangavelu Chetti, 50 Ind. Cas: 880; 42 M. 637; (1919, M. W. N. 415; 26 M. L. T. 147; 10 L. W. 833 and Matadin v. Ali Mirza, 5 O C. 197 at p. 208, followed.

Imam-ud-din v. Mumtaz-un-nissa, 27 Ind. Cas. 118; 18 O. C. 31; 1 O. L. J. 747, explained and dissented . from.

Arjun Ranji v Ramabai, 37 Ind. Cas. 221; 40 B; 561; 18 Bom. L. K. 579, explained.

Appeal from a decree of the First Addi. tional Judge, Lucknow, dated the 25th April 1921, upholding that of the Subordinate Judge, Lucknow, dated the 17th July 1920.

Mr. Niamat Ullah, for the Appellants in Appeal No. 227.

Mr. Rajeshwari Prasad, for the Respondents. in Appeal No. 227.

Mr. Rajeshwari Prasad, for the Appellants in Appeal No. 231.

Mr. Niamat Ullah, for the Respondents in Appeal No. 231.

JUDGMENT .- This second appeal been referred to a Bench for the decision of. a question of limitation arising out of see. tion 6 of the Limitation Act. The facts are

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given in the referring order and may be stated in a very small compass. The house in dispute was sold to one Ram Narain by Ganga Din on 6th April 1906. Ram Narain re-sold it to the defendants in 1908. The lower Appellate Court has found that the defendants and their predecessor-in-interest have been in adverse possession from the date of the sale to Ram Narain which took place more than twelve years before the suit. Ganga Din was separated from his father. Nohri, and his brother, Radhe Shiam, and it has been found that the real title to the house vested in the latter. Radhe Shiam was born on 9th March 1900 so he was a minor till within a little more than a year of the present suit. On 13th January 1919 Radbe Shiam executed a sale-deed of the house to one Kandhai. Under the roling of this Court in Imam-ud din v. Mumtae unnissa (1) Kandhai could not have maintainted a suit to recover possession. Accordingly, shortly afterwards, the plaintiffs brought a suit to get the sale deed to Kandhai set aside and a compromise deeree was passed on 4th June 1919 setting aside the sale. On 3rd July 1919 Radhe Shiam executed a fresh sale-deed in favour of the plaintiffs and on the same date the present suit for possession was launched against the defendants. The object of these mar cenvres on the part of Radhe Shiam and the plaintiffs evidently was to take advantage of another distum in Imam ud.din v. Mumtas-un-nissa (1) to the effect that, though the benefit of section 6 does not enure in favour of the transferee from the minor, yet the transferse can maintain a suit if he brings it on the same date on which the transfer takes place. question of law which arises for decision in this case is whether that dietum is

The general principle of law that a transferse cannot claim the benefit of section 6 of the Limitation Act was not questioned when the case was argued before the Referring Judge. It has been disputed at the hearing before us. That principle was first laid down by a Full Bench of the Calcutta High Court in Rudra Kant Surma Sircer v. Nobe Kishore Surma Biewas (2) and it has

quite recently been followed by the Madras High Court in the case of Rangasami Chetti v. Thangarelu Chetti (3). It was also affirmed by a Judge of this Court in the case of Imamud-din v. Mumtaz-un-nissa (1) already referred to and in the earlier case of Matadin v. Ali Mirza (4). The respondents have suggested before us that the rule laid down in these cases is incorrect, but they can adduce no authority in their favour except the ruling of the Bombay High Court in Arjun Rampiv. Ramabai (5) which was concerned with a suit by the legal representatives of a minor. The learned Judges held that where a minor died after attaining majority his legal representatives could bring a suit within three years of his attaining majority. They expressly stated, however, that they were not concerned with the question decided in Rudra Kant's case (2) with reference to representatives by transfer. We agree with the view laid down in the Calentta and Madras cases that both, on the wording of the Act and in view of the intention of the provisions, a transferes sannot elaim the benefit of section 6. As the learned Judges of the Madras High Court pointed cut if the view contended for by the respondents is correct sub-section (3) of section 6 is entirely superfluous.

With the greatest respect to the learned Judge who decided Imam-ud din v. Mumtazun-nissa (1), we can find no reason for the distinction there taken between a suit brought on the date of the transfer and a suit brought on a subsequent date. Either the benefit of section 6 is a personal one or it is not. If it is a personal one, which may be regarded as settled by the authorities already referred to, it makes no difference whether the alienes sues one hour or one year after the transfer takes place. Until the transfer is complete he has no cause of action at all. As soon as the transfer is made, the special privilege which is vested in the minor is extinguished. As was pointed out by our learned solleague in the referring order, the distinction drawn in the concluding portion of the judgment in the ease of Imam ud din v. Mumtae.un-

^{(1) 27} Ind. Cas. 118; 18 O.C. 31; 1 O. L. J.

^{747.} (2) 9 C. 663; 12 C. L. R. 269; 4 Ind. Dec. (N. 8) 1091,

^{(3) 50} Ind. Cas. 880; 42 M. 637; (1919) M. W. N. 448; 26 M L. T. 147; 10 L. W. 383.

^{(4) 5 0} C. 197 at p. 208. (5) 37 Ind. Cas. 221; 40 B. 564; 18 Bem. L. R. 579.

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of the transfer and a suit instituted on the day of the transfer and a suit instituted subsequently is not to be found in any of the eases relied on by the learned Judge in support of his decision. It is noticed by Mr. Rustomji in his commentary with a querry, which appears to us well founded, whether any such distinction is made by the Act. For the above reasons, we hold that the decision of the Courts below on the point of limitation is incorrect and that the suit was barred by time.

We may note in conclusion that the respondents have argued that adverse possession did not begin till 1910 when the appellants actually began to reside in the house and that the sale-deed was not proved. From the judgment of the Court below it appears that neither of these facts was challenged before it. It is enough to say that there is sufficient evidence to establish the sale-deed and that there is a finding of fact of the lower Appellate Court, supported by evidence, that adverse possession began in 1906.

We accordingly allow the appeal and dismiss the suit with costs in all Courts. The suit having been dismissed, the cross-appeal fails and is dismissed with costs.

J. P. Appeal allowed.

OALOUTTA HIGH COURT.

APPEAL PROM APPELLATE DECKER No. 2007

OF 1917.

June 29, 1920.

Present: --Justice Sir N. R. Chatterjea, Kr.,
and Mr. Justice Newbould.

SABJAN MANDAL-PLAINING.

APPELLANT

Bengal Tenancy Act (VIII of 1835), s. 167—Purchaser of holding at sale in execution of rent-decree —Previous purchaser in execution of mortgage-decree — Subsisting encumbrance.

On the 18th September 1913 the plaintiff purchased a holding in execution of a decree for arroars of rent obtained in a suit instituted on the 16th April 1912. In taking possession he was resisted by the defendant who had purchased the interest of one of the tenants in execution of a mortgage.

decree on the 18th May 1912. Thereupon the plaintiff brought the present suit for recovery of possession on the basis of his right by purchase at the ront-sale:

Held, that inasmuch as rent was the first charge on the holding the defendant's purchase was subject to that charge and that, therefore, there was no subsisting encumbrance at the date of the plaintiff's purchase which the plaintiff was bound to annul under the provisions of section 167 of the Bengal Tenancy Act. [p. 104, col. 1]

Appeal against a decree of the District Judge, Murshidabad, dated the 19th of July 1917, reversing that of the Munsif, First Court at Jangipur, dated the 27th of June 1916.

Babus Jogendra Nath Mukherjee, Bankim Chandra Ghose and Kanaidhone Dutt, for the Appellant.

Babu Hemendra Nath Sen, for the Re-

JUDGMENT.—The plaintiff, who is the appellant in this case, purchased a holding in execution of a decree for arrears of rent on the 18th September 1913 and obtained formal possession on the February 1914. He was, however, resisted by the defendant who had purchased the interest of one of the tenants in execution of a mortgage decree on the 18th May 1912. The rent suit appears to have been instituted on the 15th April 1912, and the sale in execution of the rent-droree took place, as stated above, on the 18th September 1913. The defendant's purchase at the sale in execution of the mortgage deeree, therefore, took place after the institution of the rent suit, but before the sale in execution of the rent decree.

The plaintiff brought the present suit for recovery of possession on the basis of his right by purchase at the rent sale. The Court of first instance decreed the suit. On appeal the decree was reversed on the ground that the plaintiff had not annulled the ensumbrance of the defendant, the service of notice under section 167. Bengal Tenancy Act, not having been proved. The plaintiff has appealed to this Court.

The question for consideration is, whether the defendant had any subsisting ensumbrance at the date of the purchase by the plaintiff at the rent sale which it was necessary to annul under the provisions of section 167 of the Bengal Tenancy Act, The learned District Judge, relying

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upon the decision in the case of Banbihari Kapur v. Khetra Pal Singh Roy (1), held that "the right purchased by the defendant was an encumbrance within the meaning of section 161 of the Bengal Act", and that he was entitled to "fall back upon his original mortgage as a shield" against the purchaser in execution of the landlord's decree for arrears of the rent of the holding in question.

The learned Judges in the ease of Banbihari Kapur v. Khetra Pal Singh Roy (1) relied upon the decision in Bhawani Koer v. Mathura Prasad (2). The latter ease was, however set aside on appeal by the Judicial Committee: See Bhawani Kumar v. Mathura Prasad Singh (3).

It was beld by their Lordships that after the sale took place on the mortgage, the mortgages who purchased at the sale became the owner of the property and that he could not maintain as against himself or against third parties unconnected with the mortgage transactions upon the property, the position that his mortgage still remained an encumbrance thereon.

It is true that the defendant's purchase in execution of the mortgage decree took place after the institution of the rentsuit, but he purchased a portion of the holding long before the sale in execution of the rent-decree took place and although he was not liable for arrears of rent for the period before his purchase, the rent was a first charge upon the holding. He, therefore, purchased subject to that charge, He became the owner of a portion of the holding before the rent sale took place, and his interest in the holding (which was that of an unregistered transferee) passed at the rent sale. There was, therefore, no subsisting encumbrance at the date of the plaintiff's purchase which the plaintiff was bound to annul under the provisions of section 167 of the Bengal Tenancy Act.

The decree of the lower Appellate Court is accordingly set aside and that of the Court of first instance restored. We make no order as to costs.

B. N. Decree set aside.

(1) 13 Ind. Cas. 785; 38 C. 923; 16 C. W. N. 259.

(2) 7 C. L. J. 1 at p. 20.

(3) 16 Ind. Cas 210; 40 C. 89; 16 C. W. N. 935; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO 411 OF 1921.

February 23, 1922.

Present:—Mr. Justice Oldfield and

Mr. Justice Vencatasubba Row.

SUDALAIMUTHU KUDUMBAN—

DEFENDANT—PETITIONER

ANDI REDDIAR-PLINTIFF-RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13

- Provincial Small Cause Courts Act (IX of 1887),
s. 17 (1)—Limitation Act (IX of 1908), s. 5, applicability of—Application to set aside exparte decree—
Payment of decree amount after limitation period—
Power of Court to excuse delay.

A payment required by the proviso (1) to section 17 (1) of the Provincial Small Cause Courts Act is not independent of the petition for setting aside a decree passed ex parte but is an element required to complete such a petition. [p. 105, col. 2.]

Section 5 of the Limitation Act is applicable to the applications under Order 1X, rule 13, Civil Procedure Code, even when that procedure takes place in a Court of Small Causes. [p. 105, cols. 1 & 2.]

Therefore, a Small Cause Court Judge is competent to excuse the delay in depositing the decree amount in Court on an application under Order IX, rule 13, Civil Procedure Code. [p. 105, col. 2.]

Petition, under section 25 of Act IX of 1887 and section 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Taticorin, dated the 8th November 1920, and made in Execution Application No. 448 of 1920 and I. A. No. 850 of 1920, in Small Cause Suit No. 299 of 1920.

Mr. T. Nallaswami Fillay, for the Peti-

Messrs. Ohidambaram and Morthandam, for the Respondent.

JUDGMENT.—This is a petition asking us to revise the order of the Subordinate Judge of Tutisorin refusing to set aside an ex parte decree passed in a Small Cause suit. The petitioner alleges that he came to know of the decree which had been passed on 31st March 1920, only about two weeks before he filed his petition on 30th July 192). Unfortunately, owing, as the lower Court has found, solely to a mistake of his Pleader's gumastah, he did not pay with his petition the whole of the decree amount. On the other side objecting that his payment was deficient, he, however,

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made good the deficiency. But he did so after the time of 30 days from the date of his knowledge of the decree, within which his petition would have been in time. The question then was whether the Court could exense the delay under section 5 of the Limitation Act. It has refused to do so, and we have been asked to revise its order of refusal.

The lower Court has dealt with the matter at considerable length, although it is really, in our opinion, very simple. We do not propose to follow the lower Court through over elaborate discussion. Shortly, its difficulty was that section 5 has been made applicable by an order of this High Court to petitions under Order IX, rule 13, but it has not been made applicable to payments under the proviso to meetion 17 (1) of the Provincial Small Cause Courts Act. This, however, cao, in our opinion, easily be met. There was, of course, no difficulty under the former Ocde.

Section 17 (I) of the Small Cause Courts Act makes the chapters and the sections of the Code specified in the Second Schedule thereof, the procedure to be followed in Courts of Small Causes in all suits and in all proseedings arising out of such suite, subject, of course, so far as section 10: of the previous Code was concerned, to the proviso already referred to. The Code now in force, no doubt, does not re-produce the Schedule of the former Code, but that is clearly because the Legislature took another course and embodied the contents of the Schedule in substantive provisions of the Oode itself. For there is, firstly, the general application of the Code to all Courts subjest to the superintendence of the High Court. There is, next, section 7, which specifies certain substantive provisions of the Code as not applicable to Small Cause Courts, and Small Cause Order L, which excepts certain orders. Neither the section 7, however, nor Order L excepts Order IX. It is, therefore, clear that Order IX will be applicable to the case before us. sufficient to displace one argument which has been suggested, that the section, taken with the Second Schedule of the former Code, and section 158 of the present Code, cannot be read as applying the provisions of the present Code, in so far as they differ from those of the former Code. Section 5 of the

Limitation Act having been applied to Order 1X, it will be none-the-less applieable to the prosedure under that Order, when that procedure takes place in a Court of Small Canses.

It is then, however, argued that the pay. ment required by the proviso to section 17 (1) must be considered as independent of the petition for setting aside a decree passed ex parts and that section 5 cannot be applied to the making of that payment, as justifying the Court in excusing the delay in making it. The answer is that the pay. ment is directed only in connection with the filing of a petition under Order IX. rule 13 and is as much an element required in order to the completeness of such a petition as any other portion of it, for instance, the stamp or verification; and this view of the payment referred to in the proviso to section 17 (1) is entirely consistent with the tenor of the judgment of the Fall Banch of this Court in Assan Mahomed Sahib v. Rahiman Sahib (1).

The result is, that the order under revision cannot be sustained on the grounds by the lower Court, The lower Court has already placed on record its opinion that if discretion to expuse the delay in making the payment were vested in it, this would be a case in which that discretion might properly be exercised, and no reason for dissent on W8 800 that

point.

The remaining question ie, accordingly, whether the patitioner did, as he alleges in paragraph 3 of his affidavit, come to know of the passing of the decree against. him only about two weeks before his petition was filed. On that point the lower Court has recorded no evidence and there is no finding. We must set aside the lower Court's order and remand the petitions for re-admission and disposal in the light of the foregoing after enquiry as to whether the petitioner's statement just referred to is true. Costs to date will be costs in the cause and will be provided for in the order to be passed by the lower Court.

M. C. P.

J. P.

Fetition allowed: Case remanded.

(1) 55 Ind. Cas. 977; 43 M. 579; 11 L. W. 543; 38. M, L. J. 539; 28 M, L. T. 17; (1920) M, W. N. 875.

BUTAB ALI U. MURAMMAD ZAMAN DEG.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 196 or 1921. October 28, 1921.

Present:-Pandit Kanhaiya Lal, J. C., and Mr. Dalal, A. J. C.

Shaikh RUTAB ALI AND OTHERS-DEFENDANTS-APPELLANTS

versus

MUHAMMAD ZAMAN BEG AND OTHERS-

Lease-Conditions to be fulfilled by lessee-Resumption of lease-hold-Inder-proprietary title, whether can be acquired.

Where a lease imposes upon the lessee certain conditions to be fulfilled by him and provides for the lessor resuming the lease hold in case the lessee fails to satisfy any conditions, but those conditions are nolonger operative, and the possible bar to the lessee's under-proprietary title has been removed, the rights conferred by the lease are perfected into under-proprietary rights. [p. 107, col. 1.]

Data Ram Tewari v. Deokali Tewari, 25 Ind. Cas. 855; 17 O. C. 299; 1 O. L. J. 463, distinguished from

Appeal from a decree of the District Judge, Fyzabad, dated the 11th April 1921, confirming that of the Additional Subordinate Judge, Fyzabad, dated the 19th July 1920.

Mr. Hailer Husain, for the Appellants. Mr. Nia nat Ullah, for the Respondents.

JUDGMENT,-This second appeal has been referred for the desision of a Banch by a learned Judge of this Court. question for determination is, whether a perpetual lessee of agricultural land holding the rights conferred by the leass in quastion would some under the definition of an under-proprietor given in the Oath Rent Ast, section 3 (8). It will not be possible to deside such a question generally because the decision of every case will depend on the conditions of the lease. In the present ease the perpetual lease to be interpreted was executed by a predecessor of the palintiffs Zemindars in favour of the defendants' predecessor-in-interest on 9th January 1885. It purports to be a perpetual lease of 26 bighas of land at a rental of Rs. 38-40 with a right of transfer to be held generation after generation on the payment of the same rate of rent which was not to be revised till the time of the next Settlement.

lessee had been granted a previous lease of 11 bighas of land at a rental of Re. 15 on 7th May 1883. That lease also was a perpetual leare, and the land covered by that lease was, it is conceded, entirely different from the land included in the lease for consideration here. The lessor in the lease of 1885 declared that the prior lease of 1883 was cancelled and further made it a condition of the lease of 1825 that if the lessee should lay claim to the 11 bighas of land of the cancelled lease on any future date, the present lease of 1885 would be reseinded. Another condition of the lease of 1885 was that in case the lessee desired to transfer his rights the offer should first be made to the lessor or his successors. A lessor contracting for a right of re-purchase does not in any way derogate from the transferable quality of the rights transferred under the lease. The question to determine is, whether the other sondition, giving the lessor a right of re-entry by reseission of the deed of lease, prevents the lesses becoming an under-proprietor of the property transferred. . In the ease Bameshar Bakhsh Singh v. Sankata Bakheh Singh (1) a Bench of this Court pointed out that the right of an under-proprietor was not exhaustively defined in section 3 (8) of the Oudh Rent Act. It held that if, in any circumstance, a proprietor is afforded a right of reentry against a transferee of agricultural land in Oudb, such transferee will not be entitled to under proprietary rights. According to that definition, where a lease imposed aron the lessee certain conditions to be fulfilled by him and provided for the lessor resuming the lesse bold in the lessee failed to satisfy any ditions no under proprietary right would be conferred on the lessee under such a lease. Applying the principle of law enunciated in that roling here, if the condition regarding re-entry in the lease were operative, the defendants would not have the status of under-proprietors under the Oudh Rent Act. In the present ease, however, that condition is no longer operative. The former lease was executed in 1883 and

^{(1) 25} Ind. Cas. 675; 1 Q, L. J. 889,

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admittedly the lessee lost possession of the lease land in 1885. The lessee cannot, therefore, claim any longer any rights under the lease of 1883. Such a claim having become impossible there is no possibility for the exercise by the lessor of a right of recutry and that clause should be put out of consideration in deciding whether the defendants are now under-proprieters or not. The possible bar to the defendants' ander-proprietary title has been removed; so we are of epinion that the rights conferred by the lease have been perfected into under-proprietary rights at the present moment.

The learned Counsel for the respondents referred us to the Bench case of Data Raws Tewari v. Deckali Tewari (2) in support of his contention that, in the siroumstances, of a transfer like the one under the lease in suit no proprietary or under-proprietary rights devolved on the transferse. In that ease it was held that a patta of birt sanhalp did not amount to a sale so as to give rise to a right of pre emption. There the question was one of consideration and different from the question raised in this ease. The lease was held not to be a because the consideration was not gale purely a money consideration but was compounded of a money-payment and the blessings of the Brahmans or their resformanse of the services of family pricats.

The learned Counsel for the respondents sought to distinguish between a right to enjoy property acquired by a lease under section 105 of the Transfer of Property Ast and the right of property possessed by an under proprietor. We see no distinetion between a right to enjoy property and a right of property in these two cases. It was urged that the lease by its form deelaring it to be a perpetual lease by the fact of rent being payable and by the proviso of a right of reentry fell short of conferring the right of an under-proprietor on the lessee. The form of transfer is not to be considered when an inquiry is made into the essential characters of a transfer, and an under proprietor is liable to pay rent and the proviso has been fully discussed above.

(2) 25 Ind. Cap. 855; 17 O. U. 209; 1 O. L. J. 463.

We are of opinion that in the present ease the defendants are under-proprietors of the land in suit. We, therefore, set aside the decress of the lower Courts and dismiss the plaintiffs' suit with costs of all the Courts.

J. P.

Appeal allowed.

PRIVY COUNCIL.

APPRAL PROM THE CALCUTTA HIGH COURT. Desember 2, 1921.

Present:-Lord Buckmaster, Lord Atkinson, Mr. Ameer Ali and

Sir Lawrence Jenking.

NATHUKHAN, SIRCE DECREED, (NOW REPRE-CONTRO BY BIDE MARBUBANNESSA

CHTERS

Thatur BURTONATH SINGH AND OTHERS-

Rustonpants,

Transfer of Property Act (IV of 1882), s. 55 (1) (g), (2)—Property sold free from encumbrance—Encumbrance existing—Purchaser, when deemed to be compelled to pay encumbrances—Purchaser, right of, to refund.

Where a sale-deed contains an express declaration that the property is sold free from encumbrances the vendor by reason of section 55 (1) (g) subsection 21 of the Transfer of Property Act is deemed to contract with the buyers that he has power to transfer the property so sold and that the property is free from burdens. [p. 108, col. 1.]

A purchaser of a preperty is deemed to be compelled to pay off mortgagees who have obtained decrees for sale of the proporty purchased by him, even though a sale is not immediately threatened. [p. 109, col. 2.]

Where a vendor of immoveable property binds himself to deliver the property free from encambrances but the purchaser has to pay either for redemption of the mortgages existing on the property purchased by him at the date of such purchase, or for purchase of the property on sales under such mortgages or to prevent sales he is entitled to a refund of all monies so paid by him. [p. 109, col. 2.]

Appeal from a decree of the Calentta High Court (Chaudhuri and Newbould, JJ.), reversing a decree of the Subordinate Judge, Hezaribagh.

FAOTS.—The appellants purchased three Monsahs in the Zemindari of Bagdo, from one Lakhpat Nath in 1964. The purchased deed contained the express declaration that

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the property was sold free from all encumbrances. But there were in fact certain encumbrances existing on the property at the date of the purchase. The vendor sold certain other properties to the first defendant to pay these encumbrances but they were not paid. On the mortgages who held the prior charges taking steps to realise their securities by sale, the first appellant paid certain sums to them in order to clear the property. The appellants instituted the present suit to recover the amounts paid by them from the first defendant and their vendor or from their properties.

The Trial Judge decreed the claim of the appallants, but on appeal the High Court allowed the appeal and dismissed the suit on the ground that the appellants were not compelled to make the payments to aver: the sale. Hance this appeal.

Mr. Kenworthy Brown, for the Appellants.—Section 55 of the Transfer of Property Act, IV of 1262, clearly lays down the duties of the vendor. The payments were made by the appellants to prevent the sale of the purchased property. The appellants are bound to redeem and pay the prior mortgagess.

Section 69 of the Indian Contrast Act is

JUDGMENT.

LORD BUCKMASTER. - On the 6th September 1904 one Lakbpat Nath sold to Natha Khau, Girab Ali Khan, Badhan Khan and Raman Khan, three Marzahe situate in the Zimindari of Bagdo, at the price of Rs. 19,000. Natha Khan is dead and his representatives, together with the other purchasers, are the present appellants. purchase price was to be discharged by the eancellation of certain debts due from the vendor to the purchasers and as to the eash. in The purchase-deed contained the express declaration that the property was sold free from ensumbrances and consequently by section 55 (1) (g), sub section (2) of the Transfer of Property Act the vendor must have been deemed to contract with the buyers that he had power to transfer the property so sold and consequently that the property was free from burdens. In truth there were existing

upon the estate considerable charges and it appears that the vendor recognising this being auxious to seeure their fact and liquidation on 7th September 1904 entered into an arrangement with one Bindesri Obsran. This took the form of a sale by the vendor to Bindeeri Charan of another estate for a sum of Rs. 82,200, the purchase-price to be discharged by the payment of a considerable number of debts, which included, among others, those owing upon the property already sold to Nathu Khan and his co-purchasers. Had Bindeeri carried out the terms of that arrangement no dispute would have arisen, but, unfortunately, he did not and as the mortgagees who held the prior charges upon the property sold to Nathu Khan and others proceeded to extremities and took steps to realise their securities by sale, Nathu Khan, apparently alone but probably on behalf of all the purchasers, paid three separate sums of Rs. 4,287, Rs. 37,090 and Rs. 4,645 in order to clear the property, and no part of these moneys has been re-paid to them. About these facts there appears to be no doubt, for, although the High Court, from where this appeal proseeds, appears to have doubted whether the property was actually subject to an effectual order for sale, yet the fast that it was subject to the mortgages appears reasonably clear. After the payments had been made. Nathu and his co-purchasers instituted a suit against Bindeeri, Lakhpat, who was defendant No. 2 to the proceedings, and others, asking for the recovery of the sums paid against the properties and persons of the defendants. The plaint was a clumey dosument, and the suit as against Bindesri was misconseived, for the plaintiffs were no parties to the deed of 7th September 1901 and no trust was thereby ereated in their favour. The real case was a personal claim against Lakhpat, and this is in fact included in the general confusion of the suit. A subsequent suit was also brought by Lakhpat Nath against Bindesri Charan and Nathu Khan and his so purchasers and others to obtain ressission of the sale of 7th September 1904 on the ground that Bindeeri Charan had wholly failed to comply with the obligations that he undertook for Nathu Khan; the purchaser was made a party to this suit which was compromised before trial and the compromise became incorporated

NATHU KHAN U. BURTONATH BINGH,

in a deeree under the seal of the Court of the 20th July 1908. It is unfortunate that this decree is couched in language which renders it extremely difficult to give a fair grammatical construction to all its terms, but their Lordships think that none-theless its purpose is elear and the obscurity is doubtless due to the fact that it represents the actual agreed terms of the parties which put into plain legal rot been bave phraseology. The desres provides for the return of the properties sold to Bindesri, subject to a condition expressed words:-

"That in case the defendant No. 2 becomes liable to Nathu Khan and others (plaintiffs in Suit No. 122 of 1907), in the final decree in that suit, that sum will be payable by the plaintiff to those defendants, and the property which is the subject of this suit will remain charged with this debt payable to those defendants."

The effect of this order was as follows: that if Lakhpat Nath, who, notwithstanding the fact that be was plaintiff, because he was defendant No. 2 in Suit Nc. 122 of 1907, is referred to as the defendant No. 2, becomes liable to Nathu Khan and others who are the plaintiffs in the Suit No. 122 of 1907, in the final deerse of that suit that sum—that is the sum for which he is liable—will be payable by him, LakhputNath, to Natha Khan and others and the property the subject of the present suit will remain charged with the debt payable to those defendants. The confusion in this decree is due to the fact that while it refers to the suit instituted by Nathu Khan against Lakhpat Nath and others to obtain a declaration of liability, it introduces the description of the parties alternately by virtue of their capacity in that suit and their capacity in the suit which is being compromised, with the result that the same person becomes the defendant and the plaintiff in the same sentence. Their Lordships having carefully studied the language of the decree are satisfied that the interpretation that they have placed upon it is correct and indeed it is the only interpretation that could give reasonable effect to the claim that Nathu Khan possessed against Lakhpat Nath at the time when the suit was set on foot. suit referred to as No. 122 of 1907 was the suit brought by Nathu Khan and others

asking for relief against Lakbpat Nath in respect of payments to which reference has been made and it is the suit out of which this appeal has arisen. Lakhpat died before this suit came on for hearing, his heir was added in his place, and the learned Subordinate Judge held that as he derived benefit from the payments made by the plaintiffs, it was equitable that the plaintiffs must be resouped, and he ordered sale of the properties that had been sold to Bindesri, if the amount were not paid.

Upon appeal the High Court held that the plaintiffs were not compelled to make the payments to avert the sale and that

they were not entitled to any relief.

Their Lordships find it difficult to accept the view that purchasers of a property are not compelled to pay off mortgagess who have obtained decrees for sale, even though a sale is not immediately threatened, but it appears there were questions about the nature of the sales not explained to their Lordships which may have caused misunderstanding on this bead.

The present appellants are themselves responsible for what occurred, for there would have been no difficuly in obtaining relief had the section of the Transfer of Property Act to which attention has been called been placed before the Court. It is plain from that section that as Lakhpat Nath had bound himself to deliver the property free from ensumbraness, and had only delivered it subject to the charges which Nathu paid. Lakhpat was, therefore, liable paid by the purchaser for the monies in order to clear his title. If that simple view had been presented to the Court of first instance and to the High Court their Lordships see no reason to doubt that the matter need not have proceeded as far as this Board; but the Courts below appear to have been confused with the effect of what had taken place and they do not seem to have had their attention directed either to the Statute or to the decree although the compromise was mentioned. It may be that as decree was made after this suit was instituted, its execution might have been a difficult matter in the present proceedings, but with that their Lordships do not intend in any way to interfere. All that they think the appellants here are entitled to is (a) a declaration that in the eireumstances Lakhpat

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Nath did become liable to Nathu Khan for the monies paid by Natha Khan either for redemption of the mortgages existing on the property purchased by him on the kobala of the 6th September 1934 at the date of such purchase, or for purchase of the properties on sales under such mortgages, or to prevent such sales; and (b) that the person mentioned in the decree of the 20th July 1908 as the defendant No. 2 was intended to be Lathpat Nath. Their Lord. ships, for these reasons, will humbly advise His Majesty that the judgment appealed from should be set aside and the decree of the learned Judge of first instance be medified by the introduction of the above declara tion that Lakhpat was liable to the plaintiffe in the suit for the monies paid under either of the above heads, and if any dispute exists as to such payments an enquiry must be directed to ascertain the facts. The appellants will have their sosts in the Courts below. There will be no costs of the appeal.

J. P. Sppeal allowed.

Solicitors for the Appellants.-Messrs. Pugh & Co.

OUDH JUDIOIAL COMMISSIONER'S COURT.

FIRST CIVIL APPRAL No. 35 or 1920. August 2, 1921.

Present: -Mr. Dalal, A. J. C., and Syed Wazir Hasan, A. J. C. KARIM DAD KHAN AND OTERES— DEPENDANTS—APPELLANTS

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Musammat BIBI GHAFURAN, DRAD, AND ON HER DRATH MUHAMMAD MUSTAFA KHAN AND OTHERS—PLAINTIFFS—
BESPONDENTS.

Construction of documnt-Lease, perpetual, interpretation of-Re-entry or reversion, right of-Absolute interest-Under-proprietor, rights of-Oudh Rent Act (XXII of 1886), s. 3 (8).

The true construction of a document does not depend upon the name which is given to it, but it must be determined with reference to its terms. [p. 111, col. 1.]

A document was christened with the name of a "perpetual lease." After reciting theorem of the lands which were the subject matter of the dead, the

document prescribed a jama of Rs. 102.2.0, annually payable by the lessor and then proceeded as follows:—"I do hereby agree and reduce to writing that the said" lessee "having his possession over it shall annually pay the pay of the Patwari and Chaukidar, i. c., the entire amount of Rs. 102.2.0 shall be paid to the Government and he shall remain in possession and enjoyment of the same generation after generation mastan bad nastan, bathan bad bathan and shall exercise all sorts of proprietary powers (akhtyarat bater malikana)." The granter did not reserve any right of re-entry or reversion in his favour in any event. It was found that the donee and his sons used to pay rent to the donor and her transferee:

Held, that the above document created an absolute interest in the dones with this qualification that a liability to pay the annual jama of Rs. 102.2.0 was imposed on him, so that he became an under-proprietor of the lands as defined in section 3 (8) of the Oudh Rent Act. [p. 111, col. 2; p. 113, col. 1.]

Kalka Singh v. Suraj Bali Lal, 45 Ind. Cas. 203; 5 0.

L. J. 80, explained and distinguished from.

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 14th May 1920.

Mr. Muhammad Wasim, for the Appel-

Dr. J. N. Miera, for the Hon'ble Pandit Gokaran Nath Miera, for Respondent No. 2.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Sultanpur, dated 14th of May 1920, by which the plaintiff respondent's suit was decreed. The suit was instituted by one Musammat Bibi Ghafaran who, on her death, is now represented by the fear respondents in this appeal. The relief which the plaintiff prayed for was a declaration to the effect that the lease, dated the 19th of December 1873, conferred no right superior or inferior in the lands in suit on the defendants.

The eriginal owner of the properties in suit was one Musammat Bibi Rahmani who executed the document of the 19th of December 1873 in favour of her brother, Jahangir Khau, who is now represented by the four defendants in the suit. On the 19th of November 1895 the same Musammat Bibi Rahmani executed a deed of gift of her entire property in favour of Musammat Bibi Ghafuran, the plaintiff in the suit, and in virtue of the title acquired by Musammat Ghafuran under the deed of the 19th of November 1895 she brought the suit out of which the present appeal has arisen.

The defendants urged a number of pleas in defence but in appeal to this Court the two grounds, which are set forth in the KARIN DAD KHAN C. BIBI GHAFORAN.

memorandum of appeal, attack the finding of the learned Subordinate Judge relating to the interpretation of the deed of 19th Decem. ber 1873. The argument urged before us in support of the appeal is to the effect that the deed in question created at least heritable and transferable interest in favour of the donee, Jahangir Khan. The sole question, therefore, which arises for decision in the appeal is the true interpretation of the dosument of the 19th of Dacember 1873. The learned Subordinate Judge found that the said deed erested heritable but not transfer. able interest in favour of Jahangir Khan. We may reproduce here the learned Subordinate Judge's finding on the question.

"On a true construction of the document it appears to me to be nothing more than a perpetual lease. It certainly does not give a life estate as is alleged in the plaint but is a heritable lease. It also does not amount to an absolute transfer of the proprietary rights because under this lease the lessees are liable to pay a certain amount every year to the lessor. It does not in any way

give any transferable rights."

The document is christened with the name of a "perpetual lease". The true construction of a document does not depend upon the name which is given to it, but it must be determined with reference to its terms. After reciting the area of the lands, which are the subject-matter of the deed, the document prescribes a jama of Rs. 102 2-0 annually payable by the lessor and then proceeds as follows:—

"I do hereby agree and reduce to writing that the said Khan having his possession over it shall annually pay the pay of Patwari and Chaukidar, i. c., the entire amount of Rs. 102-2-0 shall be paid to the Government and he shall remain in possession and enjoyment of the same generation after generation (naslan bad naslan, batnan bad

bathan) and shall exercise all sorts of proprietary powers."

It is conceded that these words of the grant create a heritable interest in the dones. The learned Subordinate Judge is also of the same opinion, but the contention on behalf of the respondents is that the dones did not acquire a transferable interest, and consequently the grant creates only heritable and non-transferable tenure. We provide the opinion that the contention put

forward on behalf of the respondents is not sound. We think that the words of the grant which we have quoted above create an absolute interest in the donee with this qualification that a liability to pay the annual sama of Rs. 102.20 is imposed on him. The words "naslan bid naslan" have acquired a technical import in Indian conveyancing. If we were to interpret these words in their literal sense they would mean, line of descendants in unending succession. This sense of the words leads to one or the other of the two conclusions:—

(1) that the successor in each generation takes as a donee under the terms of the

grant, or

(2) that the first dones takes an absolute estate. The first conclusion must be rejected because it would, in the first instance, infringe the rule against perpetuity and, secondly, would create an estate of a nature of an estate tail which is wholly foreign to the Muhammadan Liw by which the parties to the suit are governed. The result is that we must adopt the construction which leads to the second of the two conclusions indicated above.

In the ease of Thakur Harihar Baksh v. Thakur Uman Parshad (1) Lord Hobhouse, in delivering the judgment of the Judicial Committee, made the following observations which appear to us to be sonelusive on the question of the construction of the deed of

the 19th of December 1873:-

Their Lordships have not been farnished with any authority; in fact Mr. Branson has fairly said he can find no authority in which a gift with the words naslan bad naslan' attached has been held to confer anything less than the absolute ownership. On the contrary, in the various cases in which the expressions 'mokurari', 'istemrari'. istemrari mokurari', have been weighed and examined with a view to see whether an absolute interest was conferred or not, it seems to have been taken for certain that, if only the words 'naslan bad naslan' had been added, there would have been an end to the argument, because an absolute interest would have been elearly conferred. Their

^{(1) 14} C. 293; 14 I. A. 7; 11 Ind. Jur. 196; 4 Sar P. C. J. 766; Rafique and Jackson's P. C. No. 95; 7 Ind. Dec. (N. 4.) 196,

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Lordships think that the insertion of those words in the razinama would be conclusive in itself; but, looking at the expressed objects of the ratinana, they would come to the same conclusion even if words of a less peremptory character had been used."

Further, besides the words upon which we have laid stress so far, we find that the grant confers "all sorts of proprietary powers" upon the donee (akhtyarat bator malikana). The word "malikana" is a grammatical variation of the word "malik", and connotes powers of a malik, and must be given the same meaning as the word malik" itself. This word has also acquired a technical sense conveying a heritable and alienable estate as was observed by Lord Davey in his judgment in the case of Lalit Mohun Singh Roy v. Chukkun Lal Roy (2). The same view was expressed by Lord Collins in the ease of Surajmani v. Rabi Nath Otha (3). His Lordehip said :-

"But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word malik' the sontext does seem to strengthen the presumption that the intention was that malik' should bear its proper technical

meaning."

The respondents in this case contend that the name "perpetual lease" given to the document excludes the presumption We do not think that absolute ownership. that fact in any way affects the technical sense of the word 'malik' or the presumption of absolute ownership arising out of the use of that word. As we have said before, it is not the name given to a document which would determine its construction but the interpretation must be founded on the terms of the deed as a whole. In the case of Tirugnanapal v. Fonnammai Nadathi in construing a document which was styled as a Will, Lord Moulton observed:-

"But calling a document a Will does not

make it so."

There is no doubt, however, that by giving the name of a perpetual lease to the doon. ment under construction and by fixing

(2) 24 C. 834; 24 I. A. 76; 1 C. W. N. 387; 7 Sar.

P. C. J. 155; 12 Ind. Dec. (N. s.) 1224.

(3) 30 A. 84; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 35 I. A. 17; 14 Bur, L. R. 221 (P. C.).

(4) 58 Ind. Cas. 228; 25 C. W. N. 511; (1920) M. W. N. 559; 28 M. L. T. 190; 12 L. W. 660 (P. C.).

liability to pay an annual ama of Rs. 102-2-0 the grantor Musimmat Bibi Rahmani intended to create only a subordinate tenure with heritable and transferable interest. There is also evidence on the record (P. W. No. 1) that Jahangir Khan, the donee, and his sons used to pay rent to Bibi Rahmani and Bibi Ghafuran. Such a tenure is generally treated as an underproprietary tenure in the Province of Oadh, The word "under-proprietor" is also defined in the Oadh Rent Act (Act XXII of 1886) section 3, sub-section (8) as 'any person possessing a heritable and transferable right of property in land for which be is liable to pay rent." The name of the document as a "perpetual lease" is, therefore, also not inconsistent with a grant of heritable and transferable right in the property which is the subject-matter of the deed in question.

The conclusion at which we have arrived is further strengthened by the proposition of law that property of every kind is transferable except as provided by any Act of the Legislature or by any other law for the time being in fores: See section 6 of the Transfer of Property Act (Act IV of 1882). And it is significant that the grantor does not reserve any right of re-entry or reversion in his favour in any event: See the decision in the ease of Nil Madhab Sikdar v. Narattam

Sikdar (5).

The lower Court has relied upon a decision of a learned Judge of this Court in the case of Kalka Singh v. Sura; Bali Lal (6) and that decision has also been pressed on us. To use the language of Lord Shaw in the case of Har Narayan v. Surja Kunwari (7): "The case merely illustrates the inexpediency of laying down a fixed and general rule applicable to the construction of settlements varying in terms and applying to estates varying in situation." The decision of the case reported in 5 Oudh Law Journal [Kalka Singh v. Suraj Bali Lal (6)] does not lay down any rule of construction. On the contrary, the learned Judge makes the following observation:-

"Cases like these must be decided on their own facts and the law being well understood the only question in each ease is, how the law is to be applied to the particular facts which are put before the Court."

(5) 17 C. 826; 8 Ind, Dec. (N. s.) 1095.

(6) 45 Ind. Cas. 208; 5 O. L. J. 80.

(7) 63 Ind. Cas. 34; 43 A. 291; 25 C. W. N. 961; 14 L. W. 633 (P. C.),

CHAJJU U. SHAM LAL,

In the document which was construed in the case reported in 5 Oath Law Journal Kalka Singh v. Suraj Bali Lal the words "akhtiyarat malikana" occur in the document before us were want. ing as were also the words "batnan bad batnan."

We, therefore, allow the appeal, set aside the deeres of the lower Court and grant a declara. tion to the respondents in the following terms:.-

That the defendants are not the propristors of the lands in suit, but that they are under proprietors, i. e., they possess heritable and transferable interest in those lands. The respondents will pay the costs of the appellante in the Court of first instance. Each party will bear its OWD coats in this Court.

J. P.

Appeal allowel.

LAHORE HIGH COURT. MIECELLARBOUS SECOND CIVIL ATPEAL No. 900 or 1921, November 2, 1921. Present:-Mr. Justice Scott Smith. CHAJJU AND OTHERS-DEPZHDANTS-APPELLANTS

SHAM LAL-PLAINT: FF-RESPONDENT. Civil Procedure Code (Act V of 1999), U. XLI, r. 23 -Remand-Court to which case can be remanded.

versus

The remand contemplated by rule 23 of Order XLI of the Civil Procedure Code is a remand to the Court from whose decree the appeal is preferred, but if the Appellate Court making the order of remand has power to transfer a case from one Court to another, there is nothing illegal in its remanding the case to some other Court.

An Additional Judge, however, has no power to transfer a case from one subordinate Court to another, and, therefore, cannot remand a case to a Court other than that which originally tried it.

Miscellaneous second appeal from an order of the Additional Judge, Delhi, dated the 3rd January 1921, reversing that of the Munsif, First Class, Delhi, dated the 8th Ostober 1920.

Mr. Jai Gopal Sethi, for the Appellants. Lala Gopal Chand, for the Respondent,

JUDGMENT .- This is an appeal from an order of the Additional Judge, Delhi, remanding a case under Order XLI, rule 23, Civil Precedure Code, for re-trial to a Court other than that which originally tried it. The ground upon which the Additional Judge remanded the case was that certain witnesses tendered by the plaintiff had not been examined by the Trial Court, and the Bench of this Court which admitted the appeal sent for the record to see whether the plaintiff or any other witnesses were tendered whether the lower Court examine bim or them. The Bensh was satisfied that this was so and admitted the appeal only on the question of the trans. fer of the ease to another Court than that which originally tried it. I, therefore, heard arguments upon this point only. According to Order XLI, rule 23, Civil Procedure Code, the remand should be to that Court from whose decree the appeal is preferred, but if the Appellate Court has power to transfer a case from one Court to another, there is nothing illegal in remanding the case to another, as was laid down in the case report. ed as Fati v. Gaddi (1). The officer who heard the appeal from the Munsit's order was the Additional Judge who had no power under the Paujab Courts Act or the Code of Civil Procedure to transfer a case from one Subordinate Court to another. His order remanding the case to another Court to that which tried it was, therefore, to this extent illegal.

I, therefore, accept the appeal so far as to order that the case be remanded to the Court which tried it. Mr. Gopal Chand on behalf of the respondent has urged that the Munsif who tried the case is prejudiced in favour of the defendants and that this Court should transfer the case to another Munsif. I am not, however, prepared to exercise my power of transfer. If the plaintiff has any ground for supposing that the Munsif who tried the case is prejudiced against him he can apply to the District Judge for transfer, Costs in this Court will be costs in the case.

Z. K.

Appeal accepted. (1) 2) Ind. Cas. 789; 158 P. W. R 1913; 279 P. L. R. 1913.

BBI NATH C. NAJMONNISA.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 176 OF 1920. January 19, 1922.

Present: - Mr. Daniels, A. J. C.
Pandit SRI NATH-DEFENDANT No. 1
- APPELLANT

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Musammat NAJMUNNISA, DECEASED, AND ON HER DEATH, Sh. GHULAM HUSSAIN AND CTHERS-PLAINTIFFS

Pancit SITAL PRASAD, DEC'ARD, AND
OR HIS DEATH MUSammat DHIYANTI
DEVI AND THE-8—
D. PENDANTS—RESPONDENTS.

Co-sharer-Joint land-Profits, suit for-Lease-Proprietor, full rights of, whether acquired-Mortgagee as well as lessee, position of.

F A co-sharer cannot always deal with joint land against the wishes of the other co-sharers

A lessee or a grantee may be a co-sharer for the purpose of a suit for profits, but he does not thereby acquire the full rights of a proprietor for all purposes.

Where a person obtains a lease with regard to a certain plot appertaining to joint shamilat land from one of the co-sharers and also obtains leases and mortgages from some of the other co-sharers, he is not entitled to deal with the lands as he likes, but is bound by the terms of the leases obtained by him.

Appeal from a decree of the District Judge, Fyzybad, dated the 15th March 1920, modifying that of the Munsif, Akbarpar, dated the 2 th March 1919.

Mr. Niomat Ullah, for the Appellant. Mr. Zahur Ahmad, for Respondents.

JUDGMENT .- The disputes in this case are now reduced to a narrow compass. The suit related to plot No. 639 in the village Basulpur Mubarakpur. There are two pattis in this mahal, Patti Zubeda Bibi and ratti Badri Parshad, and an area of 285 bighas 6 biswas shamilat land is held jointly by the proprietors of both. The plot in suit is in the shamilat land. The defendant-appellant is a lessee from the plaintiff. The lease contains an express covenant forbidding the deferd. ant to convert the land in suit into a bagicha or garden. The lower Appellate Court has granted an injunction to prevent his doing so. The injunction forbids the defendant to plant any fruit or garden trees or to do anything which would convert the land in suit into a bagicha or garden. Toe lower Appellate Court has maintained the

walls which the defendant has built round the land subject to this condition that if at any time the plaint ff or her successors in interest become entitled to actual possession of the land, the appellant and the second and third defendants in the Trial Court or their successors will be bound to demolish so much of the new walls on three sides of the garden as affects the area to actual possession of which the plaintiffs respondents or their successors become entitled. Other reliefs claimed by the plaintiff were refused.

Both parties filed separate appeals but the plaintiff's appeal abated on her death as her legal representatives made no application to be brought on the record. The appeal of the defendant, Pandit Sri Nath, has now to be decided. The defendant's learned Advocate does not deny that he is bound by the covenant in the lease as against the plaintiff. He argues that, because he has obtained leases and mortgages from some of the other co-sharers, he has, therefore, become a cosharer and cannot be prevented from dealing with the lands as be likes. Even a co sharer cannot always deal with joint land against the wishes of the other so sharers, but putting this aside, the appellant's argument is fallacious. It has, no doubt, been held in two rulings of this Court that a lessee or a grantee may be a so sharer for the purpose of a suit for profits, but that does not mean that he has acquired the full rights of a proprietor for all purposes. As against the plaintiff his rights are those which acquired under the lease. He has acquired no further rights against her and thing which has taken place the defendant and third parties deprive the plaintiff or her successors of her right to enforce the express sovenant entered into between her and the appellant, As regards the second relief it is conceded that it does no more than express what the rights of the parties will be in the event of the plaintiff's successors at any time becoming entitled to actual possession of the land and I, therefore, see no reason for disturbing it. The result is, that the appeal fails and I accordingly dismiss it with costs. J. P.

Appeal dismissed,

RANI OF TUNI U. MAHABAJA OF JETAPOBE.

MADRAS HIGH COUPT.

OLVIL MINCELLANEOUS PETITION No. 3544

CF 1919.

February 3, 1922.

Present: - Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.
THE RANI OF TUNI-PETITIONES

cersus

THE MAHARAJA OF JEYAPORE (. BC ASED) AND STHE-8 - BESPONDENTS.

Vizagnpatam Agency Rules, rr 16, 20—Execution proceedings, order in, whether 'decree'—Appeal, maintainability of—Suit wrongly worded as petition—Agency Court, jurisdiction of, to grant appropriate relief as in suit.

Rules 16 and 20 of the Vizagapatam Agency Bules apply only to decrees of an Agency Court and no appeal is provided in the hules against either orders passed in execution or other orders of a miscellaneous nature [p 1.5, col. 2.]

Sri Sri ri Vikramadeo Maharajulam Garu v Sri Neladeri Pattamadhadevi Garu, 28 M. 268 and Lagadavati Venkatanagabushanam v. Ovilapati Mahalarmi, 42 Ind. Cas 555, 41 M. 325; 31 M. L. J.

534, followed.

Miscellaneous orders by an Agent or Assitant Agent can be displaced only by an application to

the Governor in Council [p 1.6, col. 1]

Where what in reality is a suit is wrongly described as a petition it is open to the Agency Courts to grant the appropriate reliefs as in a sait, and orders passed on such petition may be regarded as decrees from which an appeal lies under rule 6, and a revision to the High Court under rule 20, of the Vizagapatam Agency Rules. [p. 116, col 1.]

Partition under rule 20 of the Agency Rules, V zagapatam, praying that, in the circumstances stated therein, the High Court will be pleased to issue an order directing the Agent to the Governor at Vizagapatam to review his proceedings in D. Dis. No. 2:5 of 1919, dated 17th June 1919, proferred against an order of the Court of the Special Assistant Agent, Parvatipur Division, dated 6th January 1919, and made in Miscellaneous Petition No. 1 of 1917.

Mr. D. Appa Rao, for the Petitioner.

Mesers, T. K. Srinivasathatha Chariar and
P. Soma Fundaram, for the Respondents.

ORDER.—This is a petition asking us to direct the Agent to the Governor, Vizaga-patam, to review his proceedings dismissing as inadmissible an appeal from a decision of the Assistant Agent.

A preliminary objection has been taken to our hearing the petition, that it does

not lie, because the Agent's disposal is not a decree, to which rule 20, V zigapatam Agency Rules applies. The question whether the Agent's disposal is a decree is indistinguishable from the question whether the decision under appeal before him was likewise a decree. The Assistant Agent was dealing with what undoubtedly was described before him as a petition and was beaded as prasented under Order XXI, rale 52, Civil Procedure Code. The circumstances were that the present first respondent was claiming the property attached by the present petitioner in execution of her decree against the second and other respondents. The Assistant Agent in dealing with the ease appears to have eventually deslined to decide the two issues originally framed which related to the claimant's title and to restricted his enquiry to possession with reference to the terms of Order XXI, rule 59. That was all in accordance with the character of the proceedings as resembling what in non agency tracts are known as claim proceedings. In fact, however, the petitioner, who was then in position of first counter-petitioner, had expressly pleaded that the claim procedure under Order XXI, rule 58, was not in force in the Agency tracts at all and had relied on a plea of title. The petitioner, therefore, cannot be held in any degree responsible, if the Assistant Agent erred in treating the proceedings before him as elaim proseedings or in limiting the scope of the enquiry consistently with their being of that pature.

The law applicable is contained exelu. sively in the Agency Roles already referred to. The only provision for appeal is rule 16, allowing an appeal from the Assistant Agent to the Agent, and there is, of sourse, the provision in rule 20 for the powers and control exercisable by this Court. Those provisions apply only to decrees and we have been able to find no provision for appeals against either order passed in execution or other orders of a miscellaneous character. If, then, we are constrained to regard the Assistant Agent's order as passed on a petition and as not constituting a decree, we shall have to hold that the appeal to the Agent was rightly rejected by him and to dismiss ANANT BAM U. NATIONAL BANK OF CPPER INDIA LTD., LUCENOW,

the present petition. To support the position that orders in execution are not appealable there is a decision in Sri Sri Sri Vikramadeo Maharaiulam Garu v. Sri Neladeri Pattamadhaderi Garu (1) and there is clearer authority in Lagadapati Venkatanagabushanam v. Ovilapati Mahalaxmi (2) to show that miscellaneous orders by an Agent or Assistant Agent can be displaced only by an application to the Governor in Council.

The result, however, is not, in our opinion, to limit a person in the first reapondent's position to a petition as the means by which he can make his claim. consequence is that, if he approaches the Coart in order to do so, he should be regarded rather as availing himself of the only remedy which the law in the Agency tracts provides; that is, the institution of a suit. The fact that he bimself deseribed his action as a petition and referred to a provision of the Civil Procedure Code which was wholly irrelevant, cannot prevent us from assertaining what was the real character of the proceedings or from treating them as what they really were, especially when we have not been shown how any unfair prejudice to any of the parties to them is to be apprehended, The necessary averments for a suit by a elaimant were contained in the first respond. ent's petition and the proper defenses were put forward in the patitioner's counterpetition. If the proper issues were not joined, that was, as already pointed out, through no fault of his. It may be observed that there is no reason why the existence in the Agency Court of a remedy by way of slaim petition should be assumed or the elaim procedure is not a part of English Law and there is no reason for regarding it as anything but a special provision of the Code or importing it into a legal system which has always stood on an independent foundation. In these circumstances, we feel at liberty to treat the proceedings as taken in the only manner available to the first respondent, by suit and, therefore, to regard the orders of the Assistant Agent and the Agent as desrees,

(1) 26 M. 268. (2) 42 lud Cas, 55; 41 M. 325; 31 M. L. J.

124.

the former being appealable and the latter being subject to the interference of this Court with reference to rule 20.

Taking this view, we must direct the Agency Commissioner to review his order after hearing the appeal on the merits in the light of the foregoing. In doing so, we take the opportunity to refer to a statement made by Mr. Appa Rso on behalf of the petitioner before us, which is entirely consistent with the record, that his elient was not heard before the order was passed. We are constrained to eall the attention of the Agency Com. missioner to this irregularity in his pre desessor's procedure. Secondly, we observe that the Agency Commissioner should, in dealing with the merits of the case, consider before desiding against the petitioner, whether the scope of the trial was not undaly limited by an unnesessary regard for the provisions of the inapplicable Order XXI, rule 59. We direct that easts of the proesedings in the Court here and in the lower Courts to date by costs in the cause and follow the result.

M. C P.

Petition allowe !.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 36 of 1921.

January 11, 1922.

Present: - Mr. Daniels, A. J. O.

Babu ANANT RAM - Dependant
APPELLANT

rerstes

NATIONAL BANK OF UPPER INDIA

L'MITED, LUOKNOW, THROUGH

Pandit PRAG NARAYAN,

GENERAL MANAGER, LATOUCHE ROAD,

LECCINGW-PLAINTIFF Babu ISHURI

PRASAU, VIKIL-DEPENDANT

—RESPONDENTS.

Contract-Money borrowed by executor to supple. ment testator's assets-Esscular, personal liability of.

AWANT RAM U. NATIONAL BANE OF UPPER INDIA, LTD., LUCE TOW.

Upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator. 'p 118, col ! |

Where there is no necessity for an executor to borrow money for the purposes of the estate and he borrows the money to supplement the assets left by the testator, the liability of the executor is a

personal one. [p. 118, col. 1.]

Appeal from a deerse of the Subordinate Judge, Lucknow, dated the 17th March 1921. Mr. Niamat Utlah, for the Appellant.

Massra. M. Wasim and B. N. Chakbast, for

Respondent No. 1.

JUDGMENT .- This ease is really a simple one. The suit was brought by the plaintiff, the National Bank of Upper India, Limited, on a pro-note expented by the first defendant, Baba Ishari Prasad, on 21st Dasambar 1916. The pro note purported to be executed by Ishari Prasad "in my capacity as trustee of Obhedi Lal's Dharamahala and administrator of Chhedi Lul's estate." It was executed in renewal of a pro-note dated 23rd Dasember 1913 executed by Babu Ishuri Prasad's late brother Baba Ganga Peasad Varma, The pro note was signed "Gauga Prasad Varma, executor of Chhedi Lul's estate." Chhedi Lul died in 1904 leaving the greater part of his estate for charitable purposes. He appointed four executors, of whom two were Baba Ganga Prasad and Baba Ishuri Prasad. Ganga Prasad alone took out Probate and was appointed executor by the Court. Hy desided to apply the money left by Chedi Lal in bailding a Dharamahala. Ha also applied a considerable amount of his money for the same purpose. In the spassh which he made at the public opening of the Diaram. shala, Exhibit 270, he stated that bailding would sout a little over Rs. 50,000, of which Rs. 35,000 had been or would be met from the estate of Cheddi Lal. In order to make up the amount he borrowed money from time to time on pro-notes of which the pro-note of 23rd Dasambor 1913 was one.

The present suit was originally instituted

against three defendants-

1. Babu Ishuri Prasad. Baba Anant Ram.

The mether of Baba Ginga Praiai.

Batwaan the plaintiff and the first and third defendants there is now no dispute.

ti'd ceen ded ctoi teredce taw ceimeremon A plaintiff and the first defendant, as a result of which the third defendant was discharged from the sait and a desree in terms of the compromise passed against the first defend. ant.

After Baba Ganga Prasad Varma's death in 1914, Baba Ishuri Prasad and one Baba Brijmohan Lil were appointed administrators of Chhedi Lal's estate. On 14th June 1917 their Letters of Administration were cancelled and, subsequently, on 5th March 1918, Letters of Administration were granted to the appellant Baba Anant Ram. It is in his eapsoity of administrator of Chhedi Lal's estate that Baba Anant Ram was made a defendant. The first relief asked for was a decree against the first defendant as trustee and manager of Chhedi Lul's Dharamshala. The second relief was that "if the said Dharamahala for any reason be not deslared to be a trust property but a portion of Baba Chhedi Lal's estate and assets then a decree for Rs. 9,911-15-2, with fature interest, be passed against the defendants Nos. 1 and 2 by creating a charge on the estate of Baba Chiadi Lal including the said Daaramabala" There was a third alternative relief asking for a desree against the defendant No. 1 personally and as in possession of property of Baba Ganga Prasad Varms, which is not now material. The learned Subordinate Judge has held the Dharamihala to be trust property but has navertheless passed a desree against the essend defendant as administrator, though this relief was only asked for in the plaint in the eyent of the Diaramshala not being held to be trast property. He has relied on the rating in Shee Shankar Gir v. Run Showi's Chowthri (1). Tais was a sait for query fewchus to eles a tart acitaralesh a erty by a pravious Mahant is invalid, and it is emseled by the respondent that it has n) application to the present fasts. Tas appallant contents, and rightly, that no such dasres sould be presed against him. The quistion waether the Diaramihals is trait proporty is absolutely inmaterial in this redictive gaininateb to escant ect act esse the appellant is liable as administrator. is almittelly not in passession

(1) 21 C. 77; 12 Ind. Dec. (x. s.) 717,

RALIA BAM U. DUNI CHAND.

Dharamshala and no decree against specific property could be passed on a simple pronote. The only question is whether Babu Ishuri Prassad or Babu Ganga Prasad, merely by purporting to sign a pro-note as executor, could render the estate of Chhedi Lal liable for the amount borrowed. The general rule established by Furhall v. Farhall (2) and referred to in Williams on Executors, Tenth Edition, page 1634, is in these terms:—

"It appears to me to be settled law, that, upon a contrast of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator."

Certain special cases in which the estate is liable are mentioned by the learned author in Chapter II of Part IV. This rule has been held applicable to India in two cases of the Caloutta High Court, Romanath Paul v. Kunai Lal Dry (3) and Debendra Noth Biswas v. Een Chandra Roy (4). In this case it is quite clear, on the contentions put forward by the respondent, that there was no necessity to borrow this money for the purposes of the estate. In so far as the money was borrowed by Babu Ganga Prasad to supplement the assets left by Chhedi Lol, his liability was olearly a personal one. If, we is also suggested, the money was partly b rrowed because there was considerable delay in realising the assets and Baba Ganga Prasad Varma did not want to wait, this was still not a case of necessity. It appears to me clear, therefore, that even if there are cases in which a decree on a pro note in respect of money borrowed by an executor can be passed against the estate, this is not one of those cases. In my opinior, the suit should have been dismissed as against the appellant and I allow the appeal and dismiss the suit as against him with costs in both Courts.

J. P.

Appeal allowed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No 3226 CF 1916.
October 26, 1921.

Present: - Mr. Justice Broadway and Mr. Justice Abdul Qudir.

RALIA RAM-PLINTIFF-APPELLANT

DUNI CHAND AND OTHERS-DEFENDANTS-

Registration Act (XVI of 1'09), s. 17 (2) 'vi'Partition-Award - List of properties allotted to coparceners - Registration.

lists of properties awarded by arbitrators to the different members of a joint Hindu family on partition form part of the award, and the mere fact that they are signed by the parties themselves does not make them compulsorily registrable. [p 119, col. 1.]

Second appeal from a decree of the District Judge, Gardaspur, dated the 5th August 1916, reversing that of the Subordinate Judge, First Class, Gurdaspur, dated the 11th December 1915.

Bakbshi Tek Chand, for the Appellant.

Lala Moti Segar, R. S., for the Respondents.

JUDGMENT.—This case was remanded by a Division Bench of this Court under Order XXII, rules 5 and 11. Civil Procedure Code, for the decision of the question whether Mehr Chand, deceased, was a member of a joint Hindu family with his brothers. The report has been returned and is to the effect that Mehr Chand, deceased, was not a member of a joint Hindu family with his brothers at the time of his death.

Objection is taken to this report by Mr. Tak Chand on behalf of the appellant, it being contended that the report is based on evidence, which is inadmissible. This inadmissible evidence is said to be a record of certain partition proceedings, which requires registration. The documents in question are lists of properties allotted by arbitrators in the course of their award to the various members of the joint Hindu family, which was then being disrupted.

Our attention has been drawn to Asimat Singh v. Kalwant Singh (1), and it has been urged that the documents in this care are practically the same as the documents in that one. We have perused the authority sited and examined the documents in this case, and are satisfied that the two cases are not

^{(2) (1872) 7} Ch. 123; 4! L J. Ch. 143; 25 L. T. 635; 20 W. R. 157.

^{(3 7} C. W. N. 104.

^{(4) 31} C. 253; 8 C. W. N. 135,

^{(1) 71} P. R. 1906; 111 P. L. R. 1907; 147 P. W. R. 1906.

SHEO RATAN U. RAN NABAYAN PANDE.

Asimat Singh v. Kalwant Singh (1), i.e., the lists of properties, were prepared by the so pareeners themselves. In the present case the lists were prepared by the arbitrators, and the mere eignature of the parties, i.e., the members of the family, on these lists does not remove these documents from the eategory of an award. We hold that these documents are a part of the award, and are, therefore, not compulsarily registrable under section 17 of the Registration Act. We are supported in our view by Wasir Ali v Mahbub Ali (2), in which case Gobardhan Das v. Jai Kishen Das (3) was approved.

We assordingly hold that it has been proved that Mehr Chand was not a member of a joint Hindu family at the time of his death. In these circumstances, admittedly, the appeal abates not only against the legal representatives of Mehr Chand, but against his so vendese, the sale being indivisible.

We accordingly dismiss the appeal with ecsts.

Z. K.

Appeal dismissed.

(2: 28 Ind. Cas. 4'2; 10 P. R. 1917; 134 P. L. R. 1914 101 P. W. S. 1914.

(3) 21 A. 234; A. W. N. (1900); 52; 9 Ind. Doo.

OUDH JUDICIAL COMMISSIONER'S COURT.

January 20, 1922.

Present:—Pandit Kanhaiya Lal, J. C.
SHEO RATAN—DEFE PART No. 1—

APPELLANT

BAM NARAYAN PANDE AND OTHERS-DREENDANTS NOS. 2 AND 3-

Jurisdiction of Civil Court—Tenancy, nature of, no dispute as to—Tenancy itself, existence of, denied—Document produced to prove tenancy—Genuineness of document, finding as to.

Where in a suit for possession, the defendant sets up a tenancy, and there is no dispute between the parties with regard to the nature of the tenancy, but

the plaintiff denies the very existence of the tenancy set up in defence and the defendant produces a document in support of his defence, the Civil Court is quite competent to give a finding regarding the genuineness or otherwise of the document. [p. 120, col 1]

Jagennath Singh v. Drigbijay Singh, 49 Ind Cas. 88; 21 O C. 210; 5 O. L. J. 611, discinguished from.

Appeal from a decree of the District. Judge, Fyzybad, dated the 30th May 1921, confirming that of the Munsif, Fyzybad, dated the 16th September 1920.

Mr. Ghulam Harm, for the Appellant. Mr. Sunder Lal, for the Respondents.

JUDGMENT .- This appeal arises out of a suit brought by the plaintiff respondent for possession of certain plots of land. His allegation was that the said plots had been mortgaged by him with possession in favour of Ram Narain Pande and Dabi Pracad on the 22nd November 18 7 for Ra. 200; that he deposited Rs. 200 on the 26th Jane 1918 under section 83 of Act IV of 1882 for payment to the mortgagess but they refused to ascept the money; that he subsequently ebtained a decree for redemption and in enforcement thereof obtained presession of the mortgaged property, and that Sheo Ratan, the present defendant-appellant, was wrongfally setting up his right to remain in possession of the said land under a lease said to have been granted by Ram Narain Pande, one of the mortgagees.

It appears that the defendant appellant filed a suit against the present plaintiffrespondent for possession of the said land in the Reverus Court under section 108, clause (10), of the Oadt Rent Act (XXII of 1836) alleging that he was a tenant of the said land and that the plaintiff respondent wrongfally ejected him. He got a decree from the Revenue Court, the propriety of which is here questioned by the plajotiff. respondent. The contention of the plaintiff respondent is that the lease, said to have been granted by Ram Narain Pande to the defendant appellant, was fistitions and fraudulent and intended to defeat the application by the mortgagor, tendering the mortgage-money under section 83 of Act IV of 1882, which was then pending. He also said that the defendant appellant did not obtain possession and that there were cartain sub tenants who entinued in possession of the land as before, The contention of the defendant appellant

WAST BAM U. BARIM BARBEH.

was that the suit was cognizable by the Civil Court. He did not file the crigical lease or a sertified copy thereof or mention the date on which, according to him, it was granted. The Courts below found that the lease had been executed fraudulently by one of the mortgagees on the 5th July 1919 after the suit for redemption was decreed and the possession of the mortgaged property had been taken by the mortgagor and that it was a sham and fictitious transac. tion.

The defendant appellant urges that the desision of the Revenue Court barred the Oivil Court from entertaining the suit for the possession or cancellation of the lease, and reliance is placed by him in support of that contention on Jagannath Singh v. Drigbijay Singh (1); that case does not, however, apply because there it was admitted by the defendant appellant during the trial that he was not in a position to claim proprietary or underproprietary rights in the disputed land and that he was only a tenant with a right of occupancy. The existence of the tenancy is denied in this case. In fact the finding of the Court below is that the lease was executed by one of the mortgagees after redemption of the mortgage. It must, therefore, be treated as inoperative and the position of the defendant appellant is no better than that of a trespasser liable to ejectment through the Oivil Court.

The learned Counsel for the defendant. appellant states that the lease was really executed on the 7th May 1918, but the finding of the Court below is against him. The defendant appellant is responsible for not having produced the original lease or accounted for its non-production and for not filing a certified copy thereof, if the original was on the file of the previous proseeding in the Revenue Court On the finding arrived at, the defendant-appellant has no locus standi, and the lease on which he relies, having been excented by a person whose right had terminated under the decree for redemption and being, moreover, fictitions, cannot ba given effect to.

The appeal ie, therefore, dismissed with coste.

J. P.

Appeal a.smitted.

(1) 48 Ind. Cas. 88; 21 O. C. 210; 5 O. L. J. 611.

LAHORE HIGH COURT. CIVIL REVISION CASE No. 415 OF 1921. November 25, 1921. Present:- Mr. Justice Obevis. WASU RAM-PLAINTIFF-PETITIONER tersus

RAHIM BAKHSH AND CVERRS-DEFENDANTS - REPONDENTS.

Limitation Act (IX of 1008), Sch. I, Art. 52-"Goods," whether include fruit-Suit to recover price of fruit-Limitation.

The term "goods" in Article 52 of Schedule I to the Limitation Act is wide enough to include fruit even before it has been gathered. [p. 20, col 2.]

A suit to recover the price of the fruit of a garden sold by the plaintiff to the defendant is, therefore, governed by Article 52 of Schedule I to the Limitation Act, as extended by the Punjab Loans Limitation Act. [p.121, col. 1.]

Civil revision petition, under rection 25 of Ast 1X of 1887, for revision of a decree of the Judge, Small Cause Court, Multar, dated the 14th March 1921.

Pandit Sham Lal, for the Petitioner.

Mr. Badr ud. Din Qureshi, for the Re-

spendente.

JUDGMENT.—The plaintiff in this case alleges that on the 28th of March 1915 he sold the fruit of two mango gardens for one year to Ranzan, now deceased. The plaintiff now sues the defendants as representatives of Ramzan for the balance of the price of the fruit. The learned Judge of the Small Cause Court has dismissed the suit as time barred holding that the case is governed either by Article 110 er Article 115 of the Schedule of the Limitation Act. Now, Article 110 clearly is inapplicable for there is here no question of rent; the support of this contention, and I am unable to agree with him, The term "goods" seems to me quite wide enough to include fruit even before the fruit has been gathered. I may note that in this ceso Mr. Badr ud Din raised a preliminary objection that this Court had no power of revision under section 115 of the Civil Precedure Code, but the answer is eimple, ramely, that this is a case of revision under scotion 25 of Provincial Small Cause Courte Act.

I ascept this application, and, reversing the order of the Small Cause Court Judge dismissing the suit as time-barred, I send tack the case to him for the contract between the parties was simply one for . JOGOBONDHU PAL U. BIJENURA NATH CHATTERJES.

the sale of the fruit for the season of 1915. Article 115 also seems to me to be inapplicable, for the plaintiff is not alleging a breach of any contract, but merely demanding the balance of the money for which the fruit was sold. In my opinion the Article applicable is Article 52 and the period of limitation under that Article being extended to six years by Panjab Loans Limitation Act, this suit, brought within six years of the sale, is within time.

Mr. Badr.ud.Din contends that fruit cannot be described as "goods" until it is removed from the tree but he has no authority to quote in support for desision on the merits. Stamp on application to this Court to be refunded. Other costs in this Court to follow the event.

Z. K.

Application accepted,

OALOUTTA HIGH COURT, APPEAL PROM OR: GINAL DECIRE No. 65 OF 1921.

April 14, 1921.

Fresent: -Justice Sir Asutosh Mookerjee,
Kr., and Mr. Justice Buckland.
JOGOBONDHU PAL-PENNITT APPRILANT

versus

RAJENDRA NATH CHATTERJEE
AND OTHERS - DEPENDING - RESPONDENTS.

Hindu Law-Partition, suit for, by purchaser of son's share-Mother, whether entitled to share-Stridhan received from husband or father-in-law, whether should be deducted-Individual member, right of.

A Hindu mother cannot compel a partition so long as the sons remain united, but if a partition does take place between the sons, she is entitled to a share equal to that of a son in the co-parcenary property, and she is entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them. [p. 123, col 2.]

Amrita Lal Mitter v. Manick Lal Mullick, 27 C. 551; 4 C. W. N. 764; 14 Ind. Dec (N. s.) 36', followed.

If the mother has received stridhan from her husband or father-in-law, its value should be deducted from her share, but the deduction to be allowed does not include stidhan received from the family of the father of the lady. [p. 124, col. 1.]

A member of a joint Hindu family cannot, by alienation of his interest, prejudice the position of another member, because no owner of property is competent as a general rule, to convey to any person a higher right than what he himself possesses [p. 123, col. 1.]

Appeal against a decree of the Subordinate Judge, Howrah, dated the 15th August 1920.

Babu Manmathu Nath Pal, for the Appel-

Babu Manmatha Nath Ray, for the Ra-

JUDGMENT.

MOOKERISS, J .- This is an appeal by the plaintiff against the preliminary deeres in a suit for partition of joint properties. The subject matter of the litigation originally belonged to one Kedernath Chatterjee, who left a widow, Thakamani Dabi, and four sons, Rajendra Nath, Bidhu Bhushan, Sadhir Kumar and Akshay Kumar. On the 10th August 1917 the plaintiff purchased from Akshay Kumar his right, title and interest in the ausestral properties. On the 8th April 1919 the plaintiff instituted the partition snit the for present in which he had besome properties parchase, by OWDer joint claimed to be placed in separate possession of a one fourth share after partition by metes and bounds. The widow of the original owner who was joined as a defendant, contended that she was entitled to a share in of partition. that the event and plaintiff the WB3 eansequently entitled to more than a one-fifth share. The Subordinate Judge has given effect to this contention and has made a decree accordingly. The substantial point which has been argued on the present appeal is, that the widow is not entitled to a share, inasmuch as partition is claimed, not by one. of her sons, but by the purchaser from one of We are of opinion that there is no foundation for this contention.

It was raied by Mr. Justice Ameer Ali in the case of Amrita Lal Mitter v. Munick Lal Mullick (1), that, as a Hindu mother is entitled under the law to be maintained out of the joint family property, if anything is done affecting that right, as, for instance, by the sale of any particular share by any of

^{(1) 27} C. 551; 4 C. W. N. 764; 14 Ind. Dec. (N. c.) 362,

JOGOBONDHU PAL U. RAJENDRA NATH CHATTERJEE.

her sons, her right somes into existence. The position of a purchaser from a son is exectly that of a son himself; he has the same rights and takes it subject to the same morw ment acereq edt to eredt es reitilideil he purchased. This desision is precisely in point and was given twenty one years ago. We have not been able to trace any judicial pronouncement where it has been doubted or discented from or where an inconsistent rule has been formulated. Apart from this, it is plain that the view adopted by Mr. Justice Ameer Ali was not a new departure but purported to follow the opinion expressed by Macl-an, C. J, and Banerjee, J., in 18.9 in the out of Jozenira Chunder v. Falkumari Dassi (2) Maelean, C. J., observed, no doubt with reference to an entirely different set of eiroumstancer, that as the widow's maintenames specially as against the sons is a charge on the estate, a right in rem in the fullest sense, adhering to the property into whatever hands it may pass, a right convertible in the event of a partition into a right to a share equal to that of sons, it is difficult to see upon what principle a son can so deal with his share as to defeat that right of his mother. Mr. Justice Banerjee emphasised the view that, as a general rule, no owner of property can convey to any person a higher right than what he bimself possesses, and that, consequently, the purchaser of joint family property from a member of a joint Hineu family must take it subject to the right of his vander's co. charers to demand partition and subject also to such rights of other persons (who were not, strictly speaking, co sharers with the vendor at the date of the alienation) as may arise under the Hindu Law upon partition. A similar view had been adopted in 1880 by a Foll Bench of the Allahatad High Court in bil so v. Dina Noth (3). where it was ruled that a Hindu widow, entitled under the Mitakshara Law to a proportionate chare with cons upon partition of the family estate, can claim such share, not only against the sons, but as against an austion purchaser, at the sale in the execution of a decree of the right, title and interest of one of the sons in such estate, before voluntary partition. It was

explained that the right the mother has is a right to participate in the property left by her husband, a latent and inshoate right of participation which becomes effective when separation takes plass; in other words, she has, as Maslean, O. J., put it in the case already mentioned, a quasi contingent right which may ripen or crystallise, if and when the partition takes place. (Sir Francis Macnaghten on Considerations on Hindu Liw, page 57). It would be contrary to elementary principles to hold that a right of this nature is l'able to be defeated by resourse to the device of an alienation, by one of the sors, of his share in the ancestral estate. The same doctrine was substantially recognised by Colvile, O. J., in 1855 in the oase of Stremutty Soor esmoney Doises v. Denubundro Mullic: (4), when he said that the rights of a so-parsener in an undivided family may, in his life time, pass to strangers, either by alienation, or, as in the case of creditors, by operation of law, but is all cases those who some in, in the place of the original eo.sharer, by inheritance. assignment cr operation of law, can take only his rights as they stand, including of source the right to call for a partition. The view we take is not affected by the decision in Barahi Debi v Debkamini Debi (5) which is an authority for the proposition that as the share allotted to a mother on a partition between her cons is given to her in lieu of or by way of provision for her maintenance, [Sorolah Dossee v. Bhoobun Mohun Neoghy (6), Remangin: Dasi v. Kedarnath Kuntu (7) she is not entitled to a share, if a portion only of the joint property is divided and the bulk of the property, ample for her maintenance, remains undivided.

It has been contended, however, that the desision in Amrita tal Mitter v. Manica Lal Malica (1) is opposed to the test of the Dayabhaga, which provides as follows, in Chapter III, section 2, paragraph 29: "When partition is made by brothers of the whole blood after the demise of the father, an equal share must

^{(2) 27} C. 77; 4 C. W. N. 254; 14 Ind. Dec. (N. s.) 51.

^{61.} (3) 3 A. 88; 5 Ind. Jur. 489; 2 Ind. Dee, (N, 8) 61 (F. B.)

^{(4) (1885) 1} Boul 223 at p 233; 3 Ind. Dec. (c. s.) 183; Reversed on Appeal 6 M. I. A. 52 at p 539; 1 Ind. Jur. N. s.) 37; 4 W. R. P. C. 114; 1 Suth. P. C. J. 291; 1 Sar P. C. J. 583; 19 E. R. 188.

^{(6) 15} C 29"; 7 Ind Dec (N s. 779.

^{(7) 16} I A 15: 6 C 753: 3 Ind Jur, 210; 5 Sar. P. C. J. 574; 5 Ind. Dec. N. s. 602.

JOGOBONDEU PAL V. ALJENDRA NATH CHATTERJEE.

be given to the mother; for the text (of Vribarrati) expresses, the mother should be made an equal sharer". This passage has been treated as authority for what most now be deemed settled law, namely. that the mother's right to elaim a share arises only when her some come to a partition, in other words, that she cannot enforce her claim to stare so long as her sons remain joint and do not ask for partition : Ganeth Dutt v. Jewoch Thakoorain (8). Now it has been argued by the appellant that under this text of the Dayabhaga, strictly construed, the mother is entitled to a stare, only when her sons make a partition, ard that, consequently, if a partition texes place at the instance of the pursbaser of the share of a son, the mother cannot obtain a share. This mode of interpretation is manifestly fallacious and proves too much; for it may as well be maintained that the purchaser of a share of a con cappot at all maintain a suit for partition, inasmuch as such a suit is not explicitly authorised by the text of the Dayabt aga. The truth is, that the author of the Dayabhaga had before him the problem of the partition of the family estate at the instance of a member thereof; he did not deal with the question of partition enforce. ed by a stratger, who, by his purchase, becomes a joint owner of the family property but not a men ber of the joint family itself; a partition at his instance cannot, by any stretch of larguage, be called Dayabhaga or partition of heritage, and must consequently be regarded as foreign to the proper scope of the treatise of Jimutavahana, When partition of the family properties is claimed in such circumstances by a stranger to the family, the question which arise must accordingly be determined by reference to general principles not inconsistent with those formulated for the case of partition enforced by a co parcener in the joint family. One of such general principles, as we have already explained, is that a member of the family cannot, by aliexation of his interest, prejudice the position of another member, because no owner of property is competent, as a general rule, to sonvey to any person a higher right than what he himself possesses. The

substance of the matter thus is, that although the text of the Dayahbaga, Chapter III, seerion 2, paragraph 2 , speaks only of a partition made by some and the allotment thereupon of a share to the mother, there is nothing said in the passage or in any other authoritative text of Hindu Law which we have been able to dissover, as to the mother's right to a share on partition being so absolutely nonexistent before partition, that it may be defeated by any of her sons alienating his share before a partition. Apart from this, it is plain that the literal and restrictive construction of the passage of the Dayabhega, as interpreted by the appellant, would lead to the obviously unreasonable conslusion that if the suit were instituted by one of the sons, the mother would be entitled to a share, even though one of the defendants happened to be the purchaser of the share of another son, while the mother would not be entitled to a share if the suit bappened to be instituted by such purchaser himself ; surely the rights of the mother could not, on any rational ground, be made dependent upon a purely accidental circumstance, namely, whether the purchaser of the share of one of ber sons is claintiff or defendant. We hold accordingly that though a mother cannot compela particion so long as the sons ramain united, if a partition doss take place between the sone, she is entitled to a share equal to that of a son in the co-parcenary property, and she is entitled to a similar share on a partition between the sons and the purshaser of the interest of one or more of them. The plaintiff has consqueatly share of the correctly determined to aeed ba 008filth.

A subordinate point which has been argued before us requires consideration. The plaintiff alleged in the plaint that the lady had been given by her hasband Government Promissory Notes of the value of Ro. 8,000, and that she was consequently not entitled to put forward a claim for mainterance. In his deposition the plaintiff asserted that the lady had got from her husband Government Promistory Notes worth Rs. 5,000, The lady admicted that her husband gave her Notes of the value of Rs. 1,500 and that her father gave her. G. P. Notes of the value of Ra. 3,500. The Sab. ordinate Judge has believed her statement and has directed that at the time

^{(8) 31} I. A. 10 at p. 15; 31 U 2'12; 14 M L. J. 8; 8 O. W. N. 146; 8 Sar. P. O. J. 575; 6 Bom. L. R. 1 (P. C.).

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of partition the value of her allotment would be the value of one fifth share of the estate minus the value of the G. P. Notes she received from her husband of which the nominal value is Rs. 1,500. The appellant has contended before this Court that this direction is erroneous, that no distinction should have been made between the G. P. Notes received from her husband and those received from her father. and that the value of her allotment should be the value of one fifth share of the estate minus the actual value of the G. P. Notes for Rs. 5,000. We are of opinion that this should contention not prevail. well-settled that if the mother stridhan from her husband or received father in law, its value should be deducted from her share. Mr. Justice Maspherson held in Jodoo Noth Dey Sircar v. Brojonath Dey (9) that on partition of the family property by the sons after their father's death, their mother is entitled to a share equal to that of a son, but if she has, before the partition, received property from their father either by gift or Will, amounting to more than a son's share, she is entitled to nothing more on partition; if, on the other hand, she has received less, she is entitled on partition to as much as will make what she has reseived equal to a son'e share. Reference was made to a text of Yajnavalkya where a share is allotted, in the case of a partition in the father's lifetime, to such wives as have had no separate property given to them by their husband or father-in law. Reliance was also placed upon the Dayabhaga, Chapter III, section 2, paragraph 31, and Jagannath's Digest, tr. by Colebrooke, Book V, section 2, Pl. 87. This visw was approved in Kishors Mohun Ghose v. Moni Mohun Ghose (10) and also receives support from the desision in Poorendia Nath Sen v. Hemangini Disi (11) which followed Jugomohan Holdar v. Sarolamoyee Dossee (12). The rule is stated in similar terms in paragraph 587 of the latest edition of the Vyavastha Darpana of Syamacharan Sarkar (3rd Ed. 1883, Pt. I, P. 517): "the equal participation, however, of

the mother with her sone takes effect, if no separate property have been given her by her husband or any of his kinsmen; but, if any have been so given, she is to have ardha or a portion which, together with the stridhan, will be equal to a son's. share." The statement is amply supported by the authorities set out in paragraph 238 (p. 199) and paragraph 552 (p. 42c). It is thus indisputable that the approved opinion is that the deduction to be allowed is in respect of stridhan received from the husband, from the father-in law, possibly also from any of the kinemen of the husband; it does not include stridhan received from the family of the father of the lady. This position is eminently reasonable; the primary responsibility for maintenance rests upon the husband and the father in-law, and gifts made by them may well be set off against the share of the family estate receivable in lieu of mainterance, on the ossasion of a partition amongst her sone; the same theory cannot be predicated in respect of gifts reseived from her father and members of his family who are not primarily responsible for her maintenance. We accordingly hold that the plaintiff is not entitled to impose on the lady a further reduction in respect of the G. P. Notes received by her from her father.

The result is, that the decree of the Eubordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at ten gold mohurs.

BUCKLAND, J .- I agree.

B. W.

Aprell dismissed.

^{(9) 12} B. L. R. 385.

^{(10) 12} C. 165; 6 Ind. Dec. (N. S.) 112.

^{(11) 1} Ind. Cas. 523; 36 C. 75; 12 O. W. N. 1002.

^{(12) 3} C. 149; 1 Ind, Dec (N. s.) 684.

MUBARAK PATIMA C. MUHAMMAD QULI EHAN.

ALLAHABAD HIGH COURT.

SECONÓ CIVIL APPEAL No. 880 of 1920.

February 22, 1922.

Present:—Mr. Justice Piggott and

Mr. Justice Stuart.

Musammat MUBARAK FATIMA—
PLAINTIFF—APPELLANT

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MUHAMMAD QULI KHAN-DEFENDANT-BESPONDENT.

Agra Tenancy Act (II of 1901), s. 20!—Evidence— Entry in Revenue Record—Presumption—Alteration in share, effect of.

Where in a suit for profits it appears that there has been an alteration in the Revenue Record prior to the institution of the suit, but made during the period for which profits are claimed the duty of the Court trying the suit is to consider the order by which the alteration was made and give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of a certain share in a mahal during the first year of the period in respect of which profits were claimed, and it were shown that after the close of that year he had been recorded as proprietor of a less share only, upon a finding that he had transferred his interest in the remaining share after the close of the first year in suit, then the duty of the Court would be to give effect to the entries year by year, calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. [p. 126, col. 1.]

When, however, it is clear, upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and was not passed upon any alleged transfer having occurred during the years covered by the suit, then the Revenue Court is bound to give effect to the entry as it stood on the late of the institution of the suit. [p. 126, cols. 1 & 2.]

Second appeal from a decree of the Additional Judge, Bareily, confirming that of the Assistant Collector, First Class.

Mr. Mukhtar Ahmad, for the Appella it. Mr. Uma Shankar Bajpai, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal in a suit for profits. These were a simed on account of three years, 1323, 13:4 and 1325 Fasli, in respect of a share of 7½ biswas and odd in a certain mahal. The defendant replied that the plaintiff vas the proprietor only of a share of 12 bi wansis and odd, that is to say, about one twelfth of the share stated in the plaint. The Court found that during the years 13:3 and 1324 Fasli the plaintiff stood recorded as proprietor of the entire share claimed by her, that this cutry had been ultered

under the orders of a Revenue Court, and the entry recording the plaintiff as proprietor of only 12 biswansis and odd bad been made before the commencement of the reverue year 1325 Faeli, Both the Courts below have held that the entry of the year 1325 Faeli, made before the institution of the present suit, raised an irrebuttable presumption that the plaintiff's share was only that shown in the said entry (namely, 12 biswansis and odd), and they have based their decrees upon this finding. In appeal before us two points have been raised, and we may note that three bave been argued. With respect to the third point, it is only necessary for us to say that a plea was taken before us in argument which we cannot find in the memorandum of appeal to this Court and which was not even taken by the plaintiff in her appeal to the lower Appellate Court. The contention is that, even on the share of 12 tisuansis and cdd and the figures given in the Patwari's statement and accepted by both the Courts below, the sum in arithmetic has been so worked out as to give the plaintiff less than her lawful dues. We have not looked into this matter or allowed the point to be taken. It was essentially one of fact, to be determined by the lower Appellate Court and, not having been taken at all in that Court, must be beld to be concluded against the plaintiff by the decision of that Court. With respect to the extent of the plaintiff's share, the memorandum of appeal raises two distinct points. The first of these is, that the irrebuttable presumption recognised by this Court in the Full Bench decision of Durga Parshad v. Hasari Singh (1) should be applied to each one of the three years in suit in accordance with the entries in the Revenue Records as they stood at the commencement of each of those years. If this contention were adopted, the plaintiff would be entitled to profits calculated on the share as elaimed in the plaint in respect of each of the years 1323 and 1324 Fasli, and to profits on the smaller share of 12 biswansis and odd in respect of the third year only. We have been referred to two decisions of this Court, one of which was in a suit for profits between the same parties. This is the case of Mubarak Fatima v. Muhammad Quli Khan (2). Re-

^{(1) 11} lad. Cas. 116; 83 A. 769; 8 A. L. J. 1025 (F. B.).

^{(2) 68} lpd. Can. 970, 19 A. L. J. 782, 43 A. 697.

MERARAE PATIMA U. MUGAMMAD QULI EHAN.

ference is made in that indement to a pravious destrion by another Bench of this Doact in the oase of Lichman Frasid v. Shitabi Kunwar (4). These two cases are authority for this propositio , that if on the date of the inalita tion of a suit for profits the plaintiff's name stands in the Revenue Repord as the proprietor of a certain share, the R vanue Courts are bound to presume the correctness of that entry and to frame their decree for profits accordingly, in spite of the fast that during the pendency of the lingation (either in the Trial Court, or in a subsequent appeal, or in second appeal) there may have been so, order of the Revenue Court altering the entry in are, therefore, There question. PARED distinguishable from the one now before us, in which there had been an alteration in the Revenue Record prior to the institution of the suit. We have to consider the question now raised independently of any express authority of this Court to which we have been referred. It seems to us that in a case like the one before us, when there has been an alteration in the Revenue Record prior to the in titation of the sait, but made during the period for which profits are claimed, the duty of the Court trying a suit for profits must be to consider the order by which the alteration was made and give effect to the intention of the said order. if, for instance, a plaintiff was the recorded proprietor of an eight-appa share in a mahal during the first year of the period in respect of which profits were elaimed, and it were shown that after the close of that year he had been recorded as proprietor of a four anna share only, upon a finding that he had transferred his interest in the remaining four anna share after the close of the first year in suit, then the duty of the Court would be to give effect to the entries year by year, calculating the profits for each year on the basis of the resord as it stood in respect of the said year in the revenue papers. When, however, it is clear upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and was not passed upon any alleged transfer having securred during the years covered by the suit, then the Revenue Court is bound to (3 59 Ind. Cas. 639; 18 A. L. J. 1008; 2 U. P. L. R.

(A) 386; 43 A. 177.

give effect to the entry as it stood on the date of the institution of the suit. Applying this principle to the present osse, the desizion of the Courts below estudiating the plaintiff's share of profits on the basis of her being the proprietor of a share of 12 biswansis and odd only appears correct. There is, however, point to be considered, further which arises out of the desicing of this Court in the case of Mabarak Fitim: V. Muhimmad Qui Rhin (2). Tist derisien was propositioned on the 25rd of May 1921, that is to say, after the decision of the lower Appellate Court in the case now before u', taeverq edt to coitatitai edt retta Leebai bas appeal. The learned Jadges had before them the order of the Revenue Court by which the village papers were corrected with effect from the year 1325 Fadi and they edt die pritespace ai relacient berehiere desision of a Civil Court upon which it parperted to be founded. They same to the onelusion that, as a matier of fact, the Rayanue Court had misunderstood the Civil Court's decision and had ordered the piaintiff's name to be recorded in respect of a smaller share than that a varied to her in the Oivil Cour litigation. So far as we can understand the matter, the opinion of the learned Judges in the case above referred to was that the plaintiff had been found by the Civil Court to be entitled in her own right to one sixth of a share of 7 biswas and odd, which is evidently just double the share in respect of which she was recorded as proprietor by the Ravenue Court and in the papers on the basis of which the decree under appeal was framed. Assuming, as we must do, that this decision was sorvest, it would seem that the Cours below have, as a matter of fact, awarded the plaintiff on account of each of the three years in suit only one-half of the profits which she would have obtained if the Revecue Court had not misunderstood Civil desree οŧ the Court upon which it professed to act. We think, however, that it is impossible for us in the present suit to give the plaintiff any relief on the basis of this contention. The presamption raised by the Revenue Court reords must be applied either one way or the other. According to the plaintiff appellant it ought to be applied so as to treat her as proprietor of the entire share of seven biswas and odd during eash of the years 1323 and SURJA MARAIN DAS C. AMIRUDDIN MOHAMMED.

1374 Paeli, a sontention which we have already repelled. If we had acceded to this contention, the plaintiff would have received a great deal too much. The only alternative for us, so far as the present suit is concerned, is to accept the Revenue Record as it stood on the date on which the present suit was instituted and to affirm the decree under appeal, although it proceeds upon an entry made in ascordance with a Revenue Court decision which this Court has pronounced to be erroneous. The effect of the present suit will apparently be to dispossess the plaintiff to the extent of one half of the share which the learned Judges of this Court in the former litigation pronounced to be her rightful share. We fear that we have to leave the plaintiff to seek an appropriate remedy for this dispossession in a further Civil Court litigation, unless she san persuade the Revenue Courts by means of a fresh application to re-sonsider their own order respecting the entry in the Revenue Records in the light of the decision propooneed by this Court and to make a further correction Even if this were done now, the astual result would be a temporary dispossession of the plaintiff in respect of the years covered by this suit, and for this we san see no remedy other than by way of suit in a Civil Court. As the case stands, we must dismiss this appeal, and we do so accordingly with costs.

J. P.

Appeal dismissed.

OALOUTTA HIGH COURT.

OIVIL RULE No. 477 OF 1921.

December 12, 1921.

Present:—Mr. Justice Subrawardy and

Mr. Justice Ghose.

SURJA NARAIN DAS AND ANOTHER—

PLAINTIPPS—PETITIONERS

CETTURE

AMIRUDDIN MOHAMMED—DEFENDANTS

Oprosite Parties.

Oivil Procedure Code (Act V of 1909), s. 115—
Revision—Application supported by affidavit of

Pleader's clerk not entertainable—Affidavit.

A High Court ought not to take cognizance of an application for revision supported by an affidevit of a Pleader's clerk swearing to all the material facts of the affidavit as true to the information derived by him from the petitioner. [p. 128, col. 1.]

Rule against an order of the Court of the

Sut-Judge, Jalpaiguri.

FACTS apprar from the judgment.

Babu Santosh Kumar Bose, for the Petitioners.—I beg to move your Lordships for interleantory orders. Your Lordships, I submit, have ample jurisdiction to interfere in a sase like this under section 1:5, Civil Procedure Code. The property is in danger of being alienated. Under Order X. X. X. rule 1, Civil Procedure Code, your Lordships may grant a temporary injunction to restrain alienation. If your Lordships are of opinion that you sound act under section 115, Civil Procedure Code, I beg leave to submit that under section 107 of the Government of India Act your Lordships' powers are very wide, Refere to Israil v. Chamer Rahman (1).

There is no harm in such an affidavit. It is for your Lardships to consider the effect

and weight of such an affidavit.

Baba Asiturarjan Ghose, for the Opposite

Partier, not called uron. .

JUDGMENT,—We are asked in the Rule to set aside an order of the Munaif of Jalpais uri refusing to issue an injunction restraining the sale of the property in suit in execution of a mortgage decree obtained by the opposite party. The order was affirmed on appeal by the Subordinate Judge of Jalpaiguri.

The mortgage decree has been obtained by the opposite party against certain persons alleged to be the heirs of one Nunda Ram Das. The petitioner's claim to be the real heirs of Nanda Ram and have instituted a suit for a declaration that the mortgage decree is not binding on them. The suit is pending before the Court of first instance and the petitioners have applied for the issue of a temporary injunction during the pendency of the suit.

Apart from the question whether an applieation like the present one lies to this Court under section 115, Code of Civil Procedure, we are of opinion that we ought not to interfere

^{(1) 21} Ind. Cas. 801; 41 C, 436; 18 C, W. N. 176; 19 C. L. J. 47.

BALDEO PRASAD C. BINDESABI PRASAD.

in this matter on the facts of the case. The petitioners were no parties to the mortgage-decree and their interest, if any, will not therefore be affected by a sale under that decree. If the sale is etayed at this stage the decree holder will be kept out of his money for some length of time to which course we do not think he should be compelled. Considering that the petitioners will not be prejudiced in any way by the sale we hold that they have failed to makt out any case for our interference.

We take this opportunity of referring to a practice which has been adopted in this case. The petition has been supported by an affidavit which has been sworn to by a Pleader's clerk. The deponent swears to all the material facts of the affidavit as true to the information derived by him from the petitioner No. 1. We are sure that if this fact had been brought to the notice of the Court at the time when the application was presented this Rule would not have been issued on the present applieation. We do not consider that an application supported by such an affidavit is one of which this Court ought to take any cogni-23D08.

This Rule is discharged with scats. Hearing fee two gold mohurs.

Rule discharged.

J. P.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 284 of 1919.
February 15, 1922.

Fresent:—Mr. Justice Rasque
and Mr. Justice Linlsay.

Ohanbey BALDEO PRASAD—
PLAINTIFF—APPELLANT

BINDESHRI PRASAD-DEFENDANT
- RESPONDENT.

Hindu Law-Debt of father, when estate under Court of Wards-Pious duty of son, whether arises-U. P. Court of Wards Act (III of 1899), s. 34.

It is not the pious duty of a son to pay off such loans as were contracted by his father during the

time that the estate was under the Court of Wards as during such a time the father is incompetent under section 34 of the U P. Court of Wards Act to enter into any contract which might involve him in pecuniary liability.

First appeal from a decree of the Additional Subordinate Judge, Banda.

Mr. Surendro Nath Sen, for the Appel-

Mesers, B. E. O'Conor, R. Malcomson, Badri Narain and Sarkar Bahadur Johri, for the Respondent,

JUDGMENT .- It appears that one Ganesh Prasad was under the Court of Wards for several years up to the time of his death in May 1914. On the 7th of January 1912 and 10th of April 1912 be executed two promissory-notes in favour of Chaubey Baldeo Prasad for consideration carrying interest at the rate of Re. 1.6.0 per cent, per meneem. Ganesh Prasad died leaving a Will by which he left his estate in charge of certain trustees. The Will of Ganesh Prasad was contested by his son Bindeshri Prasad who in the end was successful in having it set aside. The Court of Wards continued in possession of the estate till the 19th of December 1914. On the 5th of October 1914 there was a compromise between Bindeshri Prasad and the trustees appointed under the Will of his father. On the 6th of October 1914 Bindeshri Prasad executed a simple money bond in favour of Baldeo Prasad in lieu of the moneys due on the two promissory-notes given by his father on the 7th of January 1912 and 10th of April 1912 to Baldeo Prasad. The amount due on the said two promissory-notes on the 6th of October 1914 was found to be Re. 9,261-8-9. The bond carried interest at the rate of Re. 1 per cent. per mensem. On the 6th of September 19:8 the suit, out of which this appeal has arisen, was brought by Baldeo Prasad to recover the sum of Re. 9,261.8.9 plus interest on foot of the bond dated the 6th of Ostober 1914. The claim was resisted by Bindeshri Prasad on various grounds. He said that the bord in suit was obtained from him under undue influence and pressure, that it was without consideration, and that he was not bourd to pay it. The learned Subordinate Judge who tried the suit came to the conclusion that Bindeshri Pracad had failed to prove the allegation as to pressure and undue inflaence, and that the bond was for MANAKAL MURTHI SANKARAN U. AREEKARA AZHAKATH SANKARAN NAIR,

consideration. But he further held that the defendant was not bound to pay it as the bond was given in lieu of debts which were contracted by his father at a time when the estate was under the Court of Wards, and under the Court of Wards Act a ward could not enter into a valid contrast. In appeal before us it is contended on bahalf of the plaintiff-appellant that the view taken by the Court below is incorrect. It is conceded that the bond in suit was given in lieu of the debts contracted by Ganesh Prasad at a time when he was a ward of the Court of Wards; but it is said that it is the pious duty of a Hindu son to pay off the debts of his father, and that the bond in suit was given for consideration and the defendis liable to pay it. In support of ant this a case is eited which is to be found at page 974 of 46 Ind. Cas. [Rajmal Shah v. Court of Wards of Tika Baldev Singh (1)]. We find ourselves unable to assede to the contention of the plaintiff appellant. Under section 34 of Act III of 1899, the Act which was applicable at the time the two promissory-notes of the 7th of January 1912, and the 10th of April 1912, were given, Ganesh Pracad was incompetent to enter into any contract which might involve him in pecuniary liability. In other words, any contract by which he made himself pesnniarily liable was void. The bond in suit was given by his son in consideration of the two promissory notes mentioned above. We do not think that it was the pious duty of the son to pay off such loans as were contracted by his father during the time that the estate was under the Court of Wards. The ease relied on by the learned Counsel on behalf of the plaintiffappellant is quite different to that before us. In that case both the father and the son gave a bond after the release of the estate from the management of the Court of Wards not merely for the sum that was borrowed during the management of the Court of Wards but for a further sum that was advanced after the release of the estate. The facts of the two eases are quite different, We, therefore, agree with the lower Court that the bond in suit is not enforceable against the defendant

The appeal fails and is dismissed with coste.

J. P.

Appeal dismissed.

MADRAS HIGH COURT. APPEAL AGAINST OSDER No. 27 OF 1918. February 28, 1921. Present :- Mr. Justice Spencer and Mr. Justice Ramesam. MANAKAL MURTHI SANKARAN alias NEELAKDHAN NAMBUDRIPAD -APPELLANT

DETSUS

AREEKARA AZHAKATH SANKARAN . NAIR AND OTHERS - RESPONDENTS.

Malabar Compensation for Tenants Improvements Act (I of 1900), ss. 5, B, scope of-Ejectment-Compensation-Re-valuation-Execution of decree, stay of.

Section 5 of the Malabar compensation for Tenants Improvements Act does not make the payment of the: compensation a condition precedent to ejectment. [p., 130, col. 1.

Where an application for re-valuation as provided by section h of the Malabar Compensation for Tenants Improvements Act is pending the section does not provide for a stay of execution of the decree for. ejectment [p. 130, col, 1.]

Appeal against an order of the District Court, South Malabar, in Appeal Suit No. 824 of 1917, preferred against an order of the District Munsif, Manjeri, in Execution Petition No. 1375 of 1917, in Original Suit No. 420 of 1912.

Mr. O. V. Anantha Krishna Aiyar, for the Appellant.

Mr. K. Kutti Brishna Menon, for the Baspondents.

JUDGMENT.

SPENCIE, J .- In this case the appellant obtained a desree for ejectment of a tenant in South Malabar and, after depositing the amount assertained as due to the tenant improvements under the Improvements Compensation Act, applied before the District Mansif for execution of his decree by ejestment of the tenant from all the lands mentioned in the deares (1) 48 Ind. Cas, 974, 142 P. W. R. 1918, or, in the alternative, he added that, if

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the tenants claimed that any improvements had been effected subsequent to the decree in Kudiyiruppus, Parambas and hills, execution might be granted of the other properties, that is, Nilams (double erop lands), Palliyals (single erop lands) and Nattupoyils (seed-beds).

As observed by the District Munsif, this application for partial delivery was intended to be for the benefit of the tenants and to avoid further demands for compensation owing to delay in execution. The District Munsif granted the appellant's prayer and ordered delivery of the Nilams, Palliyals and seed beds and directed that execution in regard to other items should wait. He also directed that the tenant should give security for any relief that might be obtained against him in execution before he took the amount deposited for the value of improvements.

The District Judge held that partial ejectment, before compensation was finally settled upon the other lands which were left in possession of the tenant, was contrary to the provisions of section 5 of the Malabar Tenants Improvements Act, and he, therefore, allowed the appeal and directed the District Munsif not to grant the petitioner's prayer till he finally deter-

mined the question of valuation.

Section 5 of Madras Act I of 1900 provides that any tenant to whom compensation in due shall be entitled to remain in possession until ejectment in execution of a decree or order of Court. The section not make the payment of doss compensation a condition precedent to ejectment. Section 6 (b) contemplates revaluation being calculated on the condition at the time of ejectment and provides that the decree shall be varied in assordance with such order of the Court executing the decree. It does not provide that ejectment shall be stayed until revaluation is made.

There is an observation in Ohowakkaran Keloth v. Karuvilote Parkum (1) that a tenant retains in Malabar his status as a tenant until the improvements are paid for; but in Nynam Veetill Mayan Kutti v. Valappilakath Kunhammat (2), Sadasiva

(1) 29 Ind. Cas. 559 at p. 560. (2) 44 Ind. Cas. 110; (1918) M. W. N. 205; 7 L. W. 143; 34 M. L. J. 167; 23 M. L. T. 156; 41 M. 641.

Iyer, J., doubted the correctness of the statement and I respectfully consider that it is not warranted by the language of the section. There is no provision in section 5 or in section 6 to the effect that, until compensa. tion is paid, no ejectment should be ordered. In the Fall Bench case in Puthiapuravil Kannyan Baduvan v. Ohennyanteakath uthia. purayil Alikutti (3) Seshagiri Aiyer, J., held that partial ejectment was not contem. plated under the Act in any circumstaness, but the majority of the Fall Beach held that a lessor was not entitled to eject a tenant in Malabar from a portion of his holding while an assignee of the reversion could do so on payment of the value of improvements to that part.

The District Judge was not correct in his opinion that ejectment of a tenant could only be ordered after the final determination of the value of improvements. If that was the state of the law it would be possible for a tenant to postpone eviction perpetually by continually making fresh improvements while the enquiry into the last application for re-

valution was going on.

The appellant's (the execution petitioner's) application for execution of the whole decree was not open to any objection even though a petition for re-valuation might be pending, and the order actually passed by the District Munsif was, as already observed, a concession to the tenants whose consent was assumed to a course which would naturally be preferred to immediate eviction from the entire holding. The District Munsif's order requiring security to be given for any relief that might arise after the execution of the decree was not reasonable and must be set aside.

In the result the appeal must be allowed and the District Munsif's order will be restored with costs here and in the lower

Appellate Court.

Ramesam, J.—I will only add that, even if a plaintiff decree holder, who obtained a decree under the Act, is not entitled to eject the defendant until he pays the sum mentioned in the decree for improvements, it does not follow that, when he pays the amount so mentioned to the de-

^{(3) 51} Ind. Cas. 286; 42 M. 603; 37 M. L. J. 47; 10 L. W. 95; (1919) M. W. N. 40! (F. B.).

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fendent or (when he refused to take it) into Court, the mere fact that the defend. ant is asking for the further valuation mentioned in section 6 (3) operates as a stay of execution of the decree for ejectment, or that an order for ejectment should not be made until the supplemental enquiry contemplated in section 6 (3) is made. None of the cases cited by the learned Counsel for respondents. Ruthiapurayil Kunnyan Baduvan v. Ohennyan. teakath Puths purayil Alikutti (3), Parames. wara Ayyan v. Zitlunni Valia Mannadiar (4). Puthiyappandikasalayıl Abtullı Koya v. Kallumpuroth Kanaran (5), kummatha Pittil Runhi Kuthalai Hai v. Antoni Goveas (6) and Nanu Nair v. Kundan Ashtamurthi (7) support sush a proposition. I agree with my learned brother in doubting the correctness of Chowakkaran Keloth v. Karuvalote Parkum (1). I agree with the order proposed by my learned brother.

M. C. P.

J. P.

Appeal allowed.

(4) 43 Ind. Cas. 178; 38 M. L. J. 591.

(5) 43 Ind. Cas. 6; 33 M. L. J. 463; 6 L. W. 696; (1917) M W. N. 822.

(6) 19 Ind. Cas. 563; 24 M. L. J. 472; (1913) M. W.

N. 839; 13 M. L. T. 850.

(7) 47 Ind. Cas. 914; (1918) M. W. N. 551; 8 L. W. 275.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 055 OF 1919.

February 28, 1922.

Present:—Mr. Justice Ryves and

Mr. Justice Gokul Prasad.

S. ALI JAWAD AND OTHERS—PLAINTIFFS

—APPELLANTS

KULANJAN SINGH AND OTHERS-

Evidence Act (1 of 1872), s. 92 (3), scope of-Parol evidence to vary written document, admissibility of.

It is not intended by provise (3) to section 92 of the Evidence Act to permit the terms of a written contract to be varied by a contemporaneous oral agreement but having regard to the illustrations (b) and (j) the proper meaning of the proviso is that a contemporaneous oral agreement to the effect that a written contract is to be of no force or effect at all and that it is to impose no obligation at all until the happening of a certain event may be proved. [p. 32, cols. & 2]

Ramjiban Serowgy v. Oghore Nath Chatterjee, 25 C. 401: 2 C. W. N. 186; 13 Ind. Dec (N s), et.6; Vilhu

Jairam v. Akaram, 42 Ind. Cas. 872, followed.

Second appeal from a decree of the Additional Subordinate Judge, Jaunpur, confirming that of the Additional Munsif.

Mr. Mukhtar Ahmad, for the Appellants. Mr. Haribans Sahai, for the Respondents.

JUDGMENT .- The facts of this case are as follows. The plaintiffs executed, on the 18.h of September 1903, a usufrustuary mortgage for five years in favour of Kulanjan Singh and Sat Ram. The deed is not on the record and it is not clear what exactly was mortgaged. According to the plaintiffs, on the 10th of August 1905 they executed a simple mortgage for Rs. 599 in favour of Mahabir Singh in which an eight. anna Zemindari share in five villages was hypothesated. The interest chargeable was Rs. 2 per mensem, On the 8th of October 1908 the plaintiffs executed a usufructuary mortgage of an eight anna two pie share in three villages which had been hypothesated in the mortgage of 1905 in favour of Kulanjan Singh alone. This mortgage was for Rs. 2,400 and for 15 years. The plaintiffs stated that, under a contemporaneous oral agreement, when the mortgage of the 10th of August 1905 was entered into, it was agreed between the parties that if the plaintiffs executed a usufructuary mortgage subsequently, then in that case the mortgages would not charge the interest as agreed npon in the mortgage-deed of 1905. It appears that proceedings were taken before the District Judge in lunasy with reference to one of the plaintiffs and in those proceedings the guardian of the lunatic wished to raise a loan on the property, whereupon the defendants produced the mortgage deed of 1905 and elaimed that it had not been fully discharged. This was the cause of action alleged in the plaint and the plaintiffs sued for a declaration that the mortgage-deed of 1905 had been paid off. The main defence with which we are now concerned was that there were two mortgage deeds executed in August 1905 and that, as a matter of fact, only the interest due on those two mortgages ALI JAWAD U. KULANJAN SINGH.

had been paid when the mortgage of 1908 was executed and that the principal same due on both the mortgages were still unpaid. Both Courts have tried the case on the allegations of fact mentioned in the plaint, assuming them to be correct, but have come to the conclusion that oral evidence was inadmissible to prove the contemporaneous agreement set up by the plaintiffs and, consequently, that having regard to the terms of the mortgage of 1908, the allegation of the plaintiffs was not proved. They dismissed the suit. The plaintiffs come here in second appeal and they urge two points, (1) that under the proviso to sestion 92 of the Indian Evidence Act oral evidence could be given to prove that on the happening of a certain event the agreement to pay interest would cease to be operative, and (2) that they could prove that, as a matter of fast, when the document of 1908 was executed the whole amount due under the mortgage of 1905 was remitted and that this was evident from the terms of the document of 1905 itself and the Court below had misread the document.

The meaning of proviso (3) would seem to be illustrated by an illustration (1) to section 92 and it would seem to refer to cases where there was an oral agreement to the effect that a contract in writing was to take effect only on the happening of a particular contingency.

On the first point it has been pointed out that "a distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event." (Vide Woodroffe and Amir Ali, Law of Evidence, 6th Edition, page 601). seems to sum up the English Law on the question and it does not seem to us that in this respect proviso (3) lays down anything different. In the case of Ramiban Scrouge v. Oghore Nath Chatterjee (1) Mr. Justice Sale took the same view. He says: "I do not think that it was intended by proviso (3) to permit the terms of a written

(1) 25 C. 401; 2 C. W. N. 189; 18 Ind. Dec. (x. a.) 263,

contrast to be varied by a contemporaneous oral agreement; but having regard to the illustrations (b) and (i), I think, the proper meaning of proviso (3) is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved." The same view was taken by a learned Judge of the Nagpur Judicial Commissioner's Court in Vithu Jairam v. Akaram (2) and we agree entirely with that judgment. This disposes

of the first point.

As to the second point, of sourse the plaintiffs could prove if it was a fact, that when the mortgage of 1908 was executed. all liability under the previous mortgage of 1905 was discharged. This, however, was not their case as brought in their plaint and the argument that the terms of the document itself are only consistent with this view, cannot be supported. Under the mortgage of 1905 the principal sum of Rs. 599 was advanced. When the mortgage of 1908 was executed, it was recited that a sum of Rs. 600 was left with the mortgages "to pay Mahabir." That is all. No reference is made to any particular debt or to any particular mortgage, much less is there any recital to the effect that this payment of Rs. 600 was in complete satisfaction of the whole debt due to Mahabir. But it is said that the words later on written in the doonment must be considered. They are to the effect that the property then mortgaged "is free from all charges and liability." It is said these words can only mean that the whole liability under the mortgage of the 10th of August 1905 was admitted to have been discharged. There might have been some force in this argument if it were not a fact that there were several mortgages between these parties on the record, and we find the same words occurring in other mort. gages where they cannot have the meaning which the plaintiffs now seek to put on this mortgage. It seems to be a set phrase used carelessly by the scribe of these documents. In the written statement it is stated that, as a matter of fact, there were two mort. gages executed in the month of August 1:05 by the plaintiffs in favour of Mahabir. When the deeds are on the record, the sam

(2) 42 Ind. Cas. 372.

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of Rs. 600 which was left to be paid to Mahabir represented not the whole amount due to Mahabir but the interest then due on the two mortgages. This may be so, or it may not, but it shows that the words relied upon as proving the complete satisfaction of the particular mortgage of the 10th of August 1905, do not of necessity mean what the appellants contend. It is, however, a remarkable eirenmetance which is on the record that the mortgage deed of the 10th of August 1905 was in the possession of Mahabir and was produced by him. If it had been paid off and nothing remained due whatever under that mortgage, one would have expected it to have been given back to the plaintiffs, or at least to the defendant Kolanjan Singh who satisfied it, with an endorsement to that effect.

In our opinion, therefore, the view taken by the Courts below is right and we dismiss this appeal with costs.

J. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIV.L APPEAL NO. 1551 OF 1918.

November 16, 1921.

Present:—Mr. Justica La Rossignol and

Mr. Justica Campbell.

GURBAKHSH SINGH, son OF DHIAN

SINGH (DECEASED)—PLAINTIFF—APPELLANT

Musammat PARTAPO AND ANOTHER— DEPENDANTS—RESPONDENTS.

Custom-Adoption-Daughter's son-Dhanoi Jats of Tahsil Kharar, Ambala District-Wajib-ul-arz-Riwaj-i-am.

Among Dhanoi Jats of Tahsil Kharar, Ambala District, the adoption of a daughter's son is valid by custom.

A waith-ul-arz is a part of the Revenue Record and is, therefore, of greater authority, than a riwaj-i-am which is of general application and is not drawn up in respect of individual villages.

Second appeal from a decree of the District Judge; Ambala, dated the 2nd February 1918, affirming that of the Subordinate Judge; First Class, Rupar, District Ambala, dated the 21st November 1917.

Pandit Sheo Narain, R. B., for the Appel-

Mr. N. O. Mehra, for the Respondents.

JUDGMENT.—In this suit a collateral in the fourth degree seeks to set aside an

adoption of a daughter's son.

The parties are Dhanoi Jats of Tabell Kharar, Ambala; the wailb-ul-ars of 1852 favours a gift to a daughter's son, and the customary adoption of such a son is merely another form of a gift. Sundar Singh v. Musammat Mano (1), is a ruling concerning this very family and in that case the entry in the wailb-ul-ars which was supported by affirmative evidence of the validity of the custom was assepted.

Against that ruling there has been adduced by the plaintiff-appellant nothing tangible, Ralla v. Budha (2), does not weaken the authority of Sundur Singh v. Musammat Mano (1), for in the latter case the burden of proving the custom was laid on the persons.

asserting it.

However that may be, the fast remains that we have in this very family a clear judicially proved instance of the alleged custom, which is, moreover, supported by the wijib-ul-art; this document is a part of the Revenus Resord and, therefore, of greater authority than a riwai-i-am which is of general application and is not drawn up in respect of individual villages.

We see no reason to differ from the Courts below which hold that the custom resited has been established, and we dismiss the appeal

with costs.

z. K.

Appeal dismissed,

(1) 63 P. R. 1888. (2) 50 P. R. 1893 (F. B.). SURAJ PRASAD O. MAKHAN LAL.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 242 of 1919.
February 9, 1922.
Fresent:—Mr. Justice Piggott and
Mr. Justice Waleb.
SURAJ PRASAD—DEFENDANT—
APPELLANT

tersus

MAKHAN LAL AND ANOTHER-PLAINTIFFS
AND Musammet KAMLA DEVI-DIFENDANT
- RESPONDENT.

Hindu Law-Mortgage to pay off prior mortgage of date when son not born-Antecedent debt-Legal necessity.

A mortgage effected by a Hindu father to pay off a prior mortgage of a date when a son was not born to him is an antecedent debt for which the father can validly alienate family property, and no question of legal necessity arises for the validity of such a debt. [p. 135, col. 2: p. 136, col 1.]

Per Walsh, J.—In an old transaction the failure on the part of a creditor to prove every pie raised by the debtor and expended for family necessity does not constitute a sufficient ground in law for interfering with the transaction even pro tanto. [p. 137, col. 1.]

First appeal from a decree of the Subor. dinate Judge, Aligarh.

Mr. Narain Frasad Aithana, for the Appel-

Mesere. Gulzari Lal and Peary Lal Baner;i, for the Respondents.

JUDGMENT.

P.GGCTT, J .- The suit cat of which this appeal arises was brought to enforce a mortgage deed of the 7th of June 1905. The executants were Recti Prasad, bis step-mother, Muscmmat Man Konwar, and his brother's widow, Mu.ammat Hokam Kunwar. It is fully established, and has admitted before us in been practically argument, that the whole of the property affected by the mortgage was the property of Reoti Prasad. The ladies concerned were simply living with him as female members of a joint undivided Hinda family in the enjoyment of their right of maintenance. It so happened, however, that their names had been shown in the village papers in respect of fractional shares in the property. On the case, as admitted before or, we must take it that these entries had in fact been made as a mere formality out of consideration for the feelings of the two widows and that the property was Reoti Prasad's. The ochesquerce, however, was that the merigagee. before entering into the transaction, insisted

upon execution of the deed by the two widows as well as by Reoti Prasad. On the date of the institution of this suit both the widow ladies who joined in executing the bond were dead; so also was Reoti Pracad. The suit was brought against Suraj Prasad, minor son of Reoti Prased, and his mother, Musammat Kamla Devi, the widow of Reoti Presad, was formally impleaded as an additional defendant in case any question might arise as to ber rights. In rep!y to the suit the defendant put the plaintiffs to proof of execution, but this has been fully established and is ro longer in question in ap sal The point for setermination in appeal is, whether the cebt rerresented by this bord was ireprred by Reoti Prasad slore or by Renti Pracad and the two widows jointly, and whether as a matter of law the money paid as consideration for this bond was taken by Recti Prasad in whole or in part for family necessity, so as to make the transaction binding upon the miner appellant. The Court below having decided all the questions raised in favour of the plaintiffs, it is the miror Suraj Prasad who appeals to this Court. The first question we have to consider is, whether the whole of the consideration was received by Reoti Prasad. According to the bond itself a som of Rs. 5.900 was left with Budh Sen for payment to a creditor ramed Hardeo Das. The balance of Rs. 4,100 was paid over in eash at registration. It is in evidence that it was fermally paid to the two ladies. There is also a great deal of evidence to show that at about this time Recti Pracad was making a number of rayments orgently necessary on account of Government revenue and to meet other debts. We have already pointed out that the whole of the property affected by the mortgage was Reoti Prasad's. On this state of facts, we think the Court below was abundantly justified in finding that the whole of the consideration, including the sum of Rs. 4, (O paid in each, reached the hands of Reoti Prasad and that the payment of this each to the two widow ladics at the time of registration was as much a matter of form and precaution as the entry of the ladies' names in the village papers and their appear. arce as joint ex entants of the bond in suit. There remains the question of legal necessity for the alietation. Of the debt due to Hardeo Das, a sum of Rs, 3,100 was due

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upon a previous mortgage executed in his favour by Reoti Prasad alone on the 12th of June 1901. The remainder was due on a promissory note. There is oral evidence, which has been accepted by the Court below and which we see no reason to distrust, to prove that Hardeo Das received payment both on his mortgage and in respect of the unsecured debt. This evidence being accepted, the unsecured debt due to Hardeo Das stands beyond question as an antecedent debt for the payment of which Recti Prasad was entitled to hypothecate the joint family property in his hands. The question of the sum of Rs. 3,10 paid in satisfaction of the mortgage of the 12th June 1901, has been strenuously argued before us. We have been referred to the desision of their Lordships of the Privy Council in Sahu Ram Chandra v. Bhup Singh (1), and more partisularly to the manner in which that pronouncement has been interpreted in subsequent decisions of this 'ourt, down to the case of Ram Sarvop v. Bharat Singh (2). I do not feel it incumbent upon me in the present case to discuss or criticise the decision of another Banch of this Court above referred to. I take the liberty of saying only this much that, with all respect to the learned Judges conserned, I entertain some suspicion that the principles laid down by their Lordships of the Privy Council have received a considerable extension at the hands of this Court in the case above referred to. I do not see why stress should be thrown entirely upon the propositions of law laid down by their Lordships in Sahu Ram Uhandra v. Bhup Singh (1), at page 447* of the report to the entire ignoring of the question dissussed in two previous pages, 443 and 44. , regarding the pions daty thrown upon the sons and grandsons to dissharge their father's debts. Their Lordships expressly noted that in the case before them the argument founded upon this pious obliga. tion, as such, failed by reason of the fact that they were dealing with a case in which the father was still alive when the suit was brought by which it was sought to bind the rights of the sons in the joint family property. In a case like the present, in which the son is being sued after the death of the father, it seems clearly neceseary that this question should be taken up and considered and decided (if it is to be decided against the creditor) on some other ground that than upon which it was disposed of in the ease of Sahu Ram Chandra V. Bhup Singh (1). At the same time, I am satisfied that the case now before us is elearly distinguishable from that of Ram Sarup v. Bharat Singh (2), so that what I have said above regarding that desision may be taken as a personal expression of affecting the ot opinion not result the present appeal. According to the Prasad's in Saraj age plaint month of June 1918, when this suit was instituted, was about 16 years. If so, he was born in or about the month of June A more reliable piece of evidence as to his age is to be found in the guardianship certificate re produced at page R. 15 of our printed book. According to this sertificate, Suraj Prasad was to attain the age of majority under the Guardians and Wards Ast (VIII of 1890), that is to say, he was to complete 2t years of age on the 5th of February 1925. Assuming piece of evidence to be correct, he was born in February 1904; in any case, he was not in existence when his father hypotherated the joint family property in favour of Hardeo Das on the 12th of June, 1901, in consideration for a loan of Rs. 2,000. If the suit were on the bond of Hardeo Das the appellant, Suraj Prasad, would not be entitled to sontest the necessity for the alienation in question. On this point it is aufficient to refer to the decision of this Lul v. Court in Ohuttun In the year 1901, therefore, Harleo Das was not dealing with Reoti Prasad as the manager of a joint Hindu family consisting of himself and a minor son, or as a trustee for the interests of that son. Reoti Prasad was at that time the sole owner of the property which he hypothecated to Hardeo Das along with his covenant to re-pay the loan. Under these circumstances, it seems to me clear that the question of legal necessity for the loan advanced by Hardeo Das cannot be raised in the present suit and must be assumed

(8) 8 Ind. Cas. 719; 88 A. 28 ; 8 A. L. J. 51.

^{(1) 39} Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 657; 15 A. L. J. 427; 19 Bom L. R. 498; 26 C. L J I; 33 M. L. J. 14; (917, M. W. N. 439; 22 M. L T 22; 6 L. W. 2:3; 4 I. A 12; P C.). (2) 64 Ind Cas 763; 19 A. L. J. 744; 43 A. 703.

[·] Pages of 88 A .- [Ed].

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against the defendant appellant. Therefore, the debt due under this bond of the 12th June 1901, was an antecedent debt for the re-payment of which Reoti Prasad could lawfully charge the joint family property in his hands. This disposes of the sum of Rs. 3,900, which we hold was applied to the satisfaction of the debte due to Harden Das. As regards the sum of Rs. 4,100 the Court below has arrived at a clear finding regarding the manner in which this money was actually applied. The desision of the Court below, as printed in our paper book, is disfigured by one or two apparent misprints and omits to notice one item of Rs. 100 paid into the Treasury on assount of irrigation dues on the 6th of Jane 1906. Making the necessary correction, I find that the payments alleged to have been made out of this advance of Rs. 4,100 are the following:-Rs. 1,000 paid on the 22nd of August 1906, being the last instalment due upon a bond in favour of one Phul Chand executed on the 16th of February 1899. It is proved that Rs. 1,000 were in fact paid to discharge this liability, vide the receipt re-produced on page 11 R. of our printed book. There were a number of payments on account of Government dues (land revenue and irrigation does) aggregating Rs. 2,082.2.0 and there were two payments of Rs. 400 to a creditor named Nathu Ram and Rs. 600 to a creditor named Thakur Das. The whole sum of Rs. 4,100 is thus accounted for except a small item of about Rs. 18, which appears, on the face of it, less than one would have reasonably expected to see charged in connection with the expenses for the execution and registration of the bond in suit. With regard to these items the appellant challenges the findings of the Court below on the questions of fast. After giving our best consideration to the arguments urged upon us, we think it sufficient to say that we feel satisfied that the Court below was right. The payments on account of the Government demand are proved by unimpeachable evidence, as also is the payment of Rs. 1,000 to Phul Chand. The two payments to Nathu Ram and Thakar Das are proved by such oral evidence as one might reasonably expect and ascept in a case of this sort. With regard to the pay. ment to Phul Chand, the same question of law is raised as has been already discuss.

ed in connection with the mortgage in favour, of Hardeo Das. The reasons given for deciding in favour of the creditor apply even more strongly in respect of this sum of Rs. 1,000 due in respect of a debt contracted even earlier than that in favour of Hardeo Das. We hold, therefore, that the decision of the Court below was correct in law and in fact, and we dismiss this appeal with costs, including fees on the higher scale.

WALSH, J .- I agree. I think the judgment of the Sabordinate Judge is an expellent one in every respect ercept that it lays itself open to one small criticism. With regard to the 1901 transaction, I am quite satisfied on the evidence that there was legal necessity to support it sufficient to bind any minor sons who were living at the time. Where nothing is shown adverse to the character or mode of livelihood of a Hindu father, I do not think the Courts ought to be astate to find objections or highly artificial conclusions as to the absence of legal nesessity in transactions which took place long ago and which are thus necessarily difficult to establish in all their details by elear verbal proof in a Court of law. The history of this man's business dealings laid a sufficient ground, in my opinion, for establishing conclusively the existence of necessity for raising a loan in 1901 in the absence of some definite evidence that the loan was raised for purposes inconsistent with his trust as father and manager of the family. The learned Judge has used language which suggests that, in his views, the mare antesedency of this debt in 1931 was sufficient to support it. I do not think he meant that. I think if he had asked himself the question whether there was legal necessity, he would have answered it in the affirmative. And it is not correct. to say that mere antecedency is sufficient to support a charge made by a father upon family property for a debt. Tas learned Judge also found that the proof of the eash which was required at the time of the loan for family purposes and of the cash which was actually expanded, nearly amounted to the money borrowed. It appears from what my brother has pointed out that the nedt erem neve et beinnome deorg lentes what the loarned Judge himself thought,

. J. P.

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but, as far as I am concerned, I should not have beld that failure on the part of the plaintiff to prove every pie raised and expended for family necessity constituted a sufficient ground in law for interfering with the transaction even pro tanto. In all such transactions there must necessarily be some margin for what one may sall incidental expenses, and to my mind the task imposed on a creditor of proving in a transaction, at least twelve years old, and in this case going back seventeen years, in a sum so considerable as Rs. 8,000, the intended and actual destination of each rupee, is, humanly speaking, an impossible one and for Courts of justice in India to impose that duty upon a plaintiff as a matter of principle and, so to speak. to punish the creditor to the extent of every pie which he does not prove up to the hilt, is to invite the ereditor to commit and suborn perjury in the Trial Courts. The failure to prove a small margin in a large sum like Rs. 8,000 is amply covered by the old maxim De minimis non curat lex. I agree with the order proposed.

Appeal dismissed.

PATNA HIGH COURT. APPEAL PROM OR: GINAL DECIRE No. 117 OF 1919.

March 16, 1922. Fresent;-Mr. Justice Jwala Prasad and Mr. Justice Adami. Rani CHHATTRA KUMARI DEBI-DEFENDANT-APPELLANT

versus

Panda BADHAMOHAN SINGARI— PLAINTIPF - RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 8, 4-No appointment of guardian ad litem-Ex parte decree-Nullity-Minor, not bound by decree-Fraud-Mere non-service of summons does not amount to fraud-Proof of fraud.

Mere non-service of summons is no evidence of frand. In order to charge a party with fraud in the suppression of summons, it is essential to prove that the non-service is the result of some active part taken by that party in not having the summons served and thereby keeping the opposite party from the knowledge of the suit [p 188, cols. 1 & z.]

Under the Civil Procedure Code when there is a minor attefendant in a suit it is incumbent upon the

Court to appoint a guardian with his consent to act as a guardian in the suit on behalf of the minor. [p. 139, col 1.]

A mere irregularity in the appointment of a guardian ad litem will not render the decree obtained against the minor null and void unless the interest of the minor has suffered by reason of such an irregularity. [p. 189, col. 1.]

An ex parte decree passed against a minor without appointment of a guardian ad litem is null and void and is not binding on the minor. [p. 139, col. 2.]

Appeal from a desision of the Subordinate Judge, Second Court, Muzaffarpore, dated the 19th March 1919.

Mr. N. Sinha and Mr. Murari Frasad, for Mr. Ambika Prasad Upadhya, for the Appellant.

Messrs. Parmeshwar Dayal and Jalgobind.

Prasad Sinha, for the Respondent.

JUDGMENT.-This appeal arises out of. an action to recover possession of the disputed. property with mesne profits after setting. aside an ex parte decree and arction-sale held thereunder.

The suit of the plaintiff has been decreed by the Subordinate Judge of Muzaffarpore by his judgment, dated the 19th of March 1919. The defendant is the appellant before us. She had instituted a suit against the plaintiff. for resovery of read and embankment eess before the Munsif of Motibari and obtained an ex parte decree on the 19th of November 1921. This deeree was executed and the Brit in question was purchased by the defendant. The delivery of possession took place through the Court in May 1913.

The grounds urged in the plaint for setting aside the ex parte decree and the subsequent proceedings are that (1) the decree in question was obtained by means of fraud resorted to by the decree holder in suppressing the notice and summons and the process in the suit and the execution proceedings, thereby preventing the present plaintiff from the knowladge of the suit and the proceedings; (2) that the property worth Rs. 10,000 was thus parchased by the defendant at a grossly inadequate price of Rs. 162 8.0, and (3) that the plaintiff suffered a serious loss and injury, on account of the fraudulent action of the defendant: The defence was a denial of the charge of fraud and it was asserted that no fraud was committed in connection with the suit and the execution proceedings. It is also alleged. that the plaintiff's mother and guardian had full knowledge about the suit, and that the price of the property fetched at the auction-sale was not inadequate.

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Court below held that the fast The stated by the plaintiff was proved that the ex parts desree in question was obtained by the defendant by means of fraud and that the decree obtained against the plaintiff was null and void inasmuch as no guardian ad litem was appointed on bahalf of the minor to protest his interest in the suit under Order XXXII of the Code of Civil Procedure. The Court below also held that the price fetched was grossly inadequate inasmuch as the total collections of the disputed property will be about Rs. 197, whereas it was sold for Re, 162-8-0 only. The Court below has, therefore, deereed the plaintiff's sait directing possession to be delivered to the plaintiff with mesne profits. The defendant has, therefore, some to us in appeal.

Mr. Parneada Naraia Sinha on behalf of the appellant urges that the Court below has not recorded a sufficient finding of fraud in order to hold that the decree in question was vitiated by reason of frand committed by the defendant in obtaining the expirts deeree in question. Re further says that there is no evidence of such a fraud. The evidence in the ease consists of the plaintiff's mother and her Karpard z. They deny the service of summons or notice upon them and knowledge of the suit in which the defendant obtained the decree in question. On behalf of the defendant no evidence of service of the notice or summons in the case was addused. The evidence on the point was. therefore, one sided and the Court below has accepted that evidence. The finding of the Court below that no notice or summons was served upon the plaintiff and his mother must be assepted as unassail. able.

There is, however, a good deal of force in the contention of Mr. Purnendu Narain Sinha that this finding alone is not sufficient to infer in law a finding of fraud, and the learned Subordinate Judge is wrong in holding that the aforesaid finding "constitutes fraud which vitiates the expirte decree obtained by the defendant against the plaintiff." It is concluded by authorities that the mere non-service of summons is no evidence of fraud. The summons might not have been served on account of the lackes of the Court peon

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or on account of other reasons. In order to charge a party with fraud in the suppression of summons it is essential to prove that the non service was the result of some active part taken by that party in not having the summons served and thereby keeping the opposite party from the knowledge of the suit. The point is so clear that now it hardly needs support of any authority. I, therefore, agree with the contention of Mr. Parnenda Narain Sinha, that the Court below has not resorded a sufficient finding to attribute fraud on the part of the defendant in obtaining the ex parte decree in question. If that were the only ground upon which the decree obtained by the defendant was attacked, then the plaintiff's suit would have been dismissed and the appeal would have been allowed; but the learned Subordinate Judge has some to a finding that the plaintiff in the suit in which an ex parte decree was passed against him was not represented at all. No guardian ad liten of the plaintiff was at all appointed by the Court. This finding of the Sabordinate Judge is borne out by the order sheet of the Original Sait No. 876 of 1912 (Exhibit 4). Oa the 9th of September 1912, the Court directed notice to issue on the minor defendant and the proposed gaardian ad liten and summons on the defendant fixing the 4th of Ostober 1912 for appointment of a guardian of the minor. After some adjournment on assount of the non-receipt of the service of summons the case was ultimately taken up on the 19th of November. On that date the Court resorded the following order: "This suit and suit o. 876 of 1912 tried together. Defendant absent. Service proved. Plaint. iff examined Dip Narain Lal. Suit desreed ez parte with costs."

It is thus elear that, although an order was passed by the Court to issue notice upon the proposed guardian, no order was passed appointing any guardian, nor did any guardian appear in the case on bahalf of the minor, and as the evidence stands no summons or notice was served upon the guardian or minor as is required by Order XXXI, rule 3, clause (1) Rule 3 of that Order makes it imperative upon the Court to appoint a person to be guardian for the suit on bahalf of a minor. Under

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role 4, clause (3) no person can be appointed a guardian for the suit without his consent. Therefore, according to the provisions in the Code of Civil Procedure, when there is a minor defendant in a suit it is incumbent upon the Court to appoint a guardian with his consent to act as a guardian in the suit on behalf of the minor.

Now, it has been held in a large number of cases that where the Court has by its action given its sanction for the appearance of a person as guardian, the absence of a formal order of appointment is not nesessarily fatal to the proceedings. In other words, a mere irregularity in the appointment of a guardian ad litem will not render the decree obtained against the minor null and void unless the interest of the minor has suffered by reason of such an irregularity. The leading decision upon the subject is that of their Lordships of the Judicial Committee in the ease of Walian v. Banke Behari Pershad Singh (1): Vide also Paresh Nath Mallik V. Hori Charan Dey (2), Nagendra Nath Bosu v. Parbati Charan (3), Surai Deo Narain Missro v. Sur eg Prasad Missra (4), Bum Array singh v. Sheonandan Singh (5) Keshawe Surendra Sahi v. Rani Decendrabala Dasi (6) and Ohhotter Singh v. Ter Singh (7). In most of these cases the guardian did act on behalf of the minor in the case and his interest, therefore, was protested. Consequently, in those cases it could not be said that the miner was not represented, though the representation was not formally sanctioned by the Court. In some of those cases it would be noticed that the Court itself permitted the guardian to set on behalf of the minor and the guardian was, therefore, asting with the full knowledge and approval of the Court; but here the case is of a different character. minor who mother of the The

(1) 30 C. 1021 at p. 1031; 30 I. A. 182; 7 C. W. N. 774; 6 Bom, L R. 822; 8 Sar P.C. J. 512 P. C.).

(2) 10 Ind. Cas. 361; 38 O. 622; 15 O. W. N. 875; 14 O. L. J. 300,

(3) 35 Ind. Cas. 339; 20 C. W. N. 819.

(4) 40 Ind Cas 227; 2 P. L. J. 890; 1 P. L. W. 647; (1917) Pat. 198.

(5) 85 Ind. Cas 868; 1 P. L. J. 578; 1 P. L. W. 35; (1917, Pat. 2 F. B).

16, 29 Ind. Cas. 211.

(7) 59 Ind. Cas. 671; 19 A. L. J. 956; 2 U. P. L R. (A.) 384; 43 A. 104.

his guardian did not know of the suit. No notice or summons was served upon her. No order of the Court was passed appointing her as guardian. No consent, either express or implied, was given by her and at no stage of the case she entered appearance. Therefore, the suit was decreed against the minor without any guardian and the minor was not at all represented in the suit. He is, therefore, not at all bound by the decree or any proceeding in connection with that decree: Ranewar Pramonik v Torapa a Bhattacharjee (8) Khigwan Dayal v. Param Sukh Das (9), Krishna Chandra [Narendra Chandra Mondol] v. Jogendra Nar in Roy (10), S. dashiv Ram. chandra Datar v. Trimbak Keshav Vate (11), Eda tunnayya v. Jangala Kama Kotayya (12) Rampirst Prosad v. Babu Thakur Saran (13). The principle has been recognized in the well-known decision of their Lordships of the Judicial Committee in Rashidun-nisa v. Muhammad lemail Khan (14). Therefore, the ex parte decree in question was not binding upon the plaintiff and was null and void. His interest in the property sould not, therefore, be affected by the sale in excention of the decree.

Mr. Pornendu Narain Sibba, however, contends that this point was not taken in the plaint for was any issue raise? and consequently no proper opportunity was given to the defendant to rebut it. It appears, however, that the order sheet of the case was filed and used as evidence on behalf of the plaintiff (marked Exhibit 4). Upon the face of that order cheet the plaintiff was not represented in the suit. It appears that on the date when the present case was taken up, that is, the 14th of March 1919, after the close of the plaintiff's case, the defendant wanted time on the allegation that her witnesses had

(8) 41 Ind. Cas. 672; 28 C. L. J. 258.

(9) 27 Ind. Cas. 6 3; 97 A. 179; 18 A. L J. 179.

(10) 27 lnd. Cas. 189; 20 C. L. J. 469; 19 C. W. N. 537.

(11) 56 Ind. Cas. 399; 44 B. 20?; 22 Bom. L R. 266. 112: 58 Ind. Cas. 18:; 37 M. L. J. 399; 26 M. L. T. 3.7; 10 L. W. 471; 11920; M. W. N. I.

113, 61 Ind. Cas. 484; (1921) Pat. 335; 2 P. L. T. 617.

(14) 3 Ind. Cas. £64; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Rom. L. R. 12.5; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.).

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missed the train and sould not some that day. The Court granted adjournment on payment of Rs. 20 as costs. Mr. Kennedy, the defendant's Vakil, then intimated to the Court that his elient was not willing to pay costs. The petition for time was accordingly rejected and the case was deeided only upon the evidence adduced on behalf of the plaintiff. Therefore, the defendant had full opportunity to rebut the case made by the plaintiff in evidence. Therefore, there is not much substance in the entention of the appellant. In fact, no evidence is required and no evidence would be available to rebut the dosumentary evidence in the shape of the order sheet in the case. The Court has held upon evidence that no notice was served and there is no order of the Court appointing any guardian of the plaintiff. This is a stubborn fast and will not be upset by any amount of evidence. Therefore, we are not prepared to remand the case to enable the defendant to give evidense in the case. He had full opportunity and no further evidence is possible.

We also note that, even if the non-representation of the plaintiff in the original suit was due to any irregularity, we find that the learned Subordinate Judge has come to a clear fluding upon evidence on the record that the property in suit was sold for a very inadequate price. The case of the plaintiff is that he is not bound to pay the embankment cass for which the exparte decree was obtained by the defendant. Therefore, there is no question that the plaintiff has been prejudiced by reason of the non-appointment of a guardian in the case.

For all these reasons, we uphold the decision of the Court below and dismiss the appeal with costs throughout.

P. D. & J. P.

Appeal dismissed,

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT. November 1, 1921.

Present:—Lord Buskmaster, Lord Carson, Sir John Edge and Sir Lawrence Jenkins. K. S. BONNERJI, OFFICIAL RECEIVER

-APPELLANT

versus

SITANATH DAS AND ANOTHER -

Trustee and persons in representative capacity— Delegation of powers—General or special power-ofattorney—Permanentlease by donee of power, validity of—Non-production of power—Admissibility of secondary evidence.

Fiduciary duties cannot be made the subject of delegation. Therefore, a person holding property in a representative capacity cannot delegate his powers by a general or special power-of-attorney, and a permanent lease granted by such donee of power is not valid. [p. 144, col. 1.]

If a proper case has not been established for the admission of secondary evidence of the contents of a written document, and objection has been taken to the fact that the document has not been produced, it is not permissible to go to other evidence for the purpose of indicating what the contents of the written document may prove to be if once it were examined. [p. 143, col. 2.]

Appeal from a judgment and a decree of Mr. Justice Chitty and Mr. Justice Panton, affirming a decree of the Subordinate Judge of the 24-Parganas at Alipur.

FACTS.—The enit was brought by the appellant, as Official Receiver, to recover certain property. The respondent resisted the action on the ground that the property was granted to them on a mokurari lease dated the 14th March 19.0, by Bhupendra Sri Ghosha, as Attorney of Protap Chandra Ghosha.

The Sabordinate Judge held that Bhupendra had authority to grant the lease and dismissed the suit.

On appeal, the High Court affirmed the decree of the Subordinate Judge, holding that Bhupendra had authority to grant the lease and that Protap, not being a trustee of the property but in the position of a karta or manager of secular property, could empower Bhupendra to deal with the property and grant the lease. Such a lease is valid and binding on the appellant.

Mr. Dunne, K. C. and Mr. E. B. Raikes, for the Appellant.—Protap was only a trustee. The lease was not granted by Protap but BONEBJI U. SITANATH DAS.

by Bhupendra under an alleged power of attorney. The power was not produced and there was no evidence that Bhupendra was the Attorney. Protap could not delegate his powers to deal with the property. Being a trustee, Protap himself could not grant a permanent lease. Secondary evidence to prove the contents of the power is not admissible.

Mr. DeGruyther, K. C. and Mr. Kenworthy Brown, for the Respondents.—The lease was beneficial to the estate as both the Indian Courts had found the respondents took the lease in good faith and the consideration paid was found adequate. The lease was granted by Bhupendra as the Attorney of Protap who was the managing member of the family. There is evidence that Bhupendra had a general power-of-attorney from Protap.

JUDGMENT.

Lord Buckmaster.—On the 14th March 1910 a document was executed by Bhupendra Sri Ghosha, purporting to act on behalf and as Attorney of his father, Protap Chandra Ghosha, by which a garden at Tallah was granted to the respondents under a mokurari lease, at the annual rent of Rs. 125, and a premium of Rs. 3,000. The respondents on the execution of the lease, entered into and have since remained in possession of the property.

The question raised in this case is, whether the lease conveyed to the a any title at all. It is challenged in the following eirsumstances: The property in caestion originally belonged to Hara Chandra Ghose, who died in 1868. He was survived by his widow, four sons and two day thers. On the 7th May 1880 a trust de d was executed by all the interested persons, by which the property was placed n the hands of trustees for certain religious and charitable purposes. The two first trustees under the deed were the widow, Srimati Padmabati Dasi, and her eldest so , Sri Protap Chandra Ghosha. The deed so stained the statement that upon the death of the widow the eldest son, Protap, should be the sole trustee, and on his death the second son, Sri Sarat Chandra Chosha, should be the sole trustes, and so on. it also provided that during the absence of any trustee for over one year during his life, the person entitled to be the trustee immediately in succession to him should be appointed to the office of trustee for the time being. It is unnecessary to consider the exact terms of the deed or the nature of the trust for which the property was conveyed. For the present purpose it is sufficient to say that, until the deed was challenged by a family suit that was instituted in 1910, it was accepted as ereating a good trust, and the persons named were assumed to be exercising the duties of trustees. On the 16th April 1900 the widow died, and from that time Protap became, by the terms of the deed, the sole trustee. On the 31st December 1900 he left Calcutts, and he only returned twice afterwards, the first of the two visits being after the execution of the lease. The lease was, as has been stated, executed by Bhupendra Ghosha, and all the preliminary negotiations and transactions must have been earried out by him, or some one on his behalf, because the evidence of Protap, which has been taken at some considerable length, makes plain that he had no knowledge of the matter until after it had taken place. He was asked when he was told that the land had been sold or perpetually leased to somebody, and his answer was he did not know. Then he was asked: "When did you come to know?" and his reply was: "About the time when the High Court suit was commenced." The suit was instituted on the 31st May 1910 after the date of the execution. Later on, he is asked this: "Do you know who gave the lease?" and his answer is: "I did not know then. I same to afterwards that it was done in my name under some power-of-attorney." in re-examination he repeats this statement. and says: "I found my actual knowledge since I perused typewritten copy supplied to me by an outsider, which suggested many things, and made me There is no evidence to which their Lordships' attention has been directed in the long and tedious deposition which Protap was called upon to make which contradicts these statements, and consequently it must be accepted that when this document was executed he had neither negotiated its contents, nor was he aware of them. whole of the authority for the execution BONNERJI U. SITANATH DAS.

of that lease must be found in the powerof-attorney under which Bhapendra Ghosha purported to act, and the existence and extent of that authority is the chief

question on this appeal.

In order, however, to see how this suit has arisen, it is necessary to go back a little in the family history. About the time of the execution of the lease, and possibly because of its execution, anxiety arose among the members of the family as to the way in which the affairs of the trust were being conducted, and in consequence a suit, to which reference has already been made, was instituted on the 31st May 1910, by Sarat against Protap, as trustee, slaim. ing to have the deed of trust deslared void, charging Protab with misconduct as trustee, and asking for accounts against him. In the plaint this lease was challenged, though not on the ground now under consideration. The beneficiaries were made parties to the suit, and a settlement of the disputes was ultimately effected; but one of the parties being an infant, it was necessary to obtain the consent of the Court to the proposed terms. This was secured by a decree on the 2nd August 1912, which declared that the general trusts of the deed were bad because the objects of the charity were far too indefinite, but the settlemnt of the litigation being approved by the learned Judge, his declaration was confined to the failure of the trusts, and to declaring that the properties that were the subject of the deed were charged merely with such necessary expenses were incurred 88 in the lifetime of the lady for the maintenance and ownership (?) of the Sradh mentioned in the third elause, and the service mentioned in the fourth appual The settlement released Protab from liability to account for moneys received from the lease, but it appointed the second trustee in the order, Sarat Chandra Ghosba, Receiver of the estate, and directions were reserved in these terms of settlement that he should be at liberty to take steps to rosover and set aside the perpetual lease or leases granted by Protap.

The poseedings out of which this appeal has arisen were assordingly instituted by Sarat. It is unfortunitely tras that the plaint is not expressed in plain terms,

but it does most clearly set out allegations in paragraph 5 and paragraph 6, putting forward this lesse under which the defendants claim as a suggested or. alleged lease, and there is nothing in the plaint to show that the lease was accepted as having in fact been properly executed. Again, the particular matter in controversy was not exactly defined in the issues that were settled, but it is certainly covered by the third issue, which was in these terms: "Was the trastee or his am moshtar competent to grant the permanent lease in question, and is it binding on the plaint iff?." The case came on for trial before the Sabordinate Judge on the 14th July 1916 when he dismissed the sait. In the sourse of taking the depositions, attempts were made to give in evidence the contents of the power of attorney under which the deed had been executed, and objection was promptly taken that no such evidence was admissible because the document must be in writing, and verbal evidence as to its contents sculd not be given until some proper and sufficient explanation was offered as to the reason why the dosument itself was not before the Court. On mor than one osession, in the source of the evidence, similar attempts were made, and similar objections were taken, and in the end there was no evidence on which reliance could be placed as to what the actual terms of that document were, or whether in fact any such document was in existence or operative at the time when the lease was executed. The best evidence upon the point was that of Zatindra Muthik who was managing elerk to Boupendra in his profession of Solicitor. He is not himself a Solicitor, and is now a trader in fish. He says that he read the power-of attorney, and that it granted full power to execute lease, mortgage, etc., but he did not resollest the exact expressions. The power was a general power to sell, mort. gage, or lease,

This evidence was objected to, and is useless for the purpose of proving the contents of a written document. Their Lordships only refer to it for the purpose of eaying that had they assented the evidense, it would not be sufficient. If any power existed in Protag to delegate authority under the strust deed it would be BONNERJI U. BITANATH DAS.

quite clear that the power of attorney to be granted would have to be a special specially referable to power-of-attorney, dealing with the estate which was subject to the trust, and not a general power ofattorney, which may have been executed by Protap in favour of his son, entitling him to deal with the whole of his private property. No evidence whatever that it is properly admissible having been given of the power-of attorney it necessarily follows that there was no proof that the lease under which the defendants' claim had ever been properly executed at all and the defence failed.

The learned Subordinate Judge, who dismissed the suit, dealt with the matter in a few sentences. He seems to think that the elatement in the plaint of the suit that had been compromised was sufficient to lead to the inference that Bhupendra, the son, had full power to execut; the lease on Protap's behalf, and he says at page

198 of the record :-

"I may also point out here that Bhupendra Sri's authority to execute the lease on behalf of Protap Babu has not been challenged in the plaint, though the plaintiff knew, as the plaint in the High Court ease indicater, that such a lease was granted. Bhupendra Sri Babu was alive when this plaint was filed and this explains, why the plaintiff did not consider it expedient to challenge his power."

It may be pointed out that even though Bhupendra Sri Babu had died since the suit was instituted, that would not have prevented the parties whose duty it was to obtain production of the power of attorney from taking the necessary steps either to obtain a copy of the document or to prove that that copy could not be obtained. The point raised that the matter was not specifically mentioned in the plaint does not appear to their Lordships to be sound, because although it is true that the plaint is conched in uncertain language, it is nowhere intimated plaint that such a lease was properly executed, and it, therefore, became incumbent upon the defendants to prove the title under which they held. whatever may be said about what happened before the Subordinate Judge, the grounds of appeal to the High Court expressly suggested that the! Court below had | made a

mistake in overlooking the fact that the alleged power-of-attorney had not been proved, so that the question was definitely raised, and the attention of the High Court directed to it. The High Court who confirmed the decree of the Subordinate Judge. dealt with the question in these terms, at page 20 i of the record :-

There can be no doubt that Bhupendra Sri Ghosha beld an am-mothtarnama from his father. Unfortunately, neither side seems to have been at any pains to procure the production of the document or to give proper secondary evidence of its contents. if it could not be found. The evidence on the record, such as it is, indicates that am-mokhtarnama was registered at Bindbyachal, and that it granted full power to sell, mortgage and lease."

Their Lordships desire to point out that if a proper case has not been established for the admission of secondary evidence of the contents of a written document, and objection has been taken to the fact that the document has not been produced, it is not permissible to go to other evidence for the purpose of indicating what the contents of the written document may prove to be if once it were examined.

Their Lordships, therefore, are clearly of opinion that in this case the defence must break down through the inability of the defendants to prove the execution of the lease under which they claim by anybody having proper authority, and even if the evidence as to the existence and contents of the power of attorney were accepted, it would be inadequate for the reasons already given. Their Lordships are, however, impressed with what had been said by Mr. De Gruyther as to the defendants not being alive to this point being raised in the plaint, though they see no reason whatever for this inadvertence from the date when the notice of appeal was given to the High Court. Their Lordships, therefore, have considered what the position would be supposing such document had, in fact, been proved, and had been shown to be a special power purporting to authorise dealings with the trust estate, and they are of opinion that, even in that event, it could not have availed the defendants. The reason for this is plain. In whatever espacity Protap held the land in question, the capacity must have been a representative one. It was

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said that he was not in the strictest language a trustee; but be it so, his position was none. the less a representative one, and it being plain that he never negotiated nor considered. nor knew of the lease until after it had been executed, if what was done was done by virtue of a prower-of-attorney, it could only have been because the power had delegated the representative authority that he possessed to a third party. The duties of Protap, however they may be defined, were in their nature fiduciary, and fiduciary duties cannot be made the subject of delegation. If, therefore, the document had been before their Lordships it would have been impossible to have supported the contention that it conferred the power to negotiate and execute the document upon which the whole of the defendants' case rests.

Their Lordships desire to express their opinion that there is nothing to cause them to qualify the findings that have been found by both the Courts as to the defendants having acted honestly in the matter. acted honestly, but they acted with scant wisdom, and with a strange disregard of the eaution that it is essential should be observed in dealing with a person who has no authority to act on his own behalf.

For these reasons their Lordships think this appeal should be allowed, the suit should be decreed, an order made for possession of the land, an enquiry should be directed as to mesne profite, and the appellants should have the costs here and below, and they will humbly advise His Majesty accordingly.

Apreal allowed. K. V. L. N. Solicitors for the Appellant. - Mesers. T. L. Wilson & Co.

Solicitors for the Respondents.-Mesers. Wathins and Hunter.

ALLAHABAD HIGH COURT. FIRST CIVIL APPRAL No. 350 of 1919. February 21, 1922. Present:-Mr. Justice Raf que and Mr. Justice Lindsay. JIWA RAM-PLAINTIFF-APPELLANT versus

NAND RAM - DEFENDANT - RESPONDENT. Civil Procedure Code (Act V of 19(8), 88. 141, 144, applicability of - Application for restitution dismissed for default, whether can be restored.

Proceedings under section 144 of the Civil Pro. cedure Code are not proceedings in execution of decree and, therefore, the terms of section 141 do apply to such proceedings, [p. 145, col. 2.]

Therefore, a Court is entitled to set aside an order of dismissal, of an application under section 144, Civil Procedure Code, for default and to restore it. [p. 146,

col. 2

First appeal from a decree of the Subordinate Judge, Aligarh.

Mr. Peari Lal Banerii, for the Appellant. Mr. Panna Lal, for the Raspondent.

JUDGMENT .- This is an appeal against an order of the Subordinate Judge of Aligarb, passed in certain proceedings taken under section 144 of the Code of Civil Procedure for the purpose of obtaining restitution.

The fasts are as follows:- One Gobardhan Das died in the month of August 1900 leaving two widows, Musammat Rupo and

Musammat Singhari.

The latter made a wagf of a certain portion of the property which had belonged to her busband, in favour of a temple, and appointed Nand Ram, the respondent in the present appeal, the trustee.

After the death of Musammat Singhari, a suit was brought against Nand Ram by the surviving widow, Musammat Rupo, and one Jiwa Ram, who, it was alleged, was her adopted son.

This suit was successful and a decree was passed in favour of Musammat Rupo and Jiwa Ram in the month of February 1910 and in execution of this decree Rupo and Jiwa Ram obtained possession of the property on the 4th of May 1910.

There was an appeal against this deerse to the High Court, and, ultimately, the decision of the First Court was set aside and the ease was remanded for decision on the merits.

After the remand the parties agreed to arbitration; and on the 21st of March 1912 the arbitrator delivered an award, upon which a decree was subsequently passed by the Subordinate Judge.

The effect of the award was to declare that a portion of the property, onse belonging to Gobardhan Das, had been effectively dedicated as wagf. The arbitrator also held that Jiwa Ram had been duly adopted by Musammat Rupo.

After this decree was passed Nand Ram on the 20th of April 1913 was put in

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possession of that portion of the proper'y which had been found to be validly dedicated to the temple.

Nand Mam then applied for the recovery of means profits from the 4th of May 1910

till the 20 h of April 1313.

A preliminary decree was passed by the Subordinate Judge on the 22nd of December 1914 by which he awarded a sum of Rs. 2,624.5.5 to Nand Ram. This decree was against both Musammat Rupo and Jiwa Ram.

An appeal was filed in the Court of the District Judge. He upheld the decision of the F ret Court so far as the amount was concerned, but he passed an order discharging Jiwa Ram from liability.

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A second appeal was brought to this Court, and in the result it was held that Musammat Rupo alone was liable for mesce profits from the 4th of May 1910 till the 21st of March 1912. It was further declared that Musammat Rupo and Jiwa Ram were jointly liable for means profits from the 22ad of March 1912 to the 20th of April 1:13.

The High Court directed an enquiry to be held in order that these liabilities might be assertained. In the order directing investigation nothing was said as to the Court in which the enquiry was to be held. Tae ease went down to the District Court and was passed on to the Court of the Sab. ordinate Judge. The Subordinate Judge has now concluded the enquiry and given a decree in which he declares Jiwa Ram and Musammat Rupo jointly liable for a sam of Rs. 708 3 2, while Musammat Rupo is deslared to be solely liable for the Rs. 1,691 3 0. It is to be mentioned here that Musammat Rapo died on the 28th of July 1918 while the enquiry in the Court of the Subordinate Judge was still pending.

Jiwa Ram now comes here in appeal, and three points have been raised and argued on his behalf. The first point taken is, that the order of the Subordinate Judge is ultra vives inasmuch as he had no jurisdiction to make the enquiry and pass the decree now complained against. It is pointed out that when the order of remand was made by this Court, the case ought to have been taken up by the District Judge against whose decision the appeal had been filed here.

This point has not been pressed, and we may say that, in any case, we should not be disposed to entertain it. It is purely a technical plea, and in view of the erroumstances of the case, and, in particular, having regard to the long period during which this dispute between the parties has remained unsettled, we should be very relustant to interfere on a ground like this. The learned Judge has conducted the enquiry very carefully and has discussed the merita of the case in full detail.

The next point taken is, that the order of the Subordinate Judge is bad for the following reasons:—

It appears that after Nand Ram made an application for restitution under section 144 of the Code of Civil Procedure, he made a default in appearance. The result of this was that an order was passed dismissing his elaim.

Subsequently, Nand Ram made an application for restoration. A date was fixed for the hearing of this application and, on that date, Nand Ram was again absent and the application for restoration was dismissed for default.

Nand Ram made a second application asking that the order of dismissal might be set aside, and, eventually, with the consent of the other side, an order was passed setting aside the order of dismissal and directing that the enquiry should proceed. In the course of those proceedings Jiwa Ram's Counsel informed the Court that he would not oppose the application for restoration, provided that he were given costs. His statement was that his client had been much harassed by the proceedings and was desirous of having the matter settled once for all. The learned Judge, in setting aside the order of dismissal, awarded costs to Jiwa Ram's Counsel, and thersupon the ease proceeded, and was terminated by the desree which is now, under appeal.

The argument for the appellant here is, that in proceedings taken under section 144 it was not competent for the learned Subordinate Judge to pass any order for restoration. It is argued that the terms of section 141 of the Oode of Civil Procedure, by which it is provided that the procedure laid down in the Code in regard to suits shall be followed, as far as it can be made applicable.

JIWA BAM O. NAND RAM.

in all proseedings in any Court of reivil jurisdiction, do not apply to proceedings under section 144 of t e Code. The conten. tion is that an application for restitution made under this latter section is a proceeding in execution of decree and that, consequently, the provisions of section 141 do apply.

It has, indeed, been laid down by high authority that the provisions of section 141 do not apply to proceedings relating to the execution of a decree.

It appears to us, however, that proceedings under section 144 of the Code cappot deseribed an properly te proceedings in execution of a deeree. We have been referred to the judgment of the Madras High Court in Comosunderam Tillei v. Chokkalinga Fillai (1), in which it bas tern beld that preceedings under ceetien 144 are execution proceedings, but, with all respect, we are unable to agree with this.

A comparison of section 144 of the preeent Code and section 5:3 of the Code of 1882 seems to make the matter elear.

Under the old Code it was provided by the section just mentioned that when a party entitled to any benefit (by way of restitution or otherwise) under a deeree passed in appeal desires to obtain execution of the same, be was to apply to the Court which passed the deeree against which the appeal was preferred, and it was directed that such Court should proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in suits.

On the language of section 583 it seems fairly elear that the proseedir ge for obtaining restitution were, under the old Code, proceed-

ings in excention of deeree.

The language of section 144, bowever, is very different, and we now find no mention regarding any application to be made for the purpose of executing the decree of the Appellate Court, nor do we find any direction laying down that such proceedings are to be regulated by the roles preseribed for the execution of deerces in suite.

The larguage of section 144 is very wide, and it is provided that, for the purposes of

making restitution, the Court may nake

any orders irelading orders for the refund of ecets and for the payment of interest. damages, compensation and mesne profits which are properly consequential on the variation or reversal which has been made in respect of the first Court's deerse. It may well be doubted whether a Court, which was merely executing a decree, could be deemed to be invested with such extensive powers, for it seems to us that under section 144 a Court is enabled topas orders and to make erquiries which might be altogether beyond the scope of the Appellate Court's decree. Be that as it may, however, we are satisfied that, in view of the difference of the language used in the present section 144 and the former section 583, we are justified in soming to the sonslusion that proceedings under section 144 are not procredings in execution of decree. In this view we hold that the terms of section 141 do apply to such proceedings, and that, in the present ease, it was competent to the learned Subordinate Judge to set aside the order of dismissal for default and to restore the application.

The only other point which has been argued before us is with regard to the form of the lower Court's decree. We have already mentioned that Musammat Rupo died on the 28th of July 1918 while these proceedings were pending. It is said that after Rupo's death no formal steps were taken to make Musammat Rapo's legal representative a party to the record.

If there is any legal representative of Musammat Rupo, he can be no other than Jiwa Ram, and it is an admitted fact that at the time Musammat Rupo died, Jiwa Ram was a party to the record. In the circumstances, we are unable to hold that, because there was any omission to take formal steps to bave it deelared that Jiwa Ram was, for the purpose of these proceedings, the legal representative of Musammat Ropo, the order of the Court below was bad.

A further point is taken to which we must now refer. The decree prepared by the Subordinate Judge, on the 10th of July 1919, directs that Rs. 7:8.3.2 shall be paid by Musanmot Ropo and Jiwa Ram jointly, and that a further sum of Rs. 1,691.3 0 was payable by Muscmmat Rupo alone.

Obviourly, as the facts stood at the time when the decree was prepared, the form

(1) 38 Ind. Cas. 808; 40 M. 780; 5 L. W. 267.

BHUP CHAND U. UDE RAM.

of the decree is wrong for, as we have pointed out, Musammat Rupo had died about a year balore.

It is further argued in the sireumstances if we hold Jiwa Ram to be the legal representative of Musammat Rupo, we ought also to modify the decree of the Court below so as to make it clear that Jiwa Ram is not personally responsible for the sum of Rs. 1,691.5.0 which the decree declares to be payable by Rupo. It is said that we ought to limit the liability of Jiwa Ram in respect of this sum to any assets of Musammat Rupo which have some to his hands.

At first sight, this argument appears to be a reasonable one but we have to examine the facts a little more closely. In the first place, it is now absolutely settled that Jiwa Ram was validly adopted by Musammat Rupo to ber husband Gobardhan Das-That was declared by the award of the arbitrators and the decree which passed thereon. If Jiwa Ram has been validly adopted by Gobardhan's widow, it follows that the title of the widow was altogether onsted, and Jiwa Ram takes the whole inheritance left by his adoptive father. Further, it is no longer disputed that in March 1910 when possession was taken after Musammat Rupo and Nand Ram had obtained a decree, this possession was delivered both to Jiwa Ram and Musammat Rupo. It follows, therefore, that Jiwa Ram's possession continued from the 4th of May 1910 till the 20th of April 1913 when Nand Ram was restored to possession of that portion of the property which was found to be waqf.

Such being the state of things, we do not see why the liability of Jiwa Ram qua this sum of Rs. 1,691-3.0 should be limited in the manner suggested. He is the adopted son of Gobardhan Das and is the owner of the estate. He represents the estate in its entirety; and in this view of the facts we think that in the present proceedings Jiwa Ram should a'so be made liable for the sum of Rs. 1,691-3 0 without any limitation of his liability. In other words, Jiwa Ram's liability to pay this sum is not dependant upon any assets which he has taken from Rupo, if indeed he has taken any assets from her at all.

The result, therefore, is that the appellant's

costs to respondents including fees in this Court on the higher scale. We direct, however, that the decree be amended so as to make it clear that the total sum awarded is payable by Jiwa Ram, appellant, to the respondent, Nand Ram.

J. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPRAL No. 2147 or 1918,

December 2, 1921.

Present: -Mr. Justice Abdul Bacof and

Mr. Justice Martineau.

BHUP CHAND—PLAINTIFF—

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UDE RAM AND OTHERS-DEFENDANTS-

Appeal, second-Instalments-Discretion of Court.

Unless a very strong case is made out a High Court will not interfere, in second appeal, with the discretion exercised by the lower Court in fixing instalments, on the ground that the instalments fixed are too low, especially where a large portion of the amount decreed consists of interest. [p. 148, col. ?.]

Second appeal from a decree of the District Judge, Ambala, dated the 22nd March 191:, varying that of the Junior Subordinate Judge, Ambala, dated the 11th Ostober 1917.

Mr. Bihari Lal, for the Appellant.
Lala Amar Nath Mosgo, for the Respondents.

JUDGMENT.—The facts of this case are few and simple. The plaintiff claimed Rs. 1,030 on the strength of a bond dated the 7th June 1911. The Trial Court found only Rs. 175 proved and gave a decree for Rs. 303, including Rs. 175 principal, and Rs. 123 interest. On appeal by the plaintiff the Appellate Court found the whole claim proved and gave a decree for the antire claim, namely, Rs. 1,030. This amount is made up of Rs. 600 principal and Rs. 430 interest. Having regard to the

GOPAL DAS C. SEI THAKER GANGA BEHARIJI.

court thought that the defendants were entitled to have the desree made payable by instalments and made the following order:—

"I, therefore, ascept the appeal and give the plaintiff a decree for Rs. 1,030 with costs payable by instalments of Rs. 25 every six months. The first instalment will be paid on the 1st of July 1918 and subsequent instalments every six months later."

The plaintiff has preferred appeal against the decree of the Appellate Court and has raised following two pleas in his memorandum of appeal, namely, (1) that the sound and proper discretion has not been exercised by the lower Appellate Court, because the decree is passed in favour of the plaintiff appellant for the sum of Rs. 1,030 and the instalments fixed are so low that the whole decretal amount cannot be satisfied for the period of 23 years to some, and (2) that if this Hon'ble Court is not inclined to interfere on the question instalments, then a stipulation should added to this effect that if the judgmentdebtor will not pay one instalment then the whole outstanding amount will, in default of one instalment, be enforced.

The question which we have to decide is, whether a case has been made out to justify an interference with the discretion exercised by the lower Appellate Court. On behalf of the respondents the case of Bishu Sekhar baneries v. Choudhry Mattab ud-Lin (1) is relied upon. In that case an instalment-decree was passed and in second appeal objection was taken questioning the discretion of the Court in passing such a decree, and a Division Bench of the Calcutta High Court refused to entertain the objection and made the following remark:—

"We think that in second appeal the question of discretion cannot now be gone into. It is perhaps somewhat anomalous that the decree-holder should be kept out of his money for seven years, but, on the other hand, he has already recovered a substantial sum, nearly double the amount of his original debt, so that the hardship complained of is more apparent than real."

(1) 11 Ird, Car. 786, 15 C.IW. N. 1088.

In the case before us a large portion of the amount decreed consists of interest and it cannot be said that the lower Appellate Court had not exercised its discretion judieially. Although we are not prepared to go so far as to hold that, in second appeal, such a question sannot be entertained, we are of opinion that, unless a very strong case is made out, this Court ought not to interfere with the discretion exercised by the lower Appellate Court. An unreported case No. 1406 of 1918 (Ramji Das v. Gumani) decided on the 30th July 1918 by Mr. Jus ice Wilber force is relied on by the appellant, but the precise question raised before us does not appear to have been raised before the learned Judge, and consequently there is no decision on this point in the judgment. The decision in that ease, therefore, is no authority in support of the contention of the appellant.

We accordingly dismiss the appeal with costs.

Z, K,

Appeal dismissed,

ALLAHABAD HIGH COURT.

SECOND CIVIL APPELL No. 757 of 1920.

February 16, 1922.

Present:—Mr. Justice Rafique
and Mr. Justice Lindeay.

GOPAL DAS—DEFENDANT—

APPELLANC

versus

SRI THAKUR GANGA BEHAR.JI MAHARAJ-PULINTIFF-RE-PONDENT.

Limitation Act (IX of 1904), Sch. I, Art. 120—Suit for declaration—Entry of name in village papers in 1901—Knowledge in 1918—Cause of action, when arises.

The name of the defendant was first entered as owner of the property in dispute, belonging to the plaintiff in 190, but the plaintiff first became awa e of it in 1918:

Held, that the right to sue for declaration accrued in 912 and that a suit brought in 1919 was well within time [p 14, col. 2.]

Second appeal from a decree of the Additional Judge, Aligarh.

Mr. Panna Lal, for the Appellant.

KAMLA PRASAD U. NATHUNI MARAYAN SINGH,

Messrs. M. L. Agarwala and Birjnath Vy18, for the Respondent.

JUDGMENT.—We have heard the learned Counsel in support of this appeal and are of opinion that the judgment of the lower

Appellate Court must be maintained.

The only point on which the judgment of the Court below is impeashed is the ground of limitation. The contention for the defendant appellant is that the suit is time barred.

There can be no doubt that the proper Article applicable to the suit was Article 120 of the Schedule to the Limitation Act. The suit was a suit for a declaration of title.

The only question which has to be considered is the date from which the plaintiff's right to sue accrued. The plaintiff, in paragraph 8 of his plaint, sets out the date on which his right to sue accrued as being the month of January 1918 and this suit was filed on the 11th of January, 1919.

On the other hand, the contention is that limitation began to run from the year 1901, corresponding to the year 1303 Fasli. The reason why this latter date is put forward is because it was in the village papers of that year that the name of the defendant was first entered as being owner of the property in dispute.

Both the Courts below are agreed in finding that the property in question is the property of the idol, who was the plaintiff in the suit. They both agreed, moreover, that the defendant Gopal Das got possession of this land not adversely but permissively. He was let into possession by one of the puraries of the temple who was, in fast, the manager of the land in dispute.

There can be no question, therefore, of any adverse possession on the part of the defendant appellant, Gopal Das. However, this is a matter with which we are not concerned here. The question is, what is the date from which it can be said that the plaintiff's right to bring a suit accraed? We cannot agree with the contention of the defendant appellant that the right to sue accraed in the year 1901-1902. The mere entry in the village papers would not of toolf give the plaintiff a cause of action, according to what has been set out

made in the year 1309 Faeli was not brought to the notice of the plaintiff until the month of Japuary 1918, when the verification of the Settlement entries was going on in the district. It was then, according to the plaintiff's case, that he became aware for the first time that the name of the defendant was recorded in the village papers.

In our opinion no right to sue ean, on these facts, be deemed to have accrued to the plaintiff in the year 1309 Fasli. We think that the right to sue accrued in the year 1 18 and this suit was well within time. The plea of limitation

fails.

The only other point which has been mentioned in argument is with regard to the lower Court's decree. It appears that the Court of first instance, although it declared the plaintiff's title, nevertheless passed an order for maintaining the defendant's possession as manager. The lower Court thought that this was a wrong order, inasmuch as the defendant did not profess to be in possession as manager but was setting up an adverse title. We agree with the learned Judge of the Court below that the order of the first Court maintaining the defendant's possession was not a proper one in the circumstances.

The result is that the appeal fails and we dismiss it with costs.

J. P. Appeal dismissed.

PATNA HIGH COURT.

APPEAL PROM APPELLATE DECRME No. 1011

OF 1920.

March 9, 1922.

Present: —Mr. Justice Coutts and
Mr. Justice Ross.

KAMLA PRASAD—APPELLANT

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NATHUNI NAR AYAN SINGH AND
OTHERS—PLAINT. FFS AND
Babu DEONATH SAHAY AND
OTHER - DAMES - Resource etc.
Hindu Law-Managing member—Power to alienate

KRISHNANAND NATH C. RAJA RAM SINGH.

family property—Legal necessity—Consent of other members implied—Mortgage—No title in mortgaged property—Title subsequently coming—Mortgagor, duty of.

The head of a joint family cannot mortgage the joint family property without consultation with and consent of the other members, but where in a suit legal necessity is proved it is unnecessary to prove consent because in such a case this is implied.

Where a mortgagor mortgages a certain property as having a right to do so but in fact has no such right and subsequently title to a portion of the property comes to him he must make good his representation to the extent of the property which comes to his hands.

Appeal from a decision of the District Judge, Arrab, (Shahabad).

Mesers. K. P. Juyaswal and N. N. Sen, for the Appellant.

Mr. Siva Saran Lal, for the Respondents.
JUDGMENT.

Courts, J.—This was a suit brought on a mortgage bond for Rs. 500 executed by Kamla Prasad, defendant No. 1, as the karta of the joint family and certificated guardian of his minor brothers. The suit was decreed in the Court of first instance on contest as against defendants Nos. 2 to 5 and ex parte against the other defendants; but on appeal to the District Judge this decree has been set aside and a decree has been passed ex parte as against the defendant No. 1.

The principal questions which arose in the suit were, whether there was any legal nesessity for the loan and whether the defendant No. 1 was the karta of the family. With regard to the question of the defendant No. 1 being the karta of the family there appears to be no doubt that this is so, but as regards legal necessity the learned District Judge has found that there was no proof of legal necessity except in regard to a sum of Rs, 160, and he says that if the bond had been otherwise a good bond as a mortgage of joint family property he would have passed a mortgage decree for Rs. 160 with interest at the bond rate against all the defendants: but he found that there is a defect in the bond inasmuch as Kamla Prasad executed it as karta and certificated guardian of his brothers. As the learned District Judge has said the law is that the head of a joint family cannot mortgage the joint family property without consultation with, and consent of, the other members, but where legal necessity is proved it is unnecessary to prove content, because this will be implied as in the present case. If Kamla Prasad had executed

the bond as karta of the family the consent of the other members would have been assumed, but one of the other members, Lashmi Narayan, was of age at the time of the execution of the bond and Kamla Prasad executed the bond as certificated guardian of Lachmi Narayan; and, as the learned District Judge very justly remarks, this recital in the bond negatives all idea of concent of Lachmi Narayan, so that there is a defect in the bond. There can be no doubt that the view of the law which has been taken by the learned District Judge in the matter of the decree against the defendant No. 1 is the correct view. Kamla Prasad martgaged a certain property as having a right to do sc; he had in fact, however, no title but as title to a portion of the property has now come to him he must make good his representation to the extent of the property which has some to his hands. This is undoubtedly the correct view of the law and the learned District Judge has rightly passed an ex parts desree against this defendant.

I see no reason to interfere and would dismiss this appeal with costs.

Ross, J. - I agree.

P. D.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 301 of 1919.

February 15, 1922.

Present:—Mr. Justice Piggott and

Mr. Justice Walsh,

KRISHNANAND NATH KHARE —

PLAINTIFF—APPELLINT

RAJA RAM SINGH-D. FENDANT-

Hindu Law-Joint family-Manager, position of-Promissory-note executed by manager-Other members, whether can question.

The position of the head of a joint Hindu family is not the same as that of an ordinary business agent and, according to the true view, a joint Hindu family being a legal person according to Hindu Law, lawfully represented by and acting through the managing member or head thereof is included ordinarily in the term "a person" [p 151, col. 2]

A joint Hindu family can execute a

A joint Hindu family can execute a negotiable instrument through its manager, and its other members cannot escape liability on the

KRISHNAWAND NATH U. BAJA BAM PINGH,

ground that it was not made or signed by them although it is open to them to raise the question whether the promissory-note was in fact made for family purposes or as a breach of trust by the person whose signature appears thereon for and on behalf of the joint family [p. 152, col. 1.]

First appeal from a decree of the Sabordinate Judge, Gorakhpur.

Mesers. Narayan Prasad Asthana and Durga

Charan Singh, for the Appellant.

Dr. Surendro Nath Sen, for the Respondent.

JUDGMENT .- This is a sait brought upon a promissory note of 1917 which is admittedly a renewal of a previous promissory note of 1914 which in itself was a renewal of a previous promissory note of 1911. The promissory-note in suit was made by one defendant only, namely, Babu Bam Baran Singh. The suit is brought against Babu Ram Baran Singh and also his brother, Baba Raja Ram Singh, upon the ground that the note was made by the defendant Babu Ram Baran Singh as head and manager of a joint Hindu family of which his so defendant, Babu Raja Ram Singh, was an adult member. The Kayastha Trading and Banking Corporation, Limited, were also made defendants as the original payees and endorsers in favour of the plaintiff. appears that both the brothers, Babu Ram Baran Singh and Baba Raja Rum Singh, were makers of the original promissory-note of 1911 of which the promissory note of 1914 was the first renewal. This fact may be of importance upon the question whether the note sued upon was in fast made for and on behalf of the joint family, of which the defendant Baba Bam Baran Singh was manager, for family purposes so as to bind the members of the family The suit has been dismissed by the Sabordinate Jadge on the ground that there is no sause of astion against the defeadant Baba Raja Ram Singh, for the reason that his name does not appear as a party to the promissory note in suit or as one of the makers thereof or, in other words, to quote the language of Lord Buskmaster in the report of the case desided by their Lordships of the Privy Council relied upon by the Court below, upon the ground that the name of Baba Raja Ram Singh was not disclosed. In arriving at that one. elusion, the Court below has relied entirely upon the judgment of their Lordships in the

Janki Das V. erry of Sadasuk Fershad (1) and, particularly, upon the principle there laid down as follows: -" [t is of the utmost importance that the name of a person or firm to be charged upon a negotiable dosument should be clearly stated on the face or on the back of the doenment, so that the responsibility is made plain and ean be instantly resognised as the dosument passes from hand to hand." In our opinion this principle has no application to the case of a joint Hindu family which it is sought to make liable through the signature of the managing member thereof, The position of the head of the joint Hindu family is not the same as that of an ordinary business agent and, according to the true view, a joint Hindu family being a legal person according to Hindu Law, lawfully represented by and acting through the managing member or head thereof, is included ordinarily in the term "a person". In other words, a promissory-note, assording to the definition contained in section 4 of the Negotiable Instruments Act, is an instrument in writing containing an unean litional undertaking to pay a sertain sum of money signed by the maker and the question, in the event of the person in whose favour such document is given or into whose hands it may fall, in a case of an alleged joint Hindu family, is whether such a joint Hindu family, is in fact the maker or only a member thersof who happens to have signed the dosument. Assepting the principles laid down in the authority referred to, we are of opinion that they have no application to the case before us. We are content to adopt, without repeating at length the judgment of Mr. Justice Shephard in the eass of Krishna Ayyar v. Krishnasami Ayyar (2). The principle accepted by the majority of the Madras High Court in that desision has been inferentially assepted by the in the ease of Court Bombay High hrishnishet v. Hiri Viljibhatys (3) and also by the Caleatta High Court in the ease of

(2) 23 M. 597 at pp. 801 to 813. S Ind. Din (x, s)

819.

^{(1) 50} Ind. Cas. 216; 43 C. 663; 2) C. L.J. 31); 17 A. L. J. 495; 25 M. L. T. 258; 36 M. L. J. 419; 21 Bom L. R. 605; 1 U. P L. R. (P. C.) 37; (1919 M. W. N. 3'0; 21 C. W. N. 9 7; 10 L. W. 141; 45 I. A. 33 (P. C.).

^{(8) 20} B. 489; 10 Ind, Dec. (x. s.) 839.

MURITORAR O. SURAT LAL CHOWDERRY.

Boisnab Chandra De v. Ramdhon Dhor (4) and we are content to follow the view taken in these three decisions.

It is extremely difficult to see how any other view could be made to work consistently with the ordinary methods of business and with the established principles of law. If the view taken by the lower Court was sound, it would be necessary to require every person who was supposed to be a member of a joint Hindu family from whom it was desired to take a promissory-note, to sign a document, including, presumably, even infant children in some way through their guardians. would make it almost impossible, for all practical purposes, for a joint Hindu family to make payments or take credit by giving promissory note at all, which hardly be the intention of the Legislature and the Negotiable Instruments Ast. only other alternative would be to relegate the question of the liability of the joint family to the Execution Court, to decided there as a substantive issue of fact, even although a member of such family had been joined as defendant to the suit and a decree had been given in his favour

exempting him from liability.

No doubt, from one point of view practical difficulties may be pointed out in commercial transactions upon the basis of this view being a correct one. All ore can say is that it seems to be an incidence of the difficulty of applying the legislative prcvisions of Western Law to the ancient ensioms and traditions of the law of the joint Hinda family; but the missbief of the latent ambiguity involved in the mere signature of the managing member of a firm circulated in the market, even although he may have signed as such managirg member for and on behalf of the joint family as a whole which he represents, would still remain, inasmuch as it would always be open to the other members of the family to raise the question whether the promissory note was in fact made for family purposes or as a breach of trast by the persons whose signatures appeared thereon for and on behalf of the joint family. The suit having been dismissed as against the defendant Babu Raja Ram

Singh as disclosing no cause of action, it must go back to be tried upon the merits. Insamueh as the point raised is a stantial and important one and this particular defendant raised it in his OWD behalf and obtained a deeree in his own favour, we think he must pay the costs of this appeal.

J. P.

Appeal allowed.

PATNA HIGH COURT. APPEAL PROM APPELLATE DECKER No. 556 or 1:20. February 20, 1822.

Present: - Mr. Justice Coutts and Mr. Justice Rose. Lola MURLIDHAR-PLAINTIFF -

AFFELLANT

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SURAT LAL CHOWDHURY AND OTHERS-DEFENDANTS-RESPONDENTS.

Mortgage - Occupancy holding, non-transferable -Rent-decree-Execution purchaser of holding in rent. decree, rights of - Encumbrance - Mortgage-decree-Purchaser, execution of mortgage-decree, right of-Redemption.

A purchaser of a non-transferable occuparcy holding in execution of a rent-decree purchases the holding itself and is entitled to take the holding free of encumbrance, if, in fact, there is no encumbrance valid in law outstanding against it which it is necessary for him to annul.

A mortgage of a non-transferable occupancy holding is of no effect against the holding or the person who purchases the holding in a rent execution and a subsequent purchaser of the holding in execution of the mortgage decree is not entitled to redeem the holding from the purchaser of the holding in the execution of the rent-decree.

Appeal from a decicion of the District Judge, Durbhanga.

Merers. Eulwant Sahay and Shiveshwar Deval, for the Appellant.

Mr. S. N. Bose for Mr. S. O. Mitter, for the Respondente.

JUDGMENT.

Ross, J .- The plaintiff is the purchaser of a non-transferable occupancy hold. ing in execution of a deeree on a mortgage excented in his favour by the original tenant. The defendant is the purchaser of RAHIM B. KESH C. MOHAMMAD ATUB.

the holding in execution of a decree for rent obtained by the landlord against the plaintiff's mortgager, after the mortgage decree was passed and before it was executed. Plaintiff claims to redeem the defendant, and the question is whether he is entitled to do so.

The learned Dietriet Judge on appeal decided against the plaintiff's claim and in my opinion rightly. The purchaser in execution of a rent decree purchases the holding itself and is entitled to say that he takes the holding free of ensumbrance, if, in fact, there is no encumbrance valid in law outstanding against it which it is necessary for him to annul. This holding is non transferable, The mortgage was a transfer and was, therefore, of no effect as against the holding or the person who purshases the holding in a rent execution. Such a mortgage cannot effectively ereate a lien in limitation of the interest of the original tenant. It would operate not by force of any title to the holding created thereby but by way of estoppel. In my opinion, therefore, the holding stands free of encumbrance and the plaintiff is not entitled to redeem.

The appeal must be dismissed with

Courts, J .- I agree.

J. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 783 OF 1921.

November 4, 1521.

Present: - Mr. Justice Le Rossignol.

RAHIM BAKHSH-DEFENDANT

-APPELLANT

tersus

MOHAMMAD AYUB AND ANOTHER-

Stamp Act (II of 1899), s. 35-Unstamped document lost-Penalty-Secondary evidence-Admission of document.

Section 25 of the Stamp Act prohibits the ad-

but it does not cover the case of a copy of a

document, [p. '54, col. 1.]

Where primary evidence of the contents of a document is inadmissible, secondary evidence of that primary evidence can be in no better position.

[p. 154, col 1]

Plaintiffs sued to recover money from defendant on an unstamped bond executed in their bahi. The bahi was presented in Court with the plaint and a copy of the bahi entry. The copy was compared by the Clerk of the Court with the bahi entry and was certified by him to be a true copy. The plaintiffs then carried off their bahi which shortly after was stolen as they alleged Defendant alleged that the bahi entry was a forgery and that being unstamped it was inadmissible in evidence:

Held, that there was no legal authority for admitting the copy of the bahi entry as secondary evidence on payment of duty and penalty at a time when the original was not before the Court, inasmuch as the proviso to section 3 of the Stamp Act did not apply to a copy of an unstamped

document.

A clerk cannot admit a document in evidence, that is a task reserved for the Court. [p. 154, col. 1.]

Second appeal from a decree of the Additional District Judge at Labore, dated the 26th January 1921, affirming that of the Mansif, First Class, Kasur, District Labore, dated the 4th Ostober 1920.

Dewan Mehr Chand, for the Appellant. Dr. G. C. Narang, for the Respondents.

JUDGMENT.—In this case plaintiffs sued to recover money from defendant on an unstamped bond executed in their bahi. The bahi was presented in Court with the plaint and a sopy of the bahi entry. The copy was compared by the Clerk of the Court with the bahi entry and was certified by him to be a true copy.

The plaintiffs then sarried off their baki, which shortly after was stolen, as they

alleged.

The defendant alleged that the bahi entry which is found to have been a bond was a forgery and that being unstamped, it was inadmissible in evidence.

The Courts below have decreed for the plaintiff and the defendant has preferred this second appeal.

The Munsif and the Appellate Court have distinguished eases in which it was held that a lost unstamped document could not be proved on payment of the stamp

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and penalty from the present ease on the ground that, in these eases the document was lost prior to the institution of the suit, whereas in this ease the document was produced in Court. The learned District Judge writes: "It appears to me that its production suffices to render the document admissible in evidence, even though the penalty had not been paid at the time it was lost."

that a document needs only to be produced to be admissible in evidence; if that
were correct, every document produced
would be admissible. Section 35 of the
Stamp Act prohibits the admission in evidence of any unstamped document and the
proviso sets forth the conditions on which
a defective document may be admitted,
but it does not cover the case of a copy
of a document and further enjoins that
no document can be admitted till after
payment of the duty and penalty.

A elerk cannot admit a document in evidence; that is a task reserved for the Court, and up to the date of the disappearance of the bahi no such order of admission had been passed by the Trial Court. Hence, I hold that there is no legal authority for admitting the copy of the bahi entry as secondary evidence on payment of duty and penalty at a time when the original was not before the Court.

The next question is, whether secondary evidence can be given of the baki entry, and here I must hold that, where the primary evidence is inadmissible, secondary evidence of that primary evidence can be in no better position, cf. Kallu v. Halki (1), for all that the secondary evidence could show was that the primary evidence was inadmissible, being unstamped. In this case it is admitted that the primary evidence was unstamped.

Section 65 of the Evidence Act states that any secondary evidence may be given that a document is lost, but that secondary evidence would include evidence that the primary evidence was unstamped and, therefore, could not be acted upor, cf. section 35 of the Stamp Act.

(1) 18 A. 295; A. W. N. (1596) 68; 8 Ind. Dec.

In this view I am confirmed by Sennandan v. Kollakiran (2) and Kopasan v. Shamu (3).

For these reasons, I must accept this appeal and set aside the decree of the Court below and dismiss the suit, but as the circumstances of the case are so peculiar, I direct that parties beer their own costs throughout.

Appeal accepted.

7 X

(2) 2 M. 203; 4 Ind. Jur. 499; 1 Ind. Dec. (v. s.)
416.

(3) 7 M. 440; 2 Ind. Dec. (N. s.) 891.

PRIVY COUNCIL.

APPEAL PROM THE CALCUTTA H.G. COURT. April 19, 1921.

Present: -Lord Buckmaster, Lord Dunedin, Lord Shaw and Sir John Edge.

GOBINDA CHANDRA PAL (A LUNATIC)

persus

KAILASH CHANDRA PAL (DECEASED)

AND OTHERS - RESPONDENTS.

Compromise - Minors - Procedure - Privy Council Appeal.

In Privy Council appeals where it is desired to bind persons under disability by a compromise, it is of the utmost importance that there should be clear expression of opinion by the proper court in India that such compromise is a beneficial one for those persons. [p 150, col. 1]

Petition to record and approve a compromise of appeal against a decree and judgment of the Calcutta High Court, affirming that of the lower Court.

Mr. Dube, for the Appellants.

Mr. E. B. Raikes, for the Respondents.

JUDGMENT.

LORD BUCKMISTER.—Their Lordships are unable to entertain this petition and regret that a procedure should have been adopted by the High Court which will delay the ultimate judgment and increase the expense. In truth, their Lordships are not in a position to decide whether the terms.

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of compromise which they are asked to sanction are beneficial to the parties who are under a disability, nor can Counsel who appeared before them give them the requisite assurance that they have been able to investigate all material matters, and that the Board can safely act in making the desired order. All such questions are essentially and necessarily the proper subject for consideration of the Courts in India, who are in a position to institute the enquiries, to ask the questions, and to obtain the information which must always be required before sanctioning proceedings on behalf of people who are unable to assent for themselves. In rare eases it may be possible that this sould be done here, and in their Lordships' desire to avoid the multiplication or prolongation of proseedings, they may occasionally assept the burden, as was done in the case of Bakinabai v. Shirinibai (1), but this is not the regular and usual course, and in this case they are unable to adopt it. In all cases where it is desired to bind persons under disability by a compromise, it is of the utmost importance that there should be a elear expression of opinion by the proper Court in India that such compromise is a beneficial one for those presons.

The petition must stand over until the proper certificate has been obtained from the

High Court.

J. P. Petition adjourned.

Solieitors for the Appellants.-Messrs. Barrow, Rogers and Nevil.

Solicitors for the Respondents. - Messrs, T. L. Wilson and Co.

(1) 55 Ind. Cas. 943; 47 I. A. 88; 11 L. W. 486; 88 M. L. J. 431; (1920) M. W. N. 811; 18 A. L. J. 499; 22 Bom. L. R. 552; 2 U. P. L. R. (P. C.) 107 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPELL No. 1464 of 1920.

October 13, 1921.

Present:—Mr. Justice Kumaraswami Sastri.

November 4, 1921.

Mr. Justice Chishnan and
Mr. Justice Odgers.

P. RAMA PATTER-PLAINTIPF -

USTELLE

A. VISWANATHA PATTER and others... DEFENDANTS.—BESPONDENTS.

Hindu Law-Joint family-Debt incurred by manager for benefit of family, nature of-Contract Act (IX of 1872); s. 25-Promise by junior member to pay, whether enforceable-Promissory-note-Barred debt-Liability.

In the case of a joint Hindu family, the debts contracted by the managing member for the joint family are binding on the joint family, but in enforcing the debt the liability of the members of the family is not personal, the liability being limited to the extent of the joint family property in which they are interested. [p. 160, col ?.]

D. and his sons, F. and H, constituted a Hindu joint family: D. borrowed money from the plaintiff for the family: On 11th September 1207 a balance was struck and acknowledged by D. Dealings with the plaintiff went on and on 16th September 1910, during the absence of D., F. and his mother, in order to save the bar of limitation, signed an acknowledgment of the debt in the plaintiff's account book. The dealings with the plaintiff continued and on 14th September 1913 accounts were settled and F. and his mother, during the absence of D., signed a promise to pay the amount due. Plaintiff brought the present suit to recover on the said promise:

Held, that as the debt contracted by D. for the joint family was a debt due by the members of the family within the meaning of section 25 of the Contract Act, the promise signed by F. and his mother undertaking to pay the debt was binding on them, and they were liable. [p. 160, col. 1.]

When a promissory-note is executed in respect of transactions which have gone on for some years, and the items consist of advances which would be barred and of subsequent dealings, the settlement cannot be impeached as to the items which, but for the settlement, would be barred, so long as there is no fraud or mistake. [p. 161, col. 1.]

Second appeal preferred against a decree of the District Court, South Malabar, in Appeal Suit No. 473 of 1919, preferred against a decree of the Court of the Additional District Munsif, Palghat, in Original Suit No. 27 of 1919 (Original Suit No. 369 of 1916 on the file of the Court of the Principal District Munsif, Palghat).

This appeal soming on for hearing on the 11th and 12th of August 1921, upon

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ments and decrees of the lower Appellate Court and the Court of first instance, and the material papers in the suit, and upon bearing the arguments of Mr. O. V. Anantakrishna Aiyar, for the Appellant, and of Mr. T. R. Venkatarama Bastri, for the second and third Respondents, and of Mr. O. V. Mahadeva Aiyer, for Respondents Nos. 1 to 3, and the fourth respondent not appearing in person or by Pleader, and the case having stood over for consideration till the 19th of angest 1921, the Court (Krishnan and Odgers, JJ.,) delivered the following

JUDGMENT. KRISHNAN, J.—The two asknowledgments made by defendants Nos. 1 and 2 in the account book, Exhibit B, are of no avail to save limitation against the joint family or against defendants Nos. 3 and 4, who were no parties to those asknowledgments. The District Judge has found on the evidence in this case that defendant No. 3, the father and managing member of the family, never ceased to be the manager, and never authorised aDy one to act for him to manage and never held out any one as acting for him. This is a finding of fact which, I think, we must accept in second appeal. It was, however, contended that, even apart from any authority given by the third defendant, his son, the first defendant, was entitled under the Hindu Law to set as the manager of the family in the absence of his father in Borma and elsewhere. For this position, reliance was placed on the ruling in Mudit Narayan Singh v. Ranglal Singh (1) and on the texts cited therein, particularly on that of Harita. The ruling itself is not applicable, as in that case it was found that the younger member had been put forward by his elders as the managing member. The text of Herita so far as it is relevant here (as translated by Setlur), says that if he (the manager) is remotely absent, the eldest son may manage the affairs of the family. See The words remotely Setlur, page 217 absent" are vague in their import, and I think they cannot be construed so as to scope the case of a bring within their manager who, though absent from his home, was in correspondence with the junior

members and was controlling the management, as the District Judge finds was the case here. No reliance was placed on this text in the lower Courts, and, therefore, the question has not been properly threshed out on fact; it is, therefore, sufficient to say that plaintiff has not proved that the first defendant, the eldest son, had authority under the Hindu Law to bind the family by his acknowledgments.

The question still remains how far defendants Nos. 1 and 2 are liable on their promise to pay the amount due on 14th September 1913. I think they are liable. It is conceded the words used therein clearly amount to a promissory note, for they say "we have hereby promised on signing this to give on demand Ra. 1,577.4.5, the balance amount, with interest at Re. I per cent. from this day" and so on. Viewing this dosument as a promissory-note, the executants of it must be held to be liable on it unless they prove that there was no consideration for it. This question should not be confused with the other question how far it was a valid acknowledgment against the family; I have already held that it was not, as the signatories were not authorised agents of the family to asknowledge. Taking it as a promissory-note, does the evidence here establish that there was no consideration for it? The amount mentioned in it no doubt includes the sum of Rs. 1,0:4 5 6 and interest due by the father to the plaintiff on assount of his dealings on behalf of the family and asknowledged by him to be sorrest in Exhibit A on 16th September 19 7, or as much of it as has not been paid off. The dealings were subsequently earried on by defendants Nos. 1 and 2, professedly, no doubt, on behalf of the family and for themselves, for the account was changed into the names of defendants Nos. 1, 2 and 3 in the plaintiff's books. It is the result of these dealings, taken with previous debt that amounted to Rs. 1,577 and odd included in the promissory note. Out of that sum, it is clear that both the defendants were personally liable for the items on the debit side in the account after the 16th September 1907, when the father ceased to have dealings and they began the dealings; the credit items would be taken towards the old debt. The amount of it has not been ascertained, but it is apparently not very large. Though

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defendants Nos. 1 and 2 acted on behalf of the family in entering into those dealings, they would become personally liable for the amount, on the finding that the family was not liable as they had no power to act on its behalf. The bulk of the amount included in the promissory note was no doubt the old debt that the father incurred, with interest added to it as appears from the account. For that portion of the note first defendant was not amount, though originally personally liable and second defendant was not liable at all, the whole of it was admittedly binding on the family property including the first defendant's share in it; in other words, it was a debt realisable from first defendant's joint property. The note being executed thus for a sum partly realisable from his property and partly from his person, it seems to me there is full sonsideration for it so far as the let defendant is concerned. Even if we suppose the original family debt was not saved from limitation even as against defendants Nos. 1 and 2 by their asknowledgment of September 1910, the note would still be saved from being void against him under section 25 of the Contract Act, both because his personal liability for his own dealings as to which there is proper consideration remains unaffected by limitation and also because under section 25, clause (3), an agreement to pay a time barred det tie sufficient to constitute a contract. It was argued that the liability of a member of a joint family to have his joint property sold for a debt contracted by the manager for a joint family purpose and binding on the joint family property is not an obligation that can be described as a debt within the meaning of section 25. authority has been sited to support this argument. No doubt it was ruled in Norayana Ohettiar v. Feerappa Ohettiar (1), that a son was not "jointly bound" with his father within the meaning of the Bankruptcy Law of Singapore; but that is not the question here at all. The question here is whether a liability to have one's joint property sold for a sum due is not a debt within the meaning of section 25, slause (3). I am inclined to think it is.

The word 'debt" does not necessarily imply an obligation created by the debtor himself, as argued by Mr. Venkatarama Sastri; we have decree debts imposed by Courts, for example. Debt is defined as "a sum payable in respect of a liquidated money demand, recoverable by action." See Stroud's Judicial Dictionary on page 471, 2nd Edition, and the eases eited there, On this view there is no doubt that there was consideration for the promissory-note, and it is enforceable against the first defendant. It is then equally enforceable against the second defendant, the other executant of it, as it is not necessary in law that consideration should move to each executant separately to make the note binding on him or her. It is sufficient if there was consideration for the instrument as a whole, for it to be enforceable against all executants. Furthermore, in this case there was some consideration moving to the second defendant herself for the note, viz, the amount due by her on the joint dealings of herself and her son after 1907; and inade. quasy of consideration is not a ground for avoiding a contract; vide Explanation II of section 25 of the Contract Act.

I would, therefore, confirm the decree of the lower Appellate Court and dismiss the second appeal with costs as regards defendants Nos. 3 and 4, but allow the appeal and restore the Munsit's decree as regards defendants Nos. 1 and 2 with costs in this and the lower Appellate Court.

ODGERS, J .- This is a suit to recover money due on an account. The third defendant is the father of first and fourth defendants, and the manager of a Mitakshara joint Hindu family consisting of first and fourth defend. ants and bimself. The second defendant is bis wife, and mother of first and fourth defendants. The father, (third defendant), had idenred debts for family necessity to plaintiff. He served a period of over three years' imprisonment from 903 or 1:04. The dealings began in 1901. On 16th September 1:07, while third defendant was in jail, accounts were adjusted and balance struck by third defendant and plaintiff and acknowledged by the former (Exhibit A). Subsequently, third defendant was released from jail, but did not return to his family; it appears that he was living in Rangoon. On loth Septem. ber 1910, second defendant and her son, first defendant, who had just then

^{(2) 35} Ind. Cas. 918; 40 M. 581; 20 M. L. T. 318; (1918) 2 M. W. N. 271; 4 L. W. 422; 31 M. L. J. 386;

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"Since the bar of limitation is approaching, etc."

Subsequently, on 14th September 1913, the same two persons executed a promissory-note to plaintiff in the following terms: "We have hereby, etc." Two questions have been argued, (1) Do the above operate as valid asknowledgments in order to save limitation against defendant No. 3 as manager of the family? (2) Do the above operate in any event against defendant No. 2 and defendant No. 1 personally?

As to (1), reliance is first placed on a text of Harita (Setlar, page 217), where it is said: "But if he (eldest member) be decay. ed, remotely absent or afflicted with disease, let the eldest son manage the affairs as he pleases." Also on Mudit Narayana Singh v. Ranglal Singh (1), where it was decided "that a younger member of a Mitakshara family may deal with family property for family necessitry, whenever he is put forward to the outside world by the elder members as the managing member." The ficding of the lower Appellate Court is that defendant No. 3 never ceased at any time to be manager, and this finding is based on a voluminous correspondence earried between the defendants with regard family affairs while defendant No. 3 was absent. It is difficult to see how third defendant's absence in Rangoon can justly be said to make him "remotely absent" in modern days with all the conveniences of modern communication. It is equally difficult to see how defendant No. I was ever put forward to the outside world as managing member. I agree with the District Judge that mere payment of rents by defendant No. 1 and defendant No. 2 is insufficient to show this.

Farther, in Patil Hari Premji v. Hakamchand (3), it is laid down that temporary absence of the father conferred no legal authority on the son, if not authorised by the father, but assuming to ast for him. The words in Exhibit B, "as per the instructions of the said Anantarama Patter (defendant No. 3) and ourselves" are insufficient to import either of these elements as they refer to the "amount expended by you (i.e., plaintiff) for our family necessities." It is further elear that, under no circumstances, could the wife, defendant No. 2, have any authority or power to act as manager so as to bind the joint family after her sop, defendant No. 1, had attained his majority.

I am, therefore, of opinion that neither defendant No. 1 nor defendant No. 2 had any power or authority from defendant No. 3 to ast as managers of the family, nor did defendant No. 3 ever cease to be the manager.

As to their personal liability, I must differ with reluctance from my learned brother. Reliance is placed on the fact that new items of eredit and debit appear in the accounts signed by defendant No. 1 and defendant No. 2. The accounts settled by defendant No. 3 in 1907 was admittedly an account binding on the family for supplies for family purposes. In the absence of evidence to the contrary, it must be assumed that the new items of debit were of the same nature. In my opinion there was no extinction of the old debt and a novatio by which the plaintiff undertook to look to the credit of defendant No. 2 and defendant No. 1 alone. The assumt stood in the name of defendant No. 3 alone up to 1911, and plaintiff's case has always been that the debt is binding on the family. Defendant No. 2 was, as stated, not authorised either in law or in fact to bind the family; it seems, therefore, that there was no consideration for her signatures in Exhibit B, and the fact that the second signature was to a promissory-note would make no difference, considering the nature of the debt (which was not hers) and for which she was in no way personally liable, nor could she make herself so liable. As to defendant No. 1, is he a debtor within the meaning of sestions 19 and 21 of the Limitation Asi? If he had no authority to act as manager for his father, an I found above, he cannot be a duly authorised agent to sign for him as such [Of. Lachhmi Narain v. Daya Shankar (+)]. Farther, according to Narayana Chelliar v. Veerappa Ohettiar (2) a Hindu son is not jointly bound

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with his father to pay debts contractd by the father. For the reasons stated, the debts which defendant No. I bound himself to pay were the debts of the father contracted by the father.

The debts were not the debts of defendant No. 1. Further, the case does not fall within section 25 (3), Contract Act, as the son was not generally or specially authorised to sign for his father. For these reasons, I em of opinion that neither defendant No. 2 nor defendant No. 1 is personally liable.

On both the grounds raised in this second appeal, in my opinion, the appeal must be dismissed with costs.

By THE COURT.—As we have differed in our opinion on the questions whether there was consideration in law for the promissory-note of date 14th September 1913 and executed by defendants Nos. 1 and 2 and whether it is binding on those defendants, we refer those questions under section 98, Civil Procedure Code, clause (2), proviso, for the opinion of a third Judge. The case will thereafter be posted again before us.

This second appeal came on for hearing on the 22nd September 1921, and the case having stood over for consideration till the 13th of October 1921, the Court (Kumaraswami Sastri, J.,) expressed the following

OPINION.

This second appeal comes before me owing to a difference of opinion between Krishnan and Odgers, JJ., as to whether there was consideration in law for the promissory note dated the 14th of September 1913, execut ed by the first and second defendants, and whether it is binding on those defendants.

The plaintiff is the brother of the second defendant. The second defendant is the mother of the first defendant. The third defendant is the father and the fourth defendant is another brother, who is a minor. It is admitted that defendant Nos. I to 4 are members of a joint Hindu family. There were dealings originally between the plaintiff

tember 1907, when third defendant was in jail, there was a settlement of assounts at which a sum of Rs. 1,084.5.6 was found due by third defendant, and the third defend. ant affixed his signature to the duly stamped settlement askowledging the amount to be due. Dealings went on subsequently, the heading of the account being "O. V. Anantarama Pattar's (third defendant's) credit and debit account." In 1910, as the claim was about to be barred, the following entry was made in the account-book on the 16th September 1910. "Since the bar of limitation is approaching, the said amount which was expended by you as per the instructions of the said Anantarama Patter and ourselves for our family necesities and since the said Apantarama Pattar is absent from here, we hereby admit the said amount which we owe you as per this account." This is signed by the first and second defendants. The dealings continued. They were mostly entries of rescipts of paddy from the the land, and small sums were also entered on the debit side. On the 14th of September 1913 assounts were settled and a sum of Rs. 1,577-4-5 was found due and the following entry was signed in the plaintiff's assount-books by the first and second defendants." We have hereby promised, on signing this, to give on demand Rs. 1,577 4-5, the balance amount, with interest thereon at Rupee one per cent. from this date, due to you from us after adjusting the credit and debit account as per account executed by us on 16th September 1910, together with interest from 1st Kanni 1086 till date for the amount expended by you as per the instructions of my father Anantarama Pattar and ourselves for our family necessities." In the account book Exhibit O, the heading is: " Accounts concerning Anantarama Pattar, son of Venkatarama Pattar, wife Lakshmi alias Ammu Ammal, and son Visvanatha Pattar."

and the third defendant. On the loth of Sep.

Both the learned Judges who heard the second appeal are of opinion that, so far as the second acknowledgment of liability of the 16th of September 1910 is concerned, it does not save limitation as it was not proved that the first and second defendants had any authority to acknowledge the debt as the father was the managing member

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of the family. The question, however, remains as to the liability on the promissory-note, dated the 14th of September 19 3. Krishnan, J., was of opinion that it was open to the 1st defendant to promise to pay a barred debt and that there was consideration for the note. Odgers, J., was of opinion that the debt was not a debt of the first defendant but that of the father which had become barred and that there was no consideration for the note.

It is clear from the facts of the case that the defendants are members of an undivided family of which the father was the managing member. So far as the transactions are concerned, it is equally clear --- and it is not disputed before me -- that the debts were contracted for the benefit of the joint family and would be binding on the joint family properties. The first question is, whether in the case of a joint family, the debts contracted by the managing member for the joint family can be said to be debts due by the other members of the family within the meaning of section 25 of the Indian Contract Act, which runs as follows :- " An agreement made without consideration is void, unless..... it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits." So far as the liability of the members of a joint family for the debts contrasted by the managing members is conserned, I think it is clear that the debt is binding on them although in the enforcing of that debt they would not be personally liable. but only liable to the extent of the joint family properties in which they are interested. In Ohalamayya v. Varadayya (5) Sabramania Aiyar, J., after referring to eases where the other co-pareeners were parties to the contract or had agreed to be bound by it or had ratified it, observed : "When, however, such is not the case, but the contract is of a character such, as, under the law, to entitle the manager to enter into independently of the consent of the other members of the family, so

as to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond the family pronarty." I may also refer to t'e feeisi in in Official Assignes of Mairis v. alani:ppa Ohetty (6) as to the liability of the members of a joint family. In such cases it is open to the ereditor to sue all the co-parceners, and each of the co-parceners, will be liable to pay the debt subject to the limitation that payment can be enforced only by having recourse to the joint family properties. A debt is none-the-less a debt because the remedies open to the creditor are circamscribed by the joint family assets can find no authority for the vew that the debt contemplated by section 25 of the Contract Act is a debt which can be enforced against the person and properties of the debtor. The test is, whether at the time the promise to pay is made the person making the promise could have been sued for the resovery of the debt but for the law of Limitation, however eireamseribed the remedies for the resovery of the debt in execution may be, owing to the personal law governing the debtor.

Reliance was placed by Mr. Venkstarama Sastri on Narayona Chettiar v. Veerappa Chettiar (2) where it was held that a son was not 'jointly bound' with his father to pay his debts within the meaning of clause (4), section 30 of the Bankruptey Ordi-S.raits Settlements The turned on Danee. question pious duty of the son to discharge his father's debts not illegal or immoral, and the learned Judges observed: "This liability as now developed is certainly not a joint liability, nor a joint and several liability understood in ordinarily Law; in fact, it is difficult to bring it under any particular legal eategory of the English Law." The facts of the present case are different. The debts were contracted for family necessity and benefit, and the claim is based not merely on the pions duty of the son to pay his father's debts not illegal or immoral, but on family necessity and benefit enjoyed by the members of the family.

(6) 49 Ind. Cas. 22); 41 M. 824; 24 M. L. T. 216; 35 M. u. J. 4/3; 5 L. W. 530; (1918) M. W. N. 731.

^{(5) 22} M. 166; 9 M. L. J. 3; 8 Ind. Dec. (N. 8)

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So far as the first defendant is concerned, I am of opinion that the note is binding on him. As regards the second defendant, his mother, it is argued that when she signed the promissory-note the whole of the sum of Rs. 1,230 found due at the settlement of 1910 was barred by limitation, and that as regards the subsequent items they consist of a few items of debit and moet. ly of items of credit from the income of the second defendant's lands, and that the credits are far in excess of the debits. This leaves her indebtedness prastically the same as that of the previous settlement, the increase being due to interest. I have already given my reasons for holding that the first defendant is liable, and it appears, both from the settlement of 1910 and 1913, that the second defendant was aware of the dealings and requested plaintiff to make the ad-The extent of the debits and eredits subsequent to the settlement of 1910 is immaterial. It is not necessary that eash of the executants of a promissory. note should ressive the consideration. When a promissory note is executed in respect of transactions which have gone on for some years and the items consist of advances which would be barred, and of subsequent dealings, I do not think the settlement ean be impeached as to the items which would but for the settlement be barred, so long as there is no fraud or mistake. The statement in the promissory note is that the loans were made at the request of the second defendant, and she has not ventured to give evidence. Having regard to the fast that she owns lands which were managed by the plaintiff, the probabilities are that her signature to the pronote and settlement was not taken as a mere matter of form, but that the plaintiff would not have made the advances but for her joining in the settlement. opinion that the note is binding on her.

In the result, I agree with the conclusion arrived at by Krishnan, J., that the note is binding on the first and second defendant.

This second appeal came on for hearing after the expression of the opinion of the Third Judge in pursuance of the Order of Reference of this Court, dated 19th August 1921, the Court delivered the following

JUDGMENT.

KRISHNAN, J.—The result of the opinion of the third Judge is that the decree proposed by me will be the decree in this second appeal, except that the fourth defendant who does not appear will not have costs.

OLGERS, J.-I agree.

M. C. P.

Decree varied.

LAHORE HIGH COURT,
MISCELLANEOUS FIRST CIVIL APPEAL No. 1214
OF 1921.

November 10, 1921.

Present :- Mr. Justice Broadway.

KANSHI RAM AND ANOTHER-DEFENDANTS

-- APPELLANTS

USTEUS

SHARF DIN AND ANOTHER-PLAINTIFFS-

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Temporary injunction, when to be granted—Balance of convenience.

The granting of a temporary injunction is a matter of discretion, albeit a judicial discretion. One of the principles the Court has to bear in mind is that it must first see that there is a bona fide contention between the parties and then, on which side, in the event of success, the balance of incovenience will lie if the injunction does not issue The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in status que until that question can be finally decided. [p 162, cols. 1 & 2.]

Defendant obtained a decree for possession of a house. The execution of that decree was resisted by the plaintiff who objected that the house belonged to him. His objection was dismissed and he filed a suit for a declaration of his title. He also prayed for the issue of a temporary injunction prohibiting the execution of the decree for possession pending the decision of the suit:

Held, that if the plaintiff was evicted from the house, the suit for declaration, as framed, would probably be thrown out and that, therefore, the balance of convenience was in favour of the plaintiff, and that the injunction prayed for should be granted.

[p. 162, col. 2.]

Misselianeous first appeal from an order of the Subordinate Judge, First Class, Lahore, MAGNIBAM SITABAM C. K. STURBHAI MANIBHAI.

dated the 29th March 1921.

Mr. Lal Chand Mehra and Lala Hukam Chand, for the Appellants.

Mr. Behari Lal, for the Respondents.

JUDGMENT.—Kanebi Ram Ram Das obtained a decree for possession of a house by the ejectment of Nur Din who was defendant in the case. The decree was granted on 14th August 1919 and in dre ecurse the deeree bolders sought to obtain execution of their decree. One Sharif Din resisted execution and on 30th August 1920. the Executing Court directed the issue of a warrant for possession of the bruse in favour of Kanshi Ram-Ram Das. On 14th Sharif Din instituted a October 1920 euit against Karshi Ram-Ram Das for a declaration to the effect that he could not be evieted in excention of the decree pasted against Nor Din. On the same date he asked for the issue of a tomparary injunction prohibiting the execution of the deeree for possession pending the decision of the case. This temporary injunction was granted on 29th March 1921 on the ground that the object of the suit would be defeated if Sharif Din were evisted in the execution proceedings. Against the issue of this temporary injunction Karshi Ram-Ram Das have preferred this appeal through Mr. Hokam (band Mehra and I have beard Mr. Behari Lal for Sharif Lin. The grounds of appeal were drafted, or at any rate signed, by Mr. Lal Chand Mebra. Mr. Hckam Chand has studiouely refrained from urging any of them, although I specifically asked him to address me in their support. I can only conslude that he does not press them. He has urged that the order complained of is not based on any law and, further, that the decree had already been executed in part, Sharif Din being in actual possession of only two kothris in the house, as I understand the case. Sharif Din claims to be in poecession of the bonce in sait as owner. There is . then a dispute as to ownership, both sides elaiming that the house belongs to them. If, in exception of the decree against Nor Din, Sharif Din is evicted be would have to sue for possession and thus bis deelaratory suit would be defeated.

The cuenting of a temporary injunction

is a matter of discretice, altest a judicial discretice. One of the principles the Court has to tear in mind is that it must first see that there is a bona fide contention between the parties and then, on which side, in the event of success, the balance of inconvenience will lie if the injunction does not issue.

It was held in Israii v. Samset Ranman (1) that the real point is not how the question should be decided at the hearing of the case, but whother there is a substantial question to be investigated and whether matters should not be preserved in statu quo until that question can be finally decided. In the present case there appears to be enbetantial question to be investigated, vie., whether the plaintiff is the owner of the house in question. That the plaintiff is in possession of at least part of the house is practicelly admitted. If, in exeout on of the decree against Nor Din, Sharif Din is now evicted the present suit as framed would, in all probability, be thrown out The balance of inconvenience, therefore, would lie on Sharif Din if the injunction were not issued and this appears to have been the view of the Court below though somewhat inadequately expressed in the order. I cannot see that any case has been made out for interference and I accordingly dismiss this appeal. Coets in this Court will follow the event.

z, K.

Apreal dismissed.

(1) 21 Ind. Cas. 861; 41 C. 426; 16 C. W. N. 176; 19 C. L. J. 47.

PRIVY COUNCIL.

APPEAL FROM THE BOART HIGH COURT.

December 5, 192.

Present:—Lord Buskmaster,

Lord Atkinson, Lord Careon,

Mr. Ameer Ali and Sir Lawrence Jenkins.

Boya MAGNIRAM SITARAM

—Appellant

Sheth KASTURBHAI MANIBHAI

AND ANOTHER—RESPONDENTS.

Hindu Lau—Temple property—Permanent icase—

MAGNIRAM SITARAM C. KASTORBHAI MANIBHAI.

Rent-Construction-Shebait's powers-Long lapse of time Presumption of validity-Parties, duty of, to define exact terms of dispute.

A lease of 5½ acres of land was evidenced by a rent-note of 1×24, which provided for the payment of Rs. 40 a year as rent and if the rent was not paid, the lessee was to be at liberty to remove the structures which he might have placed upon the property. The lessee sub-let the property in 1872, 1883 and 1900 and the lessors never raised any objection:

Held, that the lease was a permanent lease which could only be terminated by non-payment of rent.

[p. 164, col, 2.]

The disability of a shebait of a Hindu deity to make a permanent grant of endowed property is

not absolute. [p. 165, col 2]

Although the manager of a temple property for the time being has no power to make a permanent alienation of the property in the absence of proved necessity for the alienation, yet, if there is a long lapse of time between the alienation and the challenge of its validity, that is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. [p. 165, col. 2.]

Where, therefore, a lease made by a grantee of property for a deity is questioned after 1011 years, when every party to the original transaction has passed away and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, the assumption is, on the principle of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, that the grant was lawfully and not unlawfully made. [p. 165, col. 2; p. 166, col. 1.]

[The attention of parties to litigation in India called to the importance of defining, at the earliest moment and in the simplest terms, the exact character and extent of the dispute which is going to be made the subject of litigation. [p. 16, col. 1.]

Appeal from a judgment and decree of the Bombay High Court, affirming that of the District Judge at Abmedabad, which reversed a decree of the Additional Sabordinate Judge at Ahmedabad.

FACTS.—The suit was instituted by the appellant to recover possession of sertain lands from the respondents as tenants from year to year. The respondents slaimed to hold under a permanent lease. The facts are fully set out in their Lordships' judgment.

The Trial Judge decreed the claim. The District Judge dismissed the claim on the ground that the respondents held under a permanent lease. The High Court affirmed the decree of the District Judge

holding that there was no question of law to be made the subject of a second appeal.

Herce the present appeal.

Mr. Upichn, K.O., and Mr. Raikes, for the Appellant — The rent note of 1824 provided for a yearly rent; it evidences only a tenancy from year to year; it cannot be construed as a permanent lease. Billamoni Dasi v. Raia Sheepersad Sing's (1). Tulshi Pershad Singh v. Ramnarain Singh (2). The person who granted the lease was a shebait, having only limited interest; Moharance Shilesscuree Debia v. Mothooranath Acharjo (3).

nept lease it is not valid beyond the lifetime of the granter, who was the shebait. Vidy: Varuthi v. Balusimi Ayyar

(4).

Mr. De Gruyther K. C., and Mr. Parikh, for the Respondents .- On a proper construction of the trace, it was a permanent leare, Upendra Krishna Mandal v. Ismail Bhan (5) Nobakumari Deti v. Behari Lal (6). shebait is not altegether prohibited from granting a permanent least; he may do so for legal necessity. Having regard to the lorg lapse of time since the grant of the lease, it is to be presumed that it was granted for legal necessity: Murugesam Fillai v. Gnana Samband: Pandara Sannadhi (7). Okockalingam Pillai v Mayandi Obettiar (8, The decree of the High Court is right. There was no question of law and beree no right of second appeal under section 100 of the C vil Procedure Code of 1908.

Mr. Raikes replied.

(1) 9 I. A. 32; 8 C. 664; 6 Ind. Jur. 274; 4 Sar. P. C. J. 825; 11 C. L. R. 215; 4 and. Dec. (N. s. 427.

. . . .

12) 12 I. A. 20 at p 214; 2 C. 117; 9 Ind Jur. 433: 4 Sar. P. C. J. 6:6. 6 Ind Dec (x s. 80.

(8. 18 M. I. A 270 at p. 275 18 W. R. P. C. 18, 2 Suth, P. C. 1, 500 2 Sor, P. C J 528; O E. R. 552,

14. 65 Ind Cas. 16; 48 I. A 50 at p 807; (1921 M. W. N. 415; 41 M. L. J. 346 44 M 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 75; 80 M. L. T. 66; 3 P. L. T. 245 (P. C.).

(5 31 I A. 144; 82 C. 41; 8 C. W. N 859.

(6) 34 I. A. 16C; 9 Bom. L. R. 846; 6 C. L. J. 122; 11 C. W. N. 65; 4 A. L. J. 570; 2 M. L. T. 433; 34 C. 902; 17 M. L. J. 897 P. C.).

(7) 89 Ind. Cas. 659; 44 I. A. 98; 21 M. I. T. 288; 32 M. L. J. 869; 15 A L. J. 81; 1 P. L. W. 457; 5 L W. 759; 21 C. W. N. 761; 40 M. 402; 19 Bom. L. R. 458; 25 C. L. J. 589; (1917) M. W. N. 497 (P. C.), (8) 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. s.)

1048.

MAGNIRAM SITARAM C. KASTUBBHAI MANIBHAI.

JUDGMENT.

LORD BUCKMASTER.—Their Lordships have some to a clear opinion upon the merits of this appeal, and as it relates to the possession of land, they will not reserve the expression of the advice that they will tender to His Majesty.

The appellant is seeking to obtain posses. sion of a piece of land some 51 acres in extent, that is situated near the Delhi Gate of the City of Ahmedabad. That the respondents are in possession by themselves or their tenants is not in dispute; it is indeed the foundation of the appellant's elaim for the proceedings out of which this appeal has arisen were instituted by the appellant as plaintiff elaiming to recover possession of the property upon the ground that the only right of the respondents is as tenants from year to year, a tenancy which had been duly determined by notice, or, in the alternative, that the conduct of the respondents rendered it unnecessary that the appellant should take any further steps to secure its determination.

The land in question was granted on the 17th June 1756 to one Sultansingh Marajji for the deity of Shri Ranchhodji; in other words, the grant was a grant to a named person for a defined religious purpose.

On the 2nd February 1824 this land was dealt with by way of lease; the document recording the transaction takes the form of a recognition by the tenant of the rights that have been granted and its informality is largely responsible for this dispute. It states that it is a rent-note given to the wife of Sultansingh Marajji, the grantee, under the original grant; that the tenant has taken the field and well for making a garden, and that in respect thereof Rs. 40 a year is to be paid. There then follows an important provision. The money is to be paid, not to the lady who made the grant, but to the Sadho, who performed the worship at the temple of the deity, and the explanation of that is to be found in later clauses of the deed, by which it appears that one Bawa Kisan. das, who had undoubtedly some official capacity in connection with the temple. had borrowed money from the lessee, and that being amount of loan Rs. 95, the lease provides for its liquida-

tion by the lessee retaining Re. 10 a year until the discharge took place. There is also a provision that if the rent is not paid, the lessee should be at liberty to remove the structures which he may have placed upon the property and the trees and seeds. Their Lordships think this means that, in the event of the rent not being paid, re-entry will be possible, and that if re-entry is attempted the structures which the permanent lessee has erected may be removed by him. There are no words whatever in the dooument that suggest any other right of reentry on the part of the lessors, nor is there anything in the actual language that gives much assistance in determining what the effect of the document might be. It has been argued that the object of taking the lease, which is said to be the making of a "Wadibag," renders some assistance, as the meaning of Wadibag is a garden, which it was intended to nee for the purpose of adding thereto a house, and that, in consequence, the grant was for building purposes. Their Lordships cannot, however, find anything that will give them any material assistance in this or any of the descriptive words. All that can be said is that there are two constructions, and no third, to which the document lends itself; the one that the tenancy recognised was a tenancy from year to year; the other that it was a permanent lease, which could only be terminated by non payment of rent. After this lesse had been granted, certain buildings were undoubtedly erected upon the land. What the nature of those buildings may be it is not easy to determine, and it appears that, whatever they were, they have been allowed to fall into disrepair. Their Lord. ships do not think that the respondents ean gain much assistance from inviting attention to the actual structures that exist upon the property as it stands now. Certainly, no case can be established that would stop the lessors from asserting their right to possession, if, under the terms of the document as construed by the circumstances known, that right exists, The evidence is unvarying to this effect—that from 1825 down to the time when this have been in dispute arose, the tenants possession of continued and undisturbed

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this land at the original rent, and that there is no case made of any act done or any document signed which suggests that during the whole of that period either one party or the other regarded the right of the respondents as anything short of permanent. There is, indeed, both in 1829 and in a reseipt for rent as late as 1906, the use of the word "Sadarmat," which has satisfied the learned Judges in the Court below that the tenure was intended to be permanent. It is a matter of extreme difficulty for their Lordships here to give with confidence desisions as to the exact meaning of words in a language with which they are unfamiliar, and they always place the greatest reliance upon the learned Judges in India for the purposes of affording them an exact and accurate interpretation of any word that may be in dispute. They do not, however, in this case, intend to rest their opinion upon the use of this particular word. It may have been accidental, it is certainly not conclusive.

Apart from any inference due to the use of this word, their Lordships think that the terms of the document which, as pointed cat by the learned District Judge, may not be satisfied if the tenarcy were one from year to year, coupled with the fact that notwithstanding the low rent, which was never changed, the property has been in fast dealt with by the lessees on three separate cassions, in 1872, in 1883, and in 1900, by being sub-leased for substantial periods of years at increased rente, a circumstance which it is not upreascuable to assume must bave come to the knowledge of the lessors at some time or another, and that no dispute has arisen as to their right to make such grants or to remain in occupation until the present time, is sufficient to justify them in saying that the memorandum signed on the 2nd February 1824 was intended to record a transaction by which a permanent right to ceeupy was conferred upon the respondent's predecessors-in title. With regard to the litigation that took place in 1893 for the purpose of partitioning the lessees' interest, it is only necessary to eay that having examined all the details which are most earefully investigated by Mr. Mobile, the Additional First Class Subordinate Judge, by whom this care was originally heard,

their Lordships agree with him and the learned District Judge in appeal that nothing was then decided which bars the present litigation or prevents the defendants from

asserting their rights.

It is, however, further nrged on behalf of the appellant that if such be the meaning of the document, effect cannot be given to it because the property dealt with was property devoted to religious purposes, so that the power of leasing would not extend beyond the granting of a lease for the life of the head of the religious charity, whoever it might be, for the time being. There is no doubt great force in that argument, but it is subject to two defects. The first is, that it certainly is not plain that the original lease in 1824 was made by anybody in the position of a shebait at all, because, the note ie given to the widow of the original grantee, and although it might have been fair to assume that the original grantee was intended to hold as a shebait, even if the widow could hold the office, it was not in virtue of that espacity that she granted the lease. Further, the disability of a shebait to make a permanent grant is not absolute.

In the case of Chockalingam Pillai v. Mayandi Ohettiar (8) it was pointed out that, although the manager for the time being had no power to make a permanent alieration of temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. Their Lordships have no hesitation in applying that doetrine to the present case. If in fact the grant was made by a person who possessed the limited power of dealing under which a thebait holds lands devoted to the purposes of religious worship, yet none-the-less there is attached to the office in special and unusual sircumstances, the power of making a wider grant than one which enures only for his life. At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts

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always adopt, of scouring as far as possible, quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawful y and not unlawfully made.

Their Lordshipe, therefore, bold that on both the grounds that have been mentioned this appeal must fail, and they have only to add that if in truth the real somplaint that the appellant desired to bring forward was a complaint based upon the limited power of the original granter, such a case ought to have been carefully stated in the original plaint, and certainly urged before the High Court as a stista tial reason why leave to appeal should have been granted. absence of this circumstance has not had any influence upon their Lordships' conclusion. They only refer to the matter for the purpose of attempting once more to call the attention of parties in India to the importance of defining at the earliest moment and in the simplest terms, the exact character and extent of the dispute which is going to be made the subject of litigation through the various Courts, and upon which this Tribunal ultimately advises.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with gosts.

K. V. L. N. & J. P. Appe I dismissed. Solicitor for the Appellant. -Mc. E. Dalgado.

Solicitors for the Rasponderts. - Messra. Baker, Blaker and Hattes.

LAHORE HIGH COURT. MIFCELLANEOUS SECOND CIVIL APPEAL No. 1364 or 1921. November 30, 1921. Present: - Mr. Justice Chevis.

UDMI AND ANOTHER - JULG SENT DESTORS -APPELLATIN

terites

SOHAN LAL AND OTHER: - DECREE- HOLDERS - RE PONIENTS.

Limitation Act (IX of 1968), Sch. I. Art. 82-Execution of decree-Decree for injunction-Limita. t.a.

The occupancy tenants of a village obtained a decree against the proprietors of the village in 1 '78 permanently restraining the latter from interfering with the grazing rights of the former in certain land in the village No steps were taken in execution of the decree and the proprietors continued to cultivate the land till 1919 when the decree-holders applied for execution :

Held, that the cultivation of the land by the preprietors was an infringement of the decreeholders' rights of grazing, and that every successive season in which the land had been cultivated was the occasion of a fresh breach of the injunction, and that, therefore, the application for execution was not barred by limitation. [p. 167, col. 1.]

Ram Saran v, Chatar Singh, 23 A, 465; A. W. N. (1901) 142 and Bhagican Dis v. Sukhilei, 28 A. 30); A. W. N. (1906, 10; 3 A. L. J. 816, followed

Miscellaneous second appeal from the order of the District Judge, Karnal, dated the 22nd February 1921, affirming that of the Junior Subordinate Judge, Second Class, Rohtak, dated the 15th July 1919.

Mr. Ra Krishna, for the Appellants. Mr. Badr ud din Qureshi, for Mr. M. Jalal. ud din, for the Respondents,

JUDGMENT.-The appellants are proprietors and the respondents are ocsupancy tenants of the village of Barons. The respondents in 1908 obtained in the Chief Court a decree which permanently restrained the appellants from in erfering with the respondents' grezing rights in certain land in the village. No steps were taken in execution of the decree till 1919 when the decree holders applied for execution and were opposed on the ground that the applieation was time barred. The First Court, relying on Ram Saran v. Chatar Singh (1), held that there was no limitation for executing a decree for an injunction. The learned District Judge on appeal held that though it might not perhaps be technic. ally correct to say that there was no limita. tion, a Court could at any time take proceedings for contempt against a person disobeying an injunction. So the learned District Judge dismissed the appeal.

On behalf of the appellants it is urged in this Court that the Allahabed raling relied on by the lower Courts is not good law and my attention is invited to Such: Praud v. A nar Nath Rai (2). Tast jadgmest, however,

(1) 2 A 135: A. W. N. (1901) 142.

(2) 45 Ind. Cas. 864; 46 C. 103; 27 C. L. J. £05.

BEVIS & CO U. BAM PEASAD.

was not decided on the question of limitation. As regards limitation the judgment merely points out that the Madras High Court has taken a somewhat different view to that of the Allahabad High Court, bat no opinion what. ever is expressed as to which of the two views is the correct one. The appellants' Counsel pextrefers me to Venkatachallam Chetty v. Veerappa Pillas (3). This ruling, Lowever, ssems to be in favour of the respondents, for it lays down that when a perpotual injune. tion has been granted, on each successive breach of it the deeree may be enforced by an application made within three years of such breach. In the present case the landlord has, as their Counsel admits before me, been sultivating ever since the decree of the Chief Court was passed in 1908. It seems to me obvious that enlitivation of land is an infringsment of the rights of grazing, and that every successive season in which the land has been suffivated has been the ossasion of a fresh breach of the injunction. I am, therefore, of opinion that the decision of the lower Courts holding the application to be not barred by limitation is sorrest. I would note that the Allahabad raling relied on by the lower Courts has also been followed in a later ruling of the same Court, namely, Bhagwan Das v. Su'idei (4).

Limitation is the only point which has been urged before me in this appeal.

I dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(3) 29 M. 314, (4) 28 A. 300; A. W. N. (1936) 10; 3 A. L. J. 886.

ALLAHABAD HIGH COURT.

OIVIL REVISION No. 85 OF 1921.

January 9, 1922.

Fresent:—Mr. Justice Piggott.

H, BEVIS & Oo.—Applicant

terius

BAM PRASAD -OPPOSITE PARIT.

High Court, rule of, regulating hours of sitting of

Court -Rule, contravention of Material irregularity—

Revision.

Where, in contravention of a rule of the High-Court laying down that the ordinary hours of attendance of Judges of Civil Courts are from attendance of Judges of Civil Courts are from 10.40 A M. to 1 P M., a Court, without any wirning to the public and in the absence of exceptional circumstances, calls on a particular suit for hearing after the hour of 5 P. M., it acts in the exercise of its jurisdiction with material irregularity, and its proceedings are liable to be set aside by the High Court in revision. [p. 163, col. 1.]

Civil revision from an order of Judge of the Court of Small Causes at Cawnpore.

Dr. Kailas Nath Katju, for the Appli-

Mr. Uma Shankar Baipai, for the Opposite

Party. JUDGMENT,-This is an application in revision against an order of the Judge of the Court of Small Causes at Cawnpore rejecting an application to have a suit restored, which had been dismissed for non appearance on the part of the plaintiff when the suit was called on for hearing. The facts alleged by the plaintiff have not been controverted, either by affidavit of the oppossite party, or by anything placed on record by the presiding Judge himself. I am entitled, therefore, to assume that those facts are admitted. The in question was down for hearing on the 3rd of March 1921. The plaintiff was personally present in Court up to 5 P. M. At that hour the Court was still engaged in hearing some other suit. The plaintiff's Pleader same round to the Court room and some conversation took place between them, as a result of which both the plaintiff and his Pleader left the Court. The suit was subsequently salled on. I from the record that the defendant was present, although the plaintiff was not. and, after recording the defendant's denial of the claim, the Court dismissed the suit. When the plaintiff applied for restoration, setting forth the fasts above stated, the Court passed an order the effect of which is that the plaintiff was to blame for leaving the Court-room while he knew that the Court was still sitting, and on this ground alone the application for re-hearing was rejected. This Court has issued a rule binding on subordinate Courts which lava down that the ordinary hours for the attendance in the Court bailding of Judges presiding in Civil Courts for judicial work shall be from 10-30 a. m to 4 P. M. and these ELUMALAI CHETTY O. BALAKRISHNA MUDILIAR.

hours shall not be altered except under special canction granted by the High Court. No doubt, it was never intended by this rale to fetter the discretion of subordinate Courts to an unreasonable extent. For a Court to sit after 4 P. M. for the purpose of concluding the hearing of a particular ease, when the parties are agreed that their own convenience will be suited by the Court's doing so, would sertainly not be regarded as a breach of this rule. In the present instance, however, the hearing of a fresh suit was commenced after 5 P. M. No reason has been stated for the adoption of this sourse, nor is it suggested that the learned Judge intimated in any way to the litigants present in Court that, for some special reason, he felt it incumbent upon him to sit to an unusually late hour on the day in question. The som. mensement of the hearing of a fresh suit after 5 P. M. was not only a contravention of the rule which has already been quoted, but it involved a practice which, if persisted in, would prevent the due observance of other rules and directions issued by this Court. Such, for instance, as the directions contained in the orders of January 1921 regarding the presautions to be taken against the oscurrence of fire in Court buildings. It has been suggested that, in any event, this is not a proper ease for interference by this Court in revisior, inasmuch as the learned Judge of the Court of Small Causes was within his jurisdiction in determining whether or not sufficient cause had been shown by the plaintiff for his absence suit was actually called on for hearing. The question, however, in my opinion, is very distinctly one for the consideration of this Court in the exercise of the powers of superintendence given it by the Provincial Small Cause Courts Ast. If proceedings such as those now before me are upheld by this Court, in the absence of any representation as to the existence of exceptional circumstances warranting the said procedure, the practical result will be that this Court must acquiesse in the open disregard of the very proper rules which it has issued for the purpose of regulating the business of subordinate Courts. Under the circumstances of the case, this suit should. in my upinion, have been re-admitted for

hearing. I am even prepared to say that the learned Judge of the Court below did. in my opinion, ast in the exercise of his jurisdiction with material irregularity where, without any previous warning to the public, and, as I must presume, in the absence of any exceptional circumstances which could be pleaded as warranting such a course, he called on this particular suit for hearing after the hour of 5 P. M.

I allow this application and, reversing the order of the Court below, direct that the suit in question be restored to the pending file of the Court of Small Causes at Cawnpore and set down for hearing according to law. The costs of this application will be costs in the cause.

W. C. A.

Application allowed.

MADRAS HIGH COURT.
SECOND CIVIL APPRAL No. 527 CF 1920.
March 31, 1921.

Present : - Mr. Justice Napier and Mr. Justice Krishnan.

BELUMALAI CHETTY AND ANOTHER -- DEPENDANTS Nos. 1 AND 2 - APPELLANTS

ver:u3

P. BALAKRISHNA MUDALIAR -- PLANTIFF -- RESPONDENT.

Evidence Act (1 of 1872), s. 92—Mortgage, equitable
—Simple mortgage, executed but unregistered—Evidence, admissibility of—Transfer of Property Act (IV of 1882), s. 54—Mortgage of immoveable property—
Sale—Registered instrument necessary—Negotiable instrument—Indorsee for value—Debt secured by deposit of title-deeds—Security, whether enforceable—Jurisdiction, how determined.

Evidence is admissible to prove the terms of a mortgage by deposit of title-deeds aliunde, in spite of the execution of a subsequent unregistered simple mortgage which is not admissible in evidence and such evidence is not barred by section 91 of the Evidence Act [p 169, col. 1.]

A mortgage of immoveable property is immoveable property under the Transfer of Property Act, irrespective of the form of the mortgage, and a transfer of the ownership of such a right falls under section 54 of that Act and can be effected only by means of a registered instrument. Consequent. ELUMALAI CHETTY O. BALLERISHNA MUDALIAB.

ly, an indorsee for value of a negotiable instrument, the amount of which has been secured by a mortgage by deposit of title-deeds, cannot claim to enforce the mortgage, in the absence of a registered instrument conveying the mortgage rights to him. [p. 170, col. 1.]

The jurisdiction of a Court to try a suit must be judged by the averments in the plaint, and does not depend upon the relief the Court finds itself able to

give after trial. [p. 171, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suit No. 42 of 1919, preferred against that of the Court of the District Munsif, Trivellors, in Original Suit No. 924 of 1917.

This second appeal came on for hearing on the 5th of November 1920, and

the Court made the following

ORDER-Following the roling in Muthiah Ohesty v. Kothandaramasıvami Naidu (1) on the point, we agree with the lower Appellate Court that evidence was admissible to prove the terms of the mortgage by deposit of title-deeds aliunde, in spite of the subsequent so-called simple mortgage, and that section 91 of the Evidence Act is no bar to the reception of the evidence. It is contended, however, that the assignment to the plaintiff did not vest the mortgage as there was no registered instrument. It is suggested that the transfer was a sale within section 54 of the Transfer of Property Act. We do not think that that is clear. It may be that the transfer was for collection only, in which case the decision in Cunniah v. Goral Chettiar (2) would have to be corsidered. We must, therefore, call for a finding on this point. Fresh evidence is allowed. Two months are allowed for submission of findings and ten days for objections.

In compliance with the order contained in the judgment herein, the Subordinate Judge of Chingleput submitted the following

FINDING.—I have been directed by their Lordships to submit a finding on the following issue:—

"Whther the transfer to the plaintiff was

for collection only."

The plaintiff was recalled and examined and one more witness, Mr. Oakley of Messre.

(1) 35 Ind. Cas. 864; 31 M. L. J. 347; (1916, 2 M. W. N. 221; 4 L. W. 472.

(2) 52 Ind. Cas. 879; 26 M. L. T. 242; (1919) M. N. 613.

Oakley Bowden and Co., was examined. Their evidence leaves no room for doubt that the question should be appreced in the negative.

I find the point accordingly in the negative.

Merers. P. Doraitawmy Aiyangar and S.

Rangasawmy Aiyangar, for the Appellants.

Mesere. E. Doraiswami Aiyar and T. N.

Srinivasa Sastri, for the Respondent.

This second appeal came on for final bearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, on the 24th of March 1921, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

KRISHNIN, J.—The first question that arises for our decision in this second appeal is, whether an indorsee for value of a negotiable instrument, the amount of which had been seenred by a mortgage by deposit of title-deeds, can claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage rights to him.

A somewhat similar question arose before the learned Chief Justice and my learned brother with reference to an indorsee for collection in Ounnigh v. Gopal Chettiar (2) and was answered in the indorsee's favour. That decision, however, is not conclusive in this case as here we have an indorsee for value and the judgment of my learned brother in that case was based entirely on the fast that the indorsement was for collection; and though the learned Obief Justice makes no such distinction, my learned brother did not apparently agree with his Lordship's views. Sitting with Hagher, J., the learned Chief Justice has again stated his view in Ferumal Ammal v. Perumal Naicker (3) that, though the rule is now that a mortgage right or debt eannot be transferred without a registered instrument under section 54 of the Transfer of Property Act, it is subject to the exception that "where the law still admits of the separate transfer of the mort. gage-debt as by the indorsement of a promissory note scenred by a deposit of title. deeds or by the attachment and sale in execu. tion of a mortgage-debt ..., section 8 of the

(3) 61 Ind. Cas. 461; 40 M. L. J. 25; 13 L. W. 69; (1921) M. W. N. 5; 44 M. 196.

ELUMALAI CEETTY S. B. LERISHMA MUDILIAR.

Transfer of Property Act still operates to earry the security with it." We are, of course, not concerned with Coart sales of mortgage-dobts or their effect in this case; that will be governed by the special provisions of the Code of Civil Procedure. The observation regarding promiseory notes is elearly an obiter dictum, if I may say to with respect; and, though the opinion of the learned Chief Justice is entitled great weight, there is no decision binding on us and we must, therefore, consider question raised before us on its the merite.

It seems to me quite clear that a mortof immoveable property is itself immoveable property under the Transfer cf Property Act, whatever the form of the mortgage may be; and the transfer of owcership of such a right falls under section 54 and will require a registered instrument for the purpose: Vide Sakhiuddin Suha v. Sonaulleh Sarkar (4) and Ferumai Ammal v. Ferumal Naicher (3). It is true that the Chief Justice sitting on the original side as Wallis, J., (as he then was) held, relying on section 8 of the Act, that the transfer of a mortgage was the transfer of the debt with its attendan securities and that registration was, therefore, unnecessary for the transfer of a mortgage. Vide Dwarka Doss Govardana Doss v. Danakoti Ammal (5). There was some earth at of opinion on the point. See Subramaniam v. Perumal Reddi (5) on one side and the opinion of Bashyam Ayyangar, J., in Ramasami Pattar v. Chinnan Asari (7) and the decision of Chamier, J., (as he then was) in Mutsiddi Lal v. Muha amad Banif (8) following it, on the other side. In this conflict of views the Legislature amended the Act in 1900 and excluded mortgage debts from the category of actionable claims. The object was plainly to remove mortgage debts from the scope of section & which speaks of "debt or other actionable claim," and to make it necessary to have a registered instrument for its transfer. It was on the application of sestion 8 that it was held that the transfer of a mortgage did not require registration and with the non-applicability of the sestion resulting from the amendment one would have thought that all doubts regarding the nessessivy of having a registered instrument for the transfer of a mortgage-right in all sases would have been removed. Batthe learned Chief Jastice thinks, as stated above, that though the role is now clear with reference to mortgage dobts in general there is still an exception in favour of mor gages by deposit of title deads where promissory. notes have also been taken for the mortgage amounts. With every respect for his Lord. ship's opinion, I find it diffisult to follow it. It is clear from his judgment in the case that he would have beld that a registered instrument would be necessary to convey the mortgage rights even in a case of a mortgage by deposit of title deads if no negotiable instrument had been taken for the mortgage amount. Does the taking of the negotiable instrument make any d fference on the point? I think not, as the mortgage debt is none theless a mortgage-debt because it happens to be also a promissory note debt. If it is a mortgage-debt, sestion S cannot apply to it and the whole argument based on the section fails.

The fast that the promissory note can be transferred by endorsement, it seems to me, does not make any real difference on the acestion before us. When the note amount is so transferred, it seems to me, it is not transferred as a secured debt at all. The Negotiable Instruments Act makes no provision with reference to securities. In my view it is only if a mortgage-debt is transferred as a secured debt that it will carry the securities with it on the principle embodied in section 8, and not otherwise. Even in the case of a mortgage where there is no promissory note it cannot, I think, be said that the law does not allow the mortgagee to transfer the debt as an unscoured or simple debt without a registered instrument if he thinks fit to do so. The sesurity is for his benefit and he can give it up if he likes; and the transferee will than get the right to the debt but not to the security. Thue, as regards transferability in law as an unssoured debt, a morigage debt for which a negotiable instrument has been taken does not seem to me to differ fundamentally from one where

^{(4) 45} Ind. Cas. 986; 22 C. W. N. 641; 27 C. L. J. 453.

^{(5, 23} Ind. Cas. 129: 15 M. L. T. 198.

^{(6) 18} M. 454; 5 M. L. J. 92; 6 Ind Dec. (N s.) 653.

^{(7) 24} M, 449.

^{(8) 15} Ind. Cae, 853; 10 A. L. J. 167.

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none such has been taken. In my view, in either case, if the debt is transferred by endorsement or otherwise, without the transferer taking care to transfer the mort. gage right by a registered instrument, the debt and the security will get disassociated and the security may possibly cease

If we are to hold that the security passes by the indorsement of the promissory notes in cases of mortgages by deposit of titledeeds where notes have been taken for the mortgage amounts we must hold the same view with reference to any kind of mortgage where the mortgages happens to have taken a promisiory note for the mor gage amoun'; for the argument will be just the same. We will also have to hold that not only the first indorese but every subsequent incorsee, including even blank indorsees, will obtain the mortgage rights by indorsement unless, of course, a different intention is manifest, This view, I think, will introduce a grave uncertainty into the registration of mortgages and render the records of Registration Offices unreliable in assertaining in whom the mortgage right subsists, for the time being. Such a view, therefore, does not commend itself to me. If I am right in thinking that section 8 does not apply to mortgage-debte, there is no scope for the application of the maxim generalis specialibus non derogant. Bat if it did apply, I am inclined to think it would make section 54 of the Act override section 8 rather than the other way; for section & refers to all kinds of securities whereas section 54, so far as it is relevant, refers only to a limited class of securities, cis., mortgage scourities. See Mutsaddi Lal v. Muhummad Hanif (8) above quoted.

No valid argument can be based on the alleged anomaly of holding that the transfer of a mortgage by deposit of title deeds requires registration when the creation of it does not; for that seems clearly to be the law at any rate where there is no promissory note involved.

After eareful consideration, I have come to the conclusion, though not without hesitation, on account of the opinion of the learned Chief Justice to the contrary, that the inderses of a negotiable instrument does not get any right to the mortgage by deposit of title-deeds in his inderser's favour by the mere inder ement of the note without a registered transfer of the mortgage-rights.

On this view, it is argued that the District Munsif had no surisdiction to try the cuit as his jurisdiction was based solely on the fact that some of the lands mortgaged were within his jurisdiction. It is contended that on the finding that the mortgage-rights did not pass to the plaintiff the Court lost jurisdiction. That is not so; jurisdiction has to be judged on the averments in the plaint, nuless indeed an avernment bas been fraudulen:ly made for the express purpose of giving juradiction. There is no such allegation here. Jurisdiction does not depend upon the relief the Court finds itself able to give after trial The jurisdiction of the Court in this case is, therefore, not affected by the view I am taking; but the decree, so for as it gives relief against the property mortgeged, must be set aside.

There will be a personal decree only against defendants Nos. I and 2 for the amount found due and interest at 6 per cent, from date of suit to date of payment. The rest of the suit is dismissed. The order as to costs in the First Court will stand but the parties will bear costs in this and the lower Appellate Court.

Napier, J.—I agree. I had already prior to the hearing of the case before the learned Chief Justice expressed my opinion in an unreported case. I saw no reason to alter it during the argument in that case nor do I now.

M, C. P.

J. P.

Decree taried.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 135 of 1919.

January 30, 1922.

Present:—Mr. Justice Rafique
and Mr. Justice Lindsay.

THE COLLECTOR OF JAUNPUR —

DIFENDANT—APPELLANT

JAMNA PRASAD-PLAINTIFF -- RESPONDENT.

Evidence Act 'I of .812), s .24-Privilege-Public document, production of Duty of Court Court of Wards-Statement of financial position of ward, nature of -Limitation Act (IX of 1908), s, 19-Acknowledge

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ment-Nature of proof-Mortgage-Stipulation for payment of interest-Failure to pay-Suit by mortgagee-Limitation terminus a quo.

Where in respect of a document privilege is claimed under section 124 of the Evidence Act, it is for the Court to decide whether or not the document is a communication made to a public officer in official confidence. If it decides that it was so made it has no authority to compel the public officer to produce it, inasmuch as the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests. [p. 174, col. 2.]

Inasmuch as a person who desires his estate to be taken over by the Court of Wards cannot be compelled under law to make a disclosure of his debts, a statement by such a person, setting forth the financial position of his estate, sent to the Collector to enable him to decide whether or not the estate should be taken over, should be regarded as a communication made to him in official confidence and he is not obliged to disclose it by reason of section 124 of the Evidence Act. [p 175, col. 1.]

Where a person prosecutes a suit which is, on the face of it, barred by limitation and he tries to bring it within limitation by proving an acknowledgment under section 19 of the Limitation Act, he must give cogent proof of his allegations. [p. 175, col 2.]

Where a mortgage-deed stipulates for the payment of interest annually on a certain date, and provides that, in default of such payment in any year on the date so fixed, the mortgagee would have power to recover the amount remaining due to him from the hypothecated property, and other property of the mortgagor by bringing a suit, the period of limitation for bringing such suit commences to run from the date of the first default. [p. 172, col 2.]

First appeal from a decree of the Officiating Second Additional Subordinate Judge, Jauppur.

Dr. S. M. Sulaiman and Mr. Lalit Mohan

Banerji, for the Appellant,

Dr. Kailas Nath Kat u, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought on the basis of a mortgage alleged to have been executed by one Maulvi Muhammad Ali.

This document is said to have been excented on the 19th of April 1895 in favour of one Dwarks Prasad, the father of the present

plaintiff.

It is proved that Maulvi Muhammad Ali died in the month of Ostober 1898. He left his widow, Musammat Muslima Bibi, two sons, Muhammad Hasan and Muhammad Zahur, and four daughters Musammat Kulsum, Musammat Makki, Musammat Fatima and Musammat Ruqiya.

In the month of April 1908 the estate belonging to Maulvi Muhammad Ali was taken over by the Court of Wards. It court of Wards. Some of the heirs of Mahammad Ali were of full age, at the time the application was made but two of the daughters, Musammat Fatima and Musammat Ruqiya, were still minors. Musammat Kulsum, one of the daughters whose names have been mentioned, declined to join in the application.

The result of all this was that the Court of Wards took over the property of all the heirs of Muhammad Ali except Musammat Kulsum.

After the notification was issued announcing the taking over of the property by the Court of Wards, a further notice was issued under section 16 of the old Court of Wards Act, (U.P. Act III of 1899) calling on all persons who had claims against the estate of Muhammad Ali to notify them to the Collector within six months from the date of notification.

It is apparent from the record in this case that Dwarks Prasad, who is now represented by his son, made no claim in respect of the mortgage debt now in suit, within the period prescribed by the notification just mentioned. There is on the record a certain petition which appears to have been presented by Dwarks Prasad to the Collector on the 27th of April 1910 in which he asserts that he had notified his claim to the Court of Wards. There is nothing, however, in this petition to show on what date this claim of his was brought to the notice of the Court of Wards.

The suit with which we are now concerned was instituted on the 16th of April 1917, and in the plaint it was stated that the original document of mortgage was not forthcoming and that, therefore, the plaintiff was pursuing his claim on a certified copy of the document.

In this suit the defendants impleaded were (1) the Collector of Jaunpur as Manager of the Court of Wards of the estate of Maulvi Muhammad Ali and (2) and (3) the sons of Maulyi Muhammad Ali, namely, Muhammad Hasan and Muham. mad Zabur. The other heirs of Muhammad Ali whose interests in the estate bave been taken charge of by the Court of Wards-that is to say, Musammat Maslima Bibi, the widow, and the three daughters, Musimmat Makki, Musammat Fatima and Musammat Ruqiya-were not joined as defendants in the Buit.

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The written statement on behalf of the defendants put the plaintiff to the proof that the mortgage-bond was in fact executed and there was also raised a plea of limitation. The lower Court has decreed the slaim in part, holding that the suit was not time-barred.

The issue of limitation is the most important issue in this case and we must deal with that first. We have come to the conclusion that the judgment of the Court below on this issue is not correct and that the whole suit was barred.

A translation of the mortgage deed is to be found at pages 7 and 8 of the respondents' book. From this it appears that the mortgage-deed purports to have been executed on the 19th of Aprli 1895 to secure a loan of Rs. 2,000. Interest on the loan was at the rate of Re. 1 per cent. per mensem, so that on the principal sum the amount of interest payable every 12 months was Rs. 240.

It is agreed in the deed that the interest is to be payable on every Jeth Puranmashi and the document contained a further stipulation that if in any year the mortgagor failed to pay interest on the date so fixed, or if he failed to pay the principal amount, by the end of ten years (namely, the period of mortgage), the ereditor was to have power to recover the amount remaining due to him. together with interest, from the hypothesated and other moveable and immoveable properties of the mortgagor by bringing a suit or in any other way he might choose. The first question we have to consider, therefore, is on what date limitation began to run. The document, as we have said, was executed in the month of April 1895 and the month of Jeth usually falls in about June. The terms of the doenment leave us in some uncertainty as to the arrangement for the payment of that portion of the interest which assrued due between the 19th of April 1895 and the first month of Jeth which fell thereafter. It is clear, of course, that the interest amounts under the deed to Rs. 240 per annum. It is also slear that the parties agreed that this sum of Rs.240 should be payable every Jeth Puranmashi, but, obviously, the sum which was payable on the first Jeth Puranmashi after the date of execution of the instrument was very much Rs. 240. We are inclined to less than hold that the document means that interest was to be payable in every Jeth and that,

consequently, there was an obligation on the mortgagor to pay in the morth of Jeth, which fell about June 1885, such interest as had accrued due by that time. Thereafter, there was to be payable at each Jeth Puranmashi a sum of Rs. 240 representing the interest of 12 months. In this view, it being admitted that no interest on the debt was ever paid, there was a default about the month of June 1895. In any case it is quite clear that there was default in the month of June 1895.

On the face of it, therefore, any suit on this mortgage was time barred at the time the present case was brought into Court. We are unable to distinguish this case from the case which was before the Full Bench in Gaya Din v. Jhuman Lal (1). That case has been followed in another case, namely, Pancham v. Ansar Rusain (2). According to those rulings limitation in the case of a document like this begins to run from the date of the first default. The plaintiff sought, however, to avoid the bar of limitation by putting forward a document which, according to his case, amounted to an asknowledgment which. under the terms of section 19 of the Limits. tion Act, saved the claim.

The document is marked Exhibit A on the record and we have now to state how it came into Court. It was not a document which was in the plaintiff's possession at the time the suit was brought, nor indeed was any acknowledgment pleaded in the plaint by way of saving the bar of limitation.

After the suit had been instituted an application was made on behalf of the plaintiff asking the Court to direct the Collector, as Manager of the Court of Wards, to produce a number of documents out of the Court of Wards file relating to the estate of Maulvi Mohammad Ali. In accordance with the summons which was sent to him, the Collector produced in Court certain documents, but he claimed privilege for them under the provisions of section 124 of the Evidence Act on the ground that the documents contained statements which were made to him in official confidence and that he objected to produce them on the

^{(1) 28} Ind. Cas. 910; 87 A. 400; 18 A. L. J. 510 (F. B.).

^{(2) 63} Ind. Cas. 441; 43 A. 596; 19 A. L. J. 592,

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ground that their disclosure would be prejudicial to the public interest.

The learned Subordinate Judge who was in charge of the suit at this time (not the Subordinate Judge who ultimately decided the case) overruled the plea of privilege raised by the Collector and held that the documents were admissible. One of these documents, as we have said, is the statement. Exhibit A.

We had better explain at this stage what Exhibit A is. It purports to be a statement in which are set out details of the property owned by the deceased Manlvi. We find particulars of the landed property which belonged to this gaptleman, and other details relating to debts which were owing from him. There is in the dicament a statement to the effect that the mortgage now in suit had been executed by Manivi Muhammad Ali in favour of D varka Prasad. At the foot of this document there is a signature which at least one witness in the ease has identified as the signature Muhammad Hasan, the eldest son of the deceased Muhammad Ali.

Tae Coart below, therefore, finding this statement and believing it to be signed by Muhammad Hasan, treated it as an asknowledgment of liability. A further question arose in this connection, namely, as to the date upon which this so called asknow. ledgment was made. There is no date apparent on the paper itself and certain other evidence bad to be relied upon for the purpose of showing that the acknowledg. ment was made within limitation, that is to say, made prior to the month of June 1938 at the very latest. Some evidence was forthcoming to show that certain information had been called for by the Collector before this estate was taken over by the Court of Wards, and the first notifieation appounding the taking over by the Court of Wards appeared in the Gazatte of the 10th April 1:08. It was, therefore, concluded that this per ioular statement, marked Exhibit A, had been prepared and sent to the Collector previous to that date.

In appeal here it has been argued that the document was inadmissible in evidence and that the Court below was wrong in overroling the plea which was put forward by the Collector under the provisions of section 124 of the Evidence Act.

After careful consideration of this argument, we think the appellant is entitled to succeed and that the opinion of the Sabordinate Julge in this matter was not correct.

In dealing with this plan the learned Subordinate Judge referred to two rulings, Venkitichella Chettiar v. Sampathu Chettiar (3) and Julobram Day v. Bulloram Day (4). On the strength of these rulings he held that statements made under process of law cannot be said to be made in official confidence within the meaning of that expression as used in session 124 of the Evidence Act.

It is quite clear on a proper construction of this section that it is for the Court to deside whether or not a particular document for which privilege is claimed is a communication made to a public officer in official confidence. If the Court decides that it was so made, then it has no authority to compel the public officer to produce it, for, according to the section, the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests.

The two cases upon which the learned Sabordinate Judge relied for his opinion dealt with returns made by persons under the Income Tax Act. In other words, they were declarations of income which were filed by parties for the purpose of enabling the officer concerned to assess the proper amount of income tax. It was laid down in the Madras case to which we have referred that "it would be difficult to say that documents produced or statements made under process of law could be said to be made in official confidence."

Assuming that this statement of the law is correct, we are of opinion that the proposition therein so widely laid down cannot be applied to the facts of the present case. There is nothing whatever to show that this statement contained in Exhibit A (assuming for the moment that it is proved to have been signed by Mahammad Hasan) was made "under process of law" In this connection we have been referred to the Court of Wards Manual containing rules which were in force under the old Ast, (Act III of

^{(2) 1} Ind. Cas. 70; 32 M. 62; 19 M. L. J. 263; 4 M. L. T. 317.

^{(4) 26} C. 281; 18 Ind. Dec. (N. s.) 781,

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1899) at the time when this estate was taken over These rules were made under the provisions of the Act. Rule 4 of Part I of the Manual imposes upon the Collector the duty of referring to the Board of Revenue all applications made by proprietors who desire to have their estates taken over. Rule 12 lays down what the report of the Collector is to contain. Amongst other particulars, it is to set forth a statement of the financial position of the estate desired to be taken over, together with an estimate of the claims which are likely to be made on the estate. Rule 13 lays down that these statements are to be made in particular forms, namely, Forms 1, 2 and 3.

It is not to be denied that the statement, Exhibit A, upon which the plaint if relies, in the Court below, is one of these forms.

But we have not been referred either to any section of the Act or to any rule contained in this Manual by which a person who desires to have his estate taken over by the Court of. Wards, can be compelled to make a disclosure of his debts. There is no question of process of law in this case.

On the assumption, therefore, that the statement, Exhibit A, in this case was drawn up by the defendant, Muhammad Hasan, and signed by him, we are of opinion that it should be treated as a communication made to the Collector in official confidence. It is hardly to be supposed that a proprietor who is fir accially embarrassed and who desires the Court of Wards to take charge of his estate, intends that any statement of his indebtedness is to be communicated to a third party or to be made public property. Any statement se made is made solely with the purpose of giving information to the Court of Wards, on the strength of which the Court of Wards may decide whether or not the estate should be taken over. We hold, therefore, that this particular document for which the Court of Wards claimed privilege, was a communication made to the Collector in official confidence and he war, therefore, not obliged to disslose it in accordance with the law as laid down in section 124 of the Evidence Act. The learned Subordinate Judge, therefore, was wrong in compelling the Collector to hand over this dosument and was also wrong in using it as svidence in this care.

It follows from this that if this doesnment is excluded from consideration the suit must fail, for, admittedly, there is no other evidence upon which it would be possible to hold that the bar of limitation was removed.

It is not necessary for us to enter into other matters in which, it appears to us, the Court below has gone wrong. We may say, however, that the evidence on the resord does not satisfy us that this state. ment, attributed to Muhammad Hasan, was uade before the month of June 1908. The whole evidence on this point is quite indefinite and we are asked to make a series of presumptions which, in the circametanees, we cannot possibly make. A plaintiff who is prosecuting a suit which ie, on the fase of it, barred by limitation, and who is trying to bring it within limitation by proving an asknowledgment under section 19 which gives him a fresh period, must give cogent proof of his allegations and in the present ease we do not find that this requirement has been complied with. Another matter which we may mention here is, that the lower Court was obviously wrong in using this acknow. ledgment against any one but Muhammad Hasan himself; section 19 of the Limita. tion Act is clear on the point. Notwithstanding this, the learned Subordinate Judge has given a decree against all the heirs of Monlyi Muhammad Ali except his three daughters-Musammat Makai, Musam. mat Fatima and Musammat Rugiya.

We need not deal with any of the other matters which were argued before us. It is sufficient for us to say that the claim was time barred and the suit ought to have been dismissed. We, therefore, allow this appeal, set aside the decree of the Court below and direct that the plaintiff's claim stand dismissed with costs in both Courts.

W. C. 4. Appeal allowed.

HASHAMALI U. BHAGWANT ATMARAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 243 OF 1921. March 27, 1922.

Present: -Mr. Prideaux, A. J. C. HASHAMALI -JULGMENT DEBTOR -APPELLANT

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BHAGWANT ATMARAM—DECREE. HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182-Execution-Application for execution against two judgment-debtors one of whom already dead, whether saves limitation.

An application seeking execution against two judgment-debtors one of whom is already dead saves limitation both against the living judgment-debtor and the legal representatives of the deceased judgment-debtors though they were not brought on record on that date.

Appeal from an order of the District Judge, Wardha, dated the 19th January 1921, in Civil Appeal No. 110 of 1920.

Mr. Atmaram Bhagwant, for the Appellant.

Mr. R. A. Mande, for the Respondent.

JUDGMENT .- In Civil Suit No. 62 of 1909, on the file of the Subordinate Judge, Wardha, Bhagwant Atmaram obtained a decree against Hakamali and Hasanali on a compromise. The decree rons thus:- "Dafendant No. 1 do pay plaintiff Rs. 600 in full satisfaction of plaintiff's claim as under, i.e., Rs. 65, sosts on Poush Sndi 15 of 1319 Fasli and the balance of Rs. 600, by annual instalments of Rs. 50 per year commencing from Poush Sudi 15 Sambat 1320 Fasli. In case of default in three instalments the whole debt would become due at once and the defaulted kists will bear 1 per cent per month compound interest. In sase the debt is not paid in a lump sum when the whole should become due then it will bear 2 per cent. per month compound interest. In case the defendant No. 1 fails to pay the debt as mentioned above defendant No. 2, will be liable as surety." The first execution application was filed in March 1912 for the Rs. 65 costs, this was recovered. Another application was filed on 7th September 1914, it was dismissed after Rs. 100 had been resovered. Then an application was filed on 9th July 1917 against both judgment-debtors execution being sought against both. This was against the moveable property of both, but before that was filed, that is, about 10th

August 1916 Hakamali had died. The next application is the one in suit which, despite the appellant's contentions, has been allowed to proceed. The appellant is the surety. He contends here that, under the authority of Madho Prasad v. Kesho Prasad (1), the application of 9th July 1917 does not save limitation, because Hakamali was dead at the time and his representatives were not brought on record. The case depended upon has been dissented from in Bipin Behari Mitter v. Bibi Zohra (2), and the latter 0330 commands itself to me. Therefore, I must hold the application of 9th July 1917 does save limitation. In any case, it would have eaved limitation against the present appellant for he was a party to it and expcation against his property was sought therein.

It is next contended that as the desree does not state that, in the event of the first defendant's death, defendant No. 2 is liable he cannot be made so. There is no force in this contention. Under that decree if defendant No. 1 did not pay, the present appellant was liable The defendant No. 1 has not paid and, therefore, he is liable. Because the plaintiff could have obtained satisfaction by attaching the estate of the deceased Hakamali it does not follow in place of doing so he cannot proceed against the surety. I see no reason for interference. This appeal, therefore, fails and is dismissed with costs. The appellant will pay the respondent's costs.

J. P.

Appeal dismissed.

(1) 19 A. 337; A. W. N. (1897) 75; 9 Ind. Dec. (N. s.) 121.
(2) 35 C, 1047.

BRIAM SUNDER U. EMPEROR.

ALLAHABAD HIGH COURT.

ORIMINAL REVISION No. 69 or 1922.

March 4, 1922.

Present:—Mr. Justice Ryves,

SHIAM SUNDER—Applicant

tersus

EMPEROR - OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1878), s. 439— Revision—Interference on facts-Reasonable doubt— -Acquittal.

The rule of the Allahabad High Court, not to interfere on facts found, by the lower Appellate Court, when sitting as a Court of Revision, on the Criminal Side, is not an absolute one and the Court will interfere where it is not satisfied as to "the propriety of the finding." [p 177, col 1.]

Where a High Court is not satisfied beyond a reasonable doubt of the guilt of the accused, the accused is entitled to an acquittal. [p. 173, col. 2.]

Oriminal revision against an order of the Sessions Judge, Farrukhabad.

Mr. O. Ross-Alston, for the Applicant.

Mr. R. Malcomion, (Assistant-Government Advocate), for the Crown.

JUDGMENT .- Sham Sunder, a sonar, was convicted of an offence under section 406 of the Indian Penal Code by a Magistrate of the First Class, and his appeal was rejected by the learned Sessions Judge of Farruktabad, He comes here in revision. The only ground taken is, that the judgment of the Appellate Court itself contains sufficient grounds for holding that there is a reasonable doubt in the case. The practice of this Court has long been not to interfere in criminal revision on facts found by the lower Appellate Court, but the rule is not an absolute one. The revision has been admitted by a very experienced Jadge of this Court and the record is before me, and I have to satisfy myself as to "the propriety of the finding."

To put it very briefly, the case for the prosecution was that Mul Chand, who keeps a medicine shop in the Bazar of Farrukhabad, was anxious to have some jewellery repaired for a seremony which was to take place on the 30th of November last at his house, and, therefore, sent for Sham Sunder, sonar, whose shop was not far off, and on his arrival made over to him three articles of jewellery, valued at about Rs. 800 or a little more, for repairs. The articles were to be returned the same evening. That evening the complainant sent his servant to get the articles. He came back and said that Sham Sunder could not be

Sham Sunder's shop and asked for return of the ornsments, whereupon Sham Sunder denied that he had received any ornaments or that he knew the complainant. That afternoon the complainant made his report at the Police Station. It is said that when the jewellery was handed at the complainant's shop to the accused, there were present five

persons who saw the transaction. The story itself seems to me highly improbable. It would be very improbable if the scene were laid in Bond Street or Pissadilly, but it besomes even more improbable in the Bazar of an Indian city. The shop faces the street and passers by can see and hear what was going on. At that hour of the day, between 12 and 1, there must have been a large number of persons in the street. Now, it is strange that the following criticism can be made against the five persons who say they saw the occurrence. One is the complainant's servant, another is a eloce relation, the third is a member of his biradari, the fourth has proved bimself unworthy of sredit, and the fifth is a next door neighbour and a man of no weight. Now, the learned Magistrate who tried the case has frankly admitted that the accused's story is not less believable than the complainant's, After saying that he cannot conceive any explanation for the divergence between the complainant's statement and that of one of his witnesses, he goes on to say: "All I can say is that the discrepancies and weakness in the defence story are infinitely greater." Later on he adds: "Very strong evidence was required to prove the line taken up by the accused. By taking this line the burden of proof was shifted to his shoulders," and he convicted the accused. The learned Sessions Judge has written a very long judgment most of which, however, is taken up with repeating arguments on both sides. He, too, it seems to me, has adopted more or less the same line as the learned Magistrate. After pointing out that the accused had a good resord, and a priori it was very unlikely that he would damage his professional carreer in the way alleged by the complainant, he goes on to say that the temptation was not small and the assused might have been in immediate want of money. This is a mere assumption. There is no evidence of it. He soneludes his judgment by saying, "it seems EHIAM SUNDER & EMPEROR.

to me that the complainant's e'ory is the more probable of the two" and le dismissed the appeal. It seems to me that this is not quite a fair way of trying the case. It is scarcely too much to say that the burden of proof is never on the accused to prove his innecence, and before he can be called on for his deferee the Court must be satisfied that there is a strong case for him to meet. It is not right, in my opinion, to say that, because the story told by the defence is more improbable than the very improbable story told by the complainant that, therefore, the seensed should be convicted. believe the complainant when he says that when he demanded back the ornaments from the accused, the accused replied that he did not even know the complainant. It is proved that there were dealings, in the past between them. Apart from this, there is the initial improbability that the accused, if he tock the ornaments in the way be is said to have dore, when he must have known that at least five persons at the shop saw it and there might have been other independent persons in the street who might have seen it, would have the audacity the very next day to deny the whole thing. Now, examining the transaction a little more elosely, I find that, although the ornaments worth Rs. 80) were made over on the occasion, no receipt was taken and no writing of any kind was resorded. It is proved that when gold of much less value was given to the accused by the complainant a memorandum was made of it. The witness, Ram Sarup Agarwale, who might be called an independent witness, says that he was present on the cesasion, baving come tack from Delhi with some drugs which he had purchased for the complainant. Unfortunately, this is the witness whose statement is so discrepant to that of the complainant that the Magiatrate frankly says: " I cannot conceive any explanation for this divergence in their statements", and it is still more unfortunate that, although the complainant keeps bahr khotz, there is no entry in it about these drugs. All the other witnesses who profested to have seen the occurrence are very closely connected with the complainant. The only other witness who seems to me to be independent is Kali Charan and I was to a considerable extent impressed with what he said. He said that on the 50th of November. that is, the day after the goods were said to

have been mode over to the serused, the complainant came to him and asked him to use his influence over the accused to get back the crraments. He is the clerk of a Vakil and prima facie there is no reason to disbelieve his story, but, at the same time, he had money dealing with the complainent and the actual state. nent which he makes is really very vague. Now, the ceession for the harding over of these ornaments to the accured is said to be a ceremony on the following day at the complainant's house. In fact, the ecmplainant's care is that he was very basy making arrangements for the next day for the seremony. On this point be is sompletely sontradicted by his own servalt, who says that the complainant and his brother remained the whole of that day at the shop. There is really no other evidence that the ceremony was to take place the very next day, and if the servant is to be believed it is improbable. It seems to me that the story of the defence, which may or may not be true, at any rate establishes this much that there had been previous dealings between the parties and that there was some cort of dispute b tween them. I am far from saying that the acsused has established his story, but that, in my opinion, does not prove that he was guilty. The complainant himself apparently owes money but this, again, I think is not very important. The accused had admittedly borne a good character previous. ly. He seems to have a fairly good business and has been up to this generally considered quite honest. The temptation, under the siroumstances, considering that micappropriation, if made, must inevitably teen defected because the goods were given to him most openly before many witnesses, does not seem to me sufficiently overpowering. Nemo repents turpiesimus fit. On the whole, I am not eatisfied beyond a ressonable doubt of the guilt of the accused. He is, in my opinion, entitled on that ground to an asquittal. I, therefore, allow this application, set aside the convicton and sentence of Sham Sander and direct that he be released.

J. P. & W. C. A.

Application allowed.

MULCHAND PANARMAL &, RESSONAL RAMCHAND.

SIND JUDIOIAL COMMISSIONER'S COURT.

ORIZINAL REPORT ON APPLICATION No. 121 OF 1920.

November 15, 1920.

Present:—Mr. Kennedy, J. C., and

Mr. Kemp, A. J. C.

MULCHAND PAMANMAL—APPELLANT

KESSOMAL BAMCHAND - RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 200 - Magistrate, power of-Complaint.

Under section 200 of the Criminal Procedure Code it is illegal for a Magistrate to whom a complaint is presented to deal with it in any way without examining the complainant.

Mr. Jessaram Banasing, for the Appli-

Mr. T. G. Elphinston, Public Prosecutor for Sind, for the Crown,

JUDGMENT -In this case a complaint, under section 379 of the Indian Penal Code, was presented by one Kessomal at Mirpur The Sub-Divisional Magistrate Mathelo. did not transfer the case immediately to ang subordinate Magistrate nor did he examine the complainant under section 200. On the 9th June he wrote an order that he wanted to hold a preliminary enquiry and summoned the witnesses for hearing on the 21st June. On the 21st Jane he passed an order transferring the enquiry to the Subordinate Magistrate for enquiry and report. Both these appear to us to be irregular. The Magistrate is bound, under section 200, if he was going to take eognizance of the complaint, to examine the complainant. Further, it is not permissible to transfer a case for enquiry to a subordinate Magistrate. If the ease is transferred simply the Magistrate to whom it is transferred can proceed with the case either by issuing direct proeess or by holding a preliminary enquiry in his discretion. The Magistrate had no right to fetter discretion of the Second Class Magistrate in report of the case, "transferred" to him. The word "transfer" in the Magistrate's order of 21st Ostober 1920 must be intended to mean "sent" under section 202. The word "transfer" which has a special meaning, should not have been used. But the provisions of sestion 200 make it illegal for BREDHA C. EMPEROR.

the Magistrate to whom a complaint is presented to deal with it in any way without examining the complainant, and this has been frequently held by several High Courts. All we can do is to set aside both the orders of the Sab-Divisional Magistrate, that of the 9th June and that of the 21st June, and direct him to dispose of the case from the point reached by his order of the 9th June according to law.

Order of the Sub-Divisional Magistrate set aside and the case ordered to proceed.

J. P.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 102 of 1922.

March 17, 1-22.

Present:—Mr Justice Gokul Presed.

BEEDHA—Accused

versus

EMPEROR, THROUGH BHAGIRATH-PROSUCUTOR.

Criminal Procedure Code (Act V of 1898), s. 344-Compensation to complainant on accused's failure to attend not allowable—Court, power of.

A Court cannot take any proceedings against an accused person in his absence.

In a criminal case an accused person cannot be ordered to pay compensation to the complainant on an adjournment of the complaint against him occasioned by his failure to appear on the date fixed for the hearing.

Oriminal reference by the Sessions Judge, Agra.

JUDGMENT.—In this case the accused was not present on the date for which the hearing of the case had been adjourned. He sent in an application of illness through the Chaukidar Rikhai. The learned Magic-trate adjourned the case for a week and, instead of confecating his bail bound, awarded Rs. 25 as damages to the other side and adjourned the case on this condition. This case has been referred for the orders of this Court by the learned Sessions Judge ef Agra on the ground that such an order of fine, so to say, capact he legally passed against an assured

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person who is absent. There is no ease of this Court on this matter. But I agree with the Panjab Chief Court in Browne v. Chanda Singh (1). The cases of this Court which I have been able to find were cases in which compensations were allowed to the accused when an adjournment was asked for by the prosecution, but I have not seen any case in which an order of compensation against an accused person had been passed because he could not attend the Court owing to his illness. Court eannot take any proceedings against an assused person in his absence. I assept the reference, set aside the order of the Trial Court and direct that the compensation, if realised, should be refunded to the assused.

J. P.

Reference accepted.

(1) 6 P. R. 1806 Cr.; 114 P. L. R. 1907; 4 Cr. L. J. 78.

JURY REFERENCE CASE No. 60 of 1920.

March 7, 1921.

Present:—Mr. Justice Teunon and

Mr. Justice Ghose.

EMPEROR—PROSECUTOR

TARIDULLAH SHAIKH AND OTBERS -ACOUSED.

Oriminal Procedure Code (Act V of 1898), s. 307-Jury trial-Sessions Judge, duty of-Alibi, plea of, not proved-Presumption-Misdirection. A Judge presiding at a trial by Jury should always be careful that he does not usurp the functions of an Advocate and that the evidence in the case is presented to the Jury in as dispassionate and impartial a manner as is expected of the presiding officer. [p. 184, col. 1.]

The fact that an accused person has failed to establish his plea of alibi does not give rise to a presumption against him as to his complicity in the

crime. [p. 183, col. 2.]

Mr. K. N. Choudhuri, Babus Probodh Chandra Chatterjee and Heramba Lal Sanyal, for the Accused.

Mr. Ashraf Als, for the Orown.

JUDGMENT.

is a reference under GHOSE, J.-This section 307 of the Code of Criminal Prosedure by the learned Sessions Judge of Pabna in a trial held by him, with the aid of a Jury, of nine persons named Taribulle, . Korban, Rahimuddi, Mahajan Mondal, Hajrat Ali Sheikh, Badu Mondal, Maju Sheikb, Amir Munshi, and Rajab Sheikb, charged with offences punishable under sections 147, 302 and 323, Indian Penal Ocde and of one of the said persons named Maju Sheikh also charged with an offence punishable under section 148 of the Indian Penal Code. The Jury were unanimously of opinion that three of the accused, namely, Taribulla, Mahajan Mondal and Badu Mondal were guilty under sections 147 and 325, read with section 149, Indian Penal. Code, but that the other assumed persons, were not guilty of any offence. The learned Sessions Judge, for the reasons stated by him in his letter of reference, was unable to accept the verdiet of the Jury and has submitted the case for the consideration of this Court. In his opinion, all the accused persons were guilty not only of an offence under section 147, but also of the graver offence punishable under section 302, Indian Penal Code.

The case for the prosecution, shortly stated, was as follows:—One Kumud Chandra Pathak, a Zemindar of village Saratia, within the jurisdiction of the Serajgung Police Station, in the District of Pabna, was murdered on the 25th May 1920, while returning home in the afternoon from Serajgung, where he had gone on business. The murder took place at a spot near the village Saratia. The deceased lived in Shibnathpur, a village about a mile off.

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from Saratia. Between him and some of his tenants in Saratia, including the present accused, there had been, for some time past, a great deal of litigation, civil and criminal. The feeling between the parties was apparently so high that the deseased, whenever he had cossision to go to Serajguni, the way to which lay via Saratia, carried a gun with him. On the 25th May he went to Serajgunj in connection with some cases of his then pending in the Courts there against some of his Saratia tenants. He went in a four wheeled Buggy and was accompanied by his eyes, Korban, and an offiser of his named Krishna Sunder Nandi. He did not, however, on this ossasion earry his gun with him. The deseased, after transacting his business, left Serajgunj in the afternoon to return home. His offiser, Krishna Sunder, had to be left behind, because the cases for the day in which he had to give evidence had not then been takan up. The distance between Sibnathpur and Serajgunj is about six miles, About four miles from Serajgunj, on the road to Sibnath. pur, is a place called Sealkhole Hat. At this place, the deceased picked up one Meher, a tenant of his, to escort him safe beyond Saratia. He then proceeded on his journey and, it is alleged, as soon as he reached the assused, Taribulla's house, one Moheruddi, who was standing near the entrance with a dao in his hand, hastily drew up, seized the reins and stopped the Buggy. Others same up and Kumud Chandra was at first struck with a bimboo. He got down from the Baggy and tried to ran away. Bat his assailants overtook him and literally hasked him to pieses and after putting his dead body in the Buggy started the horse off. The present accused are alleged to have been among the men who attached and murdered Kumud Chandra Pathak and they were cent up for trial under the sections referred to

The first information of the occurrence was lodged at about 6 30 p. M., on the 25th May by one Hemanta Kumar Chakravorty, a neighbour and tenant of the deceased, at the Serajganj Police Station. Hemanta had been informed of the occurrence by Meher and beyond the fact that it was stated in the first information that the men of Saratia had attacked Komud Chandra and murdered him, no details were given and no names

were mentioned. The investigation commenced on the same evening and it appears that the Sab Inspector, Abdul Kader Khan, reached the place of occurrence at about 9 30 P. M. The latter arranged to send the dead body to Sarajganj and sent for Zurban and Meher. He resorded their statements and thereafter deputed his constables to arrest the persons who had been named by Kurban and Meher. The persons, when arrested, denied having committed the crime and stated that they had been implicated out of enmity. Various searches, full details of which are given in the deposition of the Sub-Inspector, were then carried out with the result stated above.

The case against the accused depended on satisfactory proof of identification and to this end a large number of witnesses have been examined by the prosecution. Five of them. namely, Korban, syes, Gomer Bawa, Meher Sheikh, Ismail Sheikh and Sadulla Sheikh are described as eye-witnesses. The syee. Korban, describes how, when his master reashed Taribulla's Bari, one Moheruddi Sheikh drew up and held the horse by the Rabim Bux and reins, how others, including οŧ gaven. the accused Taribullah, Mahajan, persons, namely Hajrat Ali, Badu Mondal, Maju (Majber) Amir Munshi, and Rajab Sheikh, same up from the Bari of Taribulla with lathic in their hands, how Kumud Chandra was strack by Rabim with a lathi, how Mo. beruddi struck the deseased on the neek with a dao, how the deceased fell and how be (Korban) and Meher thereafter ran to the west. In eross examination the witness states that he noticed from a distance of about 20 cubits that Moheruddi was standing in front of the Bari of Taribulla, and that he entertained no suspecions then. After the deceased had been struck by Moheruddi, he ran away and on looking back, after he had run about 3 pakhis, he saw that a number of persons had surrounded the deceased and that some of them were striking with lathis and some with dage. He did not notice which of them were strik. ing with lathis and which with daos, Later, he met the Chonkidar Loharam, and the constables who had been sent to the place of occurrance by the Sub-Inspector. but he did not mention either to the

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Chonkidar or to the constables the names of the deceased's assailants. His explanation is that neither the Chonkidar for the constables asked him anything on this point. He says, later, that the constables did ask him who had killed his master, but he kept silent, the reason being that he thought he had better mention the names to the Sub-Inspector.

The witness Gomor Bewa identified the accused Korban (Kurman) as being one of the party of ten or twelve persons who were running away from the gari, when she arrived, Kumud had then been killed and his dead body had been placed on the gari. In cross-examination she states that she came to know Kurman's name by enquiry. She also states: "I know the other people besides Korman, who ran away, from a long time." She is apparently a very old woman and her eye sight is defective.

The witness Meher Sheikh described how he was asked by the deceased to escort him safe beyond Saratia, and how Moheruddi, who had been standing at the entrance to the Bari of Taribulla, came up and saught the reins of the horse. He and Korben (the syee) tried to snatch away the reins from Moheruddi but just then Mojber and Rabim Bux rushed up from the Bari Taribulla, Rabim Bux struck the deceased with a lathi. A number of men thereafter surrounded the deceased, he Taribulla, Hazrat Ali, Badu identified Mandal, Mojber, Amir Munshi and Rajab Sheikh as having been among the deceased's assailants. He ran as fast as he could towards the west, i.e., towards Sibnathpur, and informed the people of the village, including Hemants, about what had hap pened. In cross examination he states that the constables asked him who had killed the deseased. He said that the Saratia reople had killed him. The constables did not ask him about their names and he did not mention any names. It is also in evidence that, besides the constables, he met a number of people but he did not tell ary one who bad murdered Kumrd Chandra.

The winess Ismail Sheikh states that he was passing by the road that runs by the south of Tariballa's Bari and that he saw the deceased surrounded by 13 or 16

men. He recognised three of them only, namely, Moheruddi, Rahim Bux and Mayej.

The witness Sadulla states that when he was proceeding to his khet he heard a shout from the witness Korban to the effect that his master was being killed. He looked about and saw four men raise the bedy of the deceased up on the gari and a number of men, about 15 or 16, run away towards the Bari of Taribulla. Three of the four men referred to above were Moheruddi, Rahim Bux and Mojher. In cross examination he states that he saw the dead body being raised from a distance of three or four pathic and that he had at the time a backet of mangoes on his head.

Pausing here for a moment, it may be pointed out that, according to Hemants, (P. W. No. 21) Meher did not tell him the names of the assailants when he informed him that the men of Saratia had killed the deceased. Krishna Sandar Nandi. (P. W. No. 20) met Meher on the morining of the 16th May but the latter did tell him which of the men of Saratia had killed the deceased or that he had seen the murder being committed. It appears from the evidence of Tarapada Das (P. W. No. 17) that no witnesses were examined on the night of the 25th May and, according to the witness Korban, the examination of witnesses by the Sub-Inspector began at dawn of the 26th May, and it was being continued when the Inspector (P. W. No. 34) arrived at about 9 30 A. M. There had andoubtedly been a great deal of litigation, as is apparent from the vast mass of documentary evideres which have been put We do not attach much importance to the compromise supposed to bave been brought about by the witness Matinr Rabaman, But the considerations to which we have drawn attention, ramely, the omission to mention names at the earliest moment are important when one has to weigh the evidence of identification in circumstances disclosed in the evidence of the witnesses mentioned above. In our opinion the conclusion may not unfairly be drawn that the evidence thus far reviewed is not sufficient to incuse us to hold that the ease against the assured has been clearly proved. Let us now see if the remaining evidence on record can be relied upon. The

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witness Umaruddi (P. W. No. 9) is aimitteil. ly on terms of somity with som of the assneed persons. Besides, having regard to sereco edt lo emit sut tacea escebive edt rence, the evidence of resognition faraished by this witness does not command itself to us. The witness Elahi Bax states that be did not resognise those who ran across the jute khet but rerognised those who ran over the bota. In cross-examination he states that Hemanta Chakravorty enquired of him, among others, who had killed the deceased and that he did not tell him anything. It is also in evidence that he did not tell the Chonkidar Lobaram what he had seen.

The witness Jonab Ali identifies Rahimuddi and Mahajan Mondal as being among the men who were running away. admit, however, in cross-examination that although immediately after the marder, men same in from all sides and assembled round the dead body and enquiries were being made as to who had killed the deceased. he did not name any body. The witness Khedu identifies Bahimuddi as baing among the men who were running away; bat he did not identify Rahimuddi in the Court of the Committing Magistrate and no satisfactory explanation is forthcoming as to why he did not.

It is unnecessary to refer in detail to the evidence of the other witnesses, but it may be observed here that the medical evidence is not consistent with the theory that there were lathi blows on the decess-That the deceased was most craelly and brutally done to death, there eannot be the elightest doubt, but the evidence on record as against the ascused, taken as a whole, leaves room for doubt as to whether their complicity in the crime has been proved. In these sireumetaness, we must accept the opinion of the Jury as regards the six accused whom they found not guilty. We assordingly direct that their bail bonds be eancelled and they be discharged.

As regards the accused who were found quilty by the Jury under sections 147 and 323, read with section 149, Indian Penal Code, it has been contended on their behalf that the learned Sessions Judge's charge to the Jury is vitiated by many and serious misdirections therein. Our attention has been drawn to a number of points and

we will proseed to examine a few of then bearing on the question of misdirection. The accused Bedu Mandal and Bajab Ali pleaded alibi. The learned Sessions Judge correctly told the Jury that the onus was upon the two assused to prove this plea and that it was for the Jury to say whether they had susseeded in establishing this plea. But the learned Sassions Judge went on to add that if the Jury were of opinion that the two assused had failed to establish this ples, then there would arise a presump. tion against them as to their complicity in the crime. We think in laying down this, the learned Sessions Judge was clearly wrong and that there is no authority for the statement that such a presumption would arise in the event mentioned above. Then, again, the learned Sessions Judga speaks of the witness Gomor Bewa being under some obligation to the accused Tariballa. We have examined the evidence of Gumor Bewa for ourselves and we are satisfied that there is no evidence on record in support of the statement that Gomor Bewa was under any obligation to the assused, Taribulla. Farther the learned Sassions Judge should not, in our opinion, have expressed himself to the effect that had the case against the accused been a got up one, the evidence would have been of a different character and free from the defects to which he had drawn the attention of the Jury. nor was he entitled to say in a general manner of the contentions on behalf of the defence that there was nothing in the evidence to support or even to lend a semblance of support to them. The sum. ming up might, with advantage, have been more dispassionate and the evidence against need eved tdgim beenees lenbivibni put in a less dogmatical manner. For instance, the loarned Sassians Judga bas "no doubt about the complisity of Taribulla in the matter"; "as to Taribulla's presence at the congresses there eapnot possibly be any doubt"; "his refusal to diselese the names of the offenders shows that he was not an honest or disinterested person wholly unconnected with the affair"; "the fast that Amir Manshi was seen returning from the Hat at dusk would not in the least detract from the truth of the prosecution atory as to his partisipation in the erime," ets., etc. The learned Sessions Judge was no doubt entitled to

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express his own opinion on the evidence adduced before him, but the opinions to which we have called attention were expresend in such a manner that it is impossible to eay that grounds for legitimate complaint do not exist. The Julge presid. ing at a trial by Jury must always be eareful that he does not usurp the functions of the Advosate and that the evidence in the case is presented to the Jury in as dispassionate and impartial a manner is expected of the presiding officer. are constrained to observe that the charge in the present case falls short of this stand. ard.

With regard to the three assused whom the Jury proposed to convict under section 147 and section 326 read section iŧ might have been necessary direct a re-trial; but, having carefully considered the entire evidence, we think that to direct a re-trial would serve no useful purpose, and we, therefore, acquit those three also and direct that they be now set at liberty and that their bail-bonds te discharged.

TEUNON, J .- I agree.

Accused acquitted. J. P.

ALLAHABAD HIGH COURT. CRIMINAL REVISION No. 699 of 1921. February 3, 1922. Present: - Mr. Justice Walsh. MUNSHI LAL-APPLICANT

versus

EMPEROR - OPPOSITE FARTY. U. P. Escise Act (IV of 1910), ss. 3, 60-"Import."

meaning of-Liquor booked but not taken delivery of-Offence, if complete.

A person who sends liquor from a Native State to a place in the United Provinces but does not take delivery of it in the United Provinces does not import liquor in the United Provinces and, consequently, commits no offence under section 60 of the United Provinces Excise Act. [p. 184, col. 2]

To "import" goods to a place means to take delivery

of the goods inside that area. [p. 185, col. 1.]

As a general rule a convoition under a section. which provides a penalty for a variety of acts done in contravention of the Statute is bad for

duplicity where the section contains, a variety of inconsistent alternatives The conviction should state the act of which the accused is found guilty, and the particular breach of the act established against him by his act so found [p. 184, col. 2.]

Criminal revision against an order of the

Sessions Judge, Agra.

Mr. G. W. Dillon, for the Applicant.

Mr. R. Malcomson (Assistant-Government

Advocate), for the Urown.

JUDGMENT .- This is an application in revision against a conviction under section 60 of the U. P. Excise Act (IV of 1910). I might say at once that, in my opinion, (subject to such authorities as may have been decided to the contrary which are binding upon me in particular illustrations), as a general rule, a conviction under a section, which provides a penalty for a variety of acts done in contravention of the Statute, is bad for duplicity where the section contains a variety of inscnsistent alternatives. take one simple example, in my opinion, to convict a man simply of an offerce under section 60 (a) would be bad for duplicity, because it might mean a conviction either for importing or for exporting, and it is impossible for a man to do both in the same act. Importing is defined by section 3 of the Act as bringing into the United Provinces, and exporting is defined as taking cut of the United Provinces, and it is a physical impossibility for anybody to do these two things by the same act. I say nothing to discourage the view that a person who exports from onteide the United Provinces to a werehouse inside the United Provinces of which be is really the proprietor or temporary possessor, even under a false name, is, in fact, committing an offence under the act of importing into the United Prcvincer, although he is also the person who exported from outside. It is perfectly possible for me to send an article for myself from the High Court at Allahabad to my Chambers in London, and if I did so with a dutiable article without declaration, I should be guilty of importing into England. But it is necessary that the ecnviction should state the act of which the assumed is found guilty and the particular breach of the act established against him by his not so found. I, therefore, think that the conviction by the Magistrate in the first Court was bad, on the face of it.

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To book liquor from Jaipur does not conetitute an offense defined in any of the alternatives under sestion 6), and the Magistrate has carefully avoiled considering the alternative, which he thought was complied with. Oa this occasion I think the learned Sessions Judge has fallen, in substance, into the same trap. The sentence in which he upholds the conviction runs as follow :- "The contention that the offence was committed at Jaipur, if anywhere, is unsound, for the importation was made to Mattra." That is a contradiction in terms. You cannot import to a place unless you are the person taking delivery inside the area in respect of which the word 'import' is used. That is to say, to import to Muttra means that you are the person taking the goods in the United Provinces at Muttra or from some other place in the United Provinces to Muttra. Of course, a person who sends goods from a Nativa State is not doing anything of the kind. It matters nothing that the actual application before me is against the order of the learned Sessions Judge. It is quite elear that, on the facts found, he ought to have quashed the original conviction, but I, in order to make the matter clear beyond doubt, amend the application so as to include an application against the original conviction which I direct to be quashed. I order the resognizance of Manshi Lal to be discharged.

J. P. & W C. A. Application amended; Oppriction quashed.

LAHORE HIGH COURT.

CRIMINAL PETITION No. 1031 CF 1919.

October 31, 1919.

Present:—Mr. Juetice Shadi Lal.

AHMAD and others—Convicts—

Petitioners

VETSUS

EMPEROR—PROSECUTOR—

RESPONDENT.

Penal Code (XLV of 1850), ss. 97, 149, 325 - Right

of private defence of property-Right exceeded-Un-

Accused, six in number, caused grievous hurt to a person, while acting in the exercise of the right of private defence of property. It was found that they had exceeded that right:

Held, (1: that it could not be held that all the

accused constituted an unlawful assembly;

(2) that the only person who could be convicted was the one who actually caused the grievous hurt.

Petition for revision, under section 439 of the Criminal Procedure Code, 1898, against the order of the Sessions Judge, Lyallpur, dated the 26th June 1919, confirming that of the Magistrate, First Class, Lyallpur, dated the 2nd June 1919.

Dr. Muhammad Ighal, for the Petitioners. Mr. D. C. Ralli, for the Government Ad-

voeste, for the Respondent.

JUDGMENT,-The learned Sessions Judge finds that the complainant's party had no right to seize the sattle of the accused after the cattle had left the field. and that the assused were, consequently, entitled to the right of private defence of property. But the learned Judge holds that the accused exceeded their right of private defense. Now, on these findings it cannot be held that all the accused constituted an unlawful assembly, and the only person who can be convicted is the one who actually inflicted the mortal wound on Mian Khan and thus exceeded his right of private defence. tide Mihan Singh v. Emperor (1). The evidenes shows that that person was Abmi.

In view of the findings of the lower Appellate Court referred to above, I am constrained to hold that no person other than Ahmi can be held to be guilty. I accordingly accept the application for revision and acquitall the petitioner, except Ahmi, whose conviction is altered to one under section 325, Indian Penal Code. The sentence imposed upon him by the Courts below is upheld.

Z. K.

Revision partly accepted.
(1) ?6 Ind. Cas. 652; £6 P. R. 1914 Cr; 64 P. W.
R. 1914 Cr.; 16 Cr. L, J. 60; 24 P. L. R. 1916.

SANT BAHAI U. LAGHMAN SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 146 of 1921. November 22, 1921.

Present:-Pandit Kanhaiya Lal, J. C. SANT SAHAI-ACCISED-APPLIC.NT

tersus

LACHMAN SINGH-COMPLAINANT-OPPOBITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 137

- Public nuisance-Property, how to be dealt with

- Enquiry obligatory-Magistrate, duty of.

No man can be permitted to deal with his property in such a way as to cause public nuisance to others.

In cases of public nuisance an enquiry is obligatory and the Magistrate cannot make his conditional order absolute without taking such evidence as the parties may adduce as in a summons case.

Application against an order of the Distriet Magistrate, Fyzabad, dated the 30th September 1:21, confirming order of the Magistrate, First Class, Fyzabad, dated 25th August 1921.

Messrs. A. P. Sen and Mahendra Deo Varma, for the Applicant.

Mr. Niamat Ullah, for the Opposite Party. JUDGMENT.—The applicant has been ordered to remove a Band or dam, constructed by him to obstruct the flow of water of a channel or stream, which flows from the east and rune through the villages Muhammadpur and Makaiya. The complainant is the Zemindar of the village Muhammadpur. The applicant is one of the co sharers of the village Makuiya. The allegation of the complainant was that the dim had been nowly constructed in August last and had the effect of flooding the fields situated adjacent to the upper part of the channel or stream and injuring the standing there. He applied for the abatement of the nuisanse. The applicant opposed the complaint and alleged that the dam existed from some time. He did not state when it was constructed. He a's) caid that it caused no nuisanse to the complainant or to any other person, oultivating the land adjacent to the channel. The Trying Magistrate directed one of the Subordinate Magistrates, namely, the Tabsil. dar of Tando, to make an enquiry. His report was that the dam had been newly constructed and that its effect was that

the land on the west cide of the channel was flooded for miles and the crops standing thereon had suffered.

It is not desied that the dam was constructed by the applicant on his own land; bat, as pointed out in Emperor v. Bharon Pathak (1) and Jagan Nat's v. Ohandrika Prasad (2), no man ean be permitted to deal with his property in such a way as to eause public nuisanse to others. The matter, therefore, merited enquiry. The report of the Subordinate Magistrate was adverse to the applicant; but it was open to the applicant to show that the dan was old and that no injury or naisansa was caused by it. It does not appear scuborq of berefto tranielques ent redtedw any evidence to show that the obstruction was new or whether any opportunity was given to the applicant at the time to prove that it was not sc.

Section 137 of the Code of Criminal Procedure requires that if the opposite party appears and shows cause against the order. the Magistrate shall take evidence in the matter as in a summons-case. The learned Magistrate failed to determine whether the dam was new or old. He considered it suffisient for his purposes to say, on the strength of the report of the Sabordinate Magistrate, that there had been an obstrustion and that the crops were being damaged. That was not, however, sufficient. He does not say that no evidense was offered. In Srinat's Roy v. Ainaddi Halter (3) it was held that an enquiry in such a case was obligatory. Maha Diji Salashiv Tilak, In the matter of the petition of (+) and Hingu v. E aperor (5) it was similarly held that a Magistrate eannot make his conditional order absolute without taking such evidence as the parties might addans as in a sum mons. ease. The complainant has to start proseedings by adducing evidence and then the party showing cause may proceed with his own evidence, if so advised. The ossa

^{(1) 13} Ind. Cas 992; 31 A. 345; 9 A. L. J. 355; 13 Cr L. J. 183.

^{(2) 54} Ind. Cas 407; 6 O. L. J. 616; 21 Cr. L. J.

^{(3) 24} C, 395 1 C. W. N. 217; 12 Ind. Dec. (v. s.) 93c.

^{(4) 11} B 375 C In l. Dec. (N s 243.

^{(5) 3} Ind. Cas. 452; 31 A. 453, 6 A. L. J. 685; 10 Cr. L. J. 237.

SCHOAR SINGH V. HUPEROR,

must, therefore, be sent back for further

enquiry.

The application is accordingly allowed and the order of the 25th August 1921 set acide. The case will be sent back with a direction that it should be disposed of after taking such evidence as the parties may adduce in the menner directed by law. As the Trying Magistrate has already expressed an opinion adverse to the applicant, the District Magistrate is directed to transfer the sase to the Court of some other Magistrate subordinate to him competent to try the same.

J. P.

Revision accepted,

LAHORE HIGH COURT. CRIMINAL APPRAL No. 793 CF 1921. December 6, 1921. Present :- Mr. Justice Scott Smith and Mr. Justice Abdul Qidir, SUNDAR SINGH-CONVICT-

APPELLANT

versus

EMPEROR - Buspondent.

Murder-Production of ornaments belonging to dezeased person-Presumption-Circumstantial evidence - Criminal Procedure Code (Act V of 1898), s. 172 (2)-Police diaries, use of.

The fact that shortly after a murder a person is found to be in possession of ornaments belonging to the murdered person, creates a very grave suspicion that he was concerned in the murder. Lp. 190, col. 2

. Where, however, the ornaments are not produced until nearly two months after the murder, during most of which period the accused was detained by the Police, and any one could have placed the ornaments where they were found, the suspicion is

not nearly so strong [p. 190, col. 2.]

In order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt This is said to be the fundamental rule, and to be experimentum crucie, by which the relevancy and effect of circumstantial evidence should be estimated. [p. 191, col. 1.]

Under section 172, sub-section (2) of the Criminal Procedure Code any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and may use such diaries, to aid it in such inquiry or trial but it is not open to a Court to use the zimnis as evidence in the case for the purpose of corroborating the statements of witnesses made before it. [p. 191, col. 2.]

Appeal from order of the Sessions Gujranwala, dated 24th the Judge. Angust 1921.

Dr. Gokai Chand Narang, for the Appellant. Dewan Khilanda Ram, R. S., (Public Prosecutor), for the Respondent.

JUDGMEN'T .- Sundar Singh has been convicted by the Sessions Judge of Guiranwals of the murder of Musammat Kesro in the Town of Gujrauwala on or about the 2nd or 3rd of April 1921, and has been sentenced to death. He has appealed to this Court through Dr. Narang, Advocate, and the Public Prosecutor has appeared to argue the case on behalf of the Crown. The case is also before us for confirmation of the sentence under section 374. Oriminal Procedure Code.

Sundar Singh belongs to the village of Wanianwala, three or four miles from Guiranwala, where Musammat Kesro lived. Musammet Ram Piyari, P. W. No. 2, is the daughter of Musammat Keero, and is married to Guranditte, P. W. No. 12, of Mansurwali, She was married about three years ago. but Musammat Kesro liked her to live near her, and Guranditta accordingly bought her a house near that of Musummat Keero in Guiranwala. In the month of Ohet last Musammat Ram Piyari was staying at Gojranwala, but in consequence of a posteard, Exhibit P. N., page 4 of the rarerbock, sent to him by Muammat Keero. he came to Gujranwala on the 2nd of April and took his wife away with him to his own village. On the evening of the 4th April the report, Exhibit P. B. page 2 of the paper-book, was made at the Sadr Police Station, Gujranwala, by Fagir Chand, P. W. No. 27, a neighbour of Musammat Keero, in which it was stated that she was a woman of bad character and of quarrelsome nature, that her house had not been looked from outside for the last two days and that since the previous day going into or the had not been seen soming! cut; of the house, In order that

SUNDAR SINGH O. EMPEROR.

she might not implicate some of the residents of mohalla in case any property was stolen he thought it advisable to make a report at the Police Station. Upon this Qizi Murad Ali, Sub-Inspector Police, P. W. No. 4, went to the spot along with others and going into Musammat Kesro's bouse found her lying dead in one of the rooms with wounds on her head and blood lying about. A rambi and a toki were found lying near the body, and there were signs as if the floor had been dug up in one place. On the morning of the 5th of April Musammat Hukam Davi, a neighbour of Musammat Kesrc, P. W. No. 16, told the Sab-Inspector that on Saturday, the day on which Musammot Ram Piyari had left Gujranwala, she saw Sundar Singh, appellant, sitting with the deceased at about sunset. Sundar Singh was ascordingly sent for and on the 9th of April he was brought to Gujranwala by Miran Bakheb, constable, P. W. No. 20. He found him near his village. The evidence of the constables, if any, who previously went to the appellant's village and failed to find him, has not been brought on to the record. Oa the Sth of April the kurta and chaddar worn by Sundar Singh were removed from bis percon, as the Sub-Inspector considered that there were suspicious stairs on them. These were sent to the Imperial Serologist in Calcutta, whose report, page 9 of the paper book, shows that some minute blood. stains were found on the kurts, but they were so small that their origin could not be determined, and that the chalder was not blood stained. During the investigation which followed, most of the witnesses for the prosecution were examined, but Sub-Inspector did not consider the evidence sufficient to warrant the formal arrest of the appellant. On the 29th of May Wir Singh and Mangal Singh, who are said to have some connection with the appellant but who have not been prodused as witnesses either by the prosecution or the defence, appeared in Gujranwala, and are said to have offered a bribe of Rs. 960 to the Sub Inspector to induce him to let Sundar Singh go. The Bub. Inspector refused to accept this bribe and threatened to bring a case against Mangal Singh and Wir Singh. Upon this they are said to have taken counsel with Sundar

Singh who after one or two hours agreed to produce the ornaments of the murdered woman, which he said were buried at his well. The Police, along with Chaudhri Mul Raj, Mehtab Singh, Maula Bakhah and Bata Singh, P. W. Nos. 21-24, then took Sundar Singh to his village, Sundar Singh is said to have led them to his well and to have had some bhusa removed from a khota there and to have told the Police to dig up the ground corner. This was done and three gold ornaments, Exhibits P.1-P.3, are to have been found buried there. There is ample evidence, which is not seriously contested by Counsel for the defence, to show that these ornaments did belong to Musammat Keero. This evidence consists of the statement of Harnam Singh, P. W. No. 9, the goldsmith, who made them, together with entries in his bahi and in a copy book, Exhibit P.4, belonging to the deceased. Their weights actually correspond to the weights entered in these books and they have also been identified by Musammit Rim Pigari and her husband.

The evidence against the appellant is purely circumstantial. At page 35 of the paper book in his judgment the learned Sessions Judge says that he finds Sundar Singh guilty, because it is proved against him.

(1) that he was with the deceased on

the evening before the murder;

(2) that his mistress Musammat Santi found blood stains on his shirt and loin sloth on the night, which was presumably the night of the murder, and that he washed the blood stained slothes next morning;

(3) that there were spots on his shirt when he appeared before the Police and that these spots were found by the Imperial Serologist to be remnants of blood:

stains ;

(4) that the toka with which the desessed had been assassinated was found to be his, and

(5) that he produced certain ornaments

which belonged to the deseased.

There is ample evidence on the record of Garanditta, the deceased's son in law, amongst others, which shows that Musame mat Keero was a woman of bad character

SUNDAR SINGH C. EMPEROR.

and that she had numerous lovers who used to visit her, including Sundar Singh, the appellant, Sundar Singh, it is said, used to visit her every 10 or 12 days. The evidence of Musammat Ram Pigari shows that he visited her two or three days before the 2nd of April, on which she left with her hasband for his village. Musammat Ram Pigari has stated Sundar Singh made an improper proposal to herself, but that she refused to have anything to do with him, and told her mother what he had said. Her mother was annoyed with him on this assount There does and reproached him. not to have been appear, however, any serious quarrel between Musammat Keero and Sundar Singh, though it is possible that he may have resented what she said to him. Musammat Hukam Davi, P. W. No. 16, has given elear evidence to the effect that she saw Sundar Singh in the house of the deceased on the evening of Saturday the 2nd of April. The Civil Surgeon, Captain Deeke, examined the dead body some time on the 5th of April and has deposed that at least 48 bours had elapsed between the time of death and his examination of the body. It, therefore, appears probable that the murder was committed either on the night between the 2nd and 3rd of April or some time on the 3rd of April. Nearer than this it is impossible to fix the time of death. We agree with the learned Sessions Judge that the appellant was with the deceased on the evening before the murder, but whether the murder was committed during the night or on the following day it is impossible to say.

With regard to the second point relied upon by the learned Sessions Judge we have the evidence of Musammat Santi, P. W. No. 10. This woman has a history of her own, as stated by the Sessions Judge in his judgment, page 35, line 21 of the paper-book. She is certainly not a woman of good character, because she admitted that she was with shild in consequence of intercourse with Harnam Singh, the nephew of her husband, After the death of her busband Labhu she lived some time with Teja Singh and subsequently with Sundar Singh without marry. ing either of them. The learned Sessions Judge has relied upon her identification of the toka found near the dead body of Musammast Keero as belonging to Sander

Singh. Her evidence on this point is that Sundar Singh used to shop fodder with this toka, but she said that it was never brought to the house but always remained at Sandar Singh's well. She also stated that the only occasion on which she went to the well was on the day after Sundar Singh had returned with his clothes blood stained. In other words, she meant to say that she saw the toka at the well on some day after the murder had been committed, but before the appellant had been arrested. This is quite impossible because the toka was found in the house of the deceased when the Police went there on the evening of the 4th of April. Musammat Santi may have purposely introduced confusion into her evidence about. this toka. But we must take her evidence. as it stands and, under the eirenmatances, it is obviously impossible to rely upon her identification of this toka. It also appears from her statement made before the Committing Magistrate, with which she was confronted in the Sessions Court, that she staying with Musammat Ram admitted Piyari in Gujranwala while the case was under investigation. She tried to deny this at the trial, which again shows that she is not a very reliable witness. On the whole, we think it would be extremely unsafe to rely upon her evidence or any portion of it.

As to the third point relied upon by the learned Sessions Judge, we no doubt have the report of the Imperial Serologist which shows that the appellant's shirt was bloodstained, but the blood stains were extremely small, so small that it was impossible to determine their origin. A Zemindar often gets blood-stains on his clothes and the presence of these minute blood stains is quite unimportant.

The fourth point relied upon by the learned Sessions Judge, namely, the identification of the toka has been already dealt with. Musammat Santi's evidence about it is quite unreliable and two other witnesses, P. W. Nos. 5 and 6, who were produced to identify it failed to do so.

We now some to the fifth point, namely, that the appellant produced certain ornaments belonging to the deceased. In this connection, first of all, we have the evidence of the Sab Inspector and the P.W. Nos. 21.24 as to the offer of bribe by Wir Singh and Manga Singh to the Sab-Inspector in Musammat

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Ram Piyari's house in Gujranwala on the 29th of May. P. W. No. 21 Chaudhri Mul Raj, is a Police Zaildar. Mehtab Singh, P. W. No. 22, is a Sufedposh, Maala Bakbab P. W. No. 23, is a leather merebant, and Buta Singh, P. W. No. 24, is a Zvildar. We find it impossible to reject the evidence of there men that a bribe was offered in the way described. Dr. Narang says that his instructions are that the money was brought to Gujranwala in order that Counsel might be engaged for the defence of Sundar Singh. Wir Singh and Mangal Singh, however, did not some forward to testify to this and there is no evidence at all in support of the story. We hold that the bribe was offered, but this does not lead to any inference that Sundar Singh has committed the murder. He had been in the custody of the Police, though not formally arrested, since the 2th of April, and it may well be that Wir Singh and Mangal Singh offered the money in order to get him out of their elutebes. The fact, however, that the bribe was offered to the Sub-Inspector gave bim a lever, by which be could bring pressure to bear upon Sundar Singh. We, therefore, believe the evidence that Wir Singh and Mangal Singh, the appellant, and perhaps Mul Raj laid their heads together, and that it was decided that certain ornaments should be produced with the object of satisfying the Sub Inspector. P. W. Nos. 21, 22 and 23 say that after Sundar Singh and others had talked together, Sundar Singh eaid that he would produce the property, if no proceedings were taken against Mangal Singh and Wir Singh. Buta Singh, P. W. No. 24, on the other hand, says—see page 28, line 2s of the paper-book they talked saide for a long time, that ir, for about an hour. Then Chaudhri Mul Raj same and whispered something into the ear of the Sub-Inspector. Then two tumiums were brought and we all drove off in the tumtums. We were not told where to we were going and for what purpose. I erquired from the Thansdar where we had to go. He said he had to go to the well of the sconced. So we went to his well." There is thus a discrepancy between the statement of Buta Singh and those of the other witnesses as to what was said before they set off to the appellant's well. When they got to the well the appellant is said

to have searched the persons of the Sab. Inspector and of the Police constable, who then went into the kotha and dug the place pointed out by Sandar Singh, from which three gold ornaments of the deseased were found. Dr. Narang has argued that if the appellant admitted his possession of the ornaments and voluntarily took the Police to the kotha where they were hidden and himself pointed out the exact spot, it is rather surious that he should have insisted on searching the persons of the Sab-Inspector and the constable before they went in to dig up the ornaments. He also urges that it is unusual for a Sub-Inspector himself to dig up property from the place pointed out by an accused person. We are disposed to agree with Connsel on both these points. We do not understand why the appellant should have been so anxious to search the Police Officers before they went in to dig the ornaments out of the hiding place where they had been concealed, and which the appellant had himself pointed out. At the same time, we are not disposed to reject altogether the evidence of the witnesses, who appear to us to be reliable persons. Maula Bakbab, P. W. No. 23, is no doubt an undischarged insolvent, but there is nothing against P. W. Nos. 21, 22 and 24, except that they are persons who usually sesist the Police in investigations, Now, there can be no doubt that if a person is found shortly after a murder in possession of ornaments belonging to the murdered person, a very grave suspicion must rest upon him that he was concerned in the murder. When, as in this case, the ornaments were not produced until nearly two months after the morder the suspicion is not nearly so strong, especially as during most of that period appellant was detained by the Police and in his absence some one else could have placed the ornaments where they were found. The second, third and fourth points relied upon by the learned Sessions Judge are not established, in our opinion, as we have already shown. There remains, therefore, the fact that Sundar Singh was one of the lovers of Musammat Kesro that he had some cause to be annoyed with her, and that he was seen in her house on the evening of the 2nd of April, probably within 24 hours of the time when We also have the she was murdered.

IMPIROR C. BURHALSIFG.

evidence about his production of the orraments belonging to the dead women some
eight weeks later. Dr. Narang urges that,
even if it be true that these ornaments were
in the possession of the appellant and that
he gave information which led to their
production, still these facts are not incompatible with his innecence. In Wills on
Circumstantial Evidence, 'th Edition,
Chapter VI, rule 4, at page 311, is as
follows:—

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innucence of the accused, and incapable of explanation upon any other reasonable bypothesis than that of his guilt. This is said to be the fundamental rule, and to be experimentum crucis, by which the relevancy and effect of circumstantial evi-

dense must be estimated."

Dr. Narang argues that it is quite possible that Sundar Singh etole these ornaments two or three days before the murder and that up till the time of her death Musammat Kesro did not discover that they were missing. She had many lovers and even if she had dissovered their loss Sundar Singh might very well have thought that she could not fasten the theft upon him because any one of her lovers might have robbed her. We think there is some force in these erguments. It is certainly not a wholly unreasonable theory. We have carefully considered all the evidence upon the rescid and even assuming the first and fifth points relied upon by the Sessions Judge as established we are not satisfied that they are incompatible with the innocence of the acoused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There is certainly a very strong suspicion against him, but we do not think it sould be safe, under the eircum. stances, to convict him.

Before we close this judgment we wish to point out to the learned Sessions Judge that he appears to have used the Police diaries in an improper manner. In his judgment, see page 34, line 37 of the paper-book, he says in regard to Musammat Ram Piyari's evidence, "I have tested her evidence by comparing it with the Police file and it is undoubtedly true on the following point." This shows that the Isarned Sessions Judge believes the evidence of

Musammat Ram Piyari, beesuse it agrees with several entries in the Police zimnis. Section 172, sub-section (2) of the Criminal Procedure Code lays down that any Criminal Court may send for the Police disries of a care under inquiry or trial in such Court, and may use such diaries, not as evidence in the sage, but to aid it in such inquiry or trial The learned Sessions Judge has in this sase undoubtedly used the simnis as evidence, which was not a proper use to make of them. For the reasons already given, we accept the appeal and, setting aside the conviction and sentence passed on Sundar Singh, we sequit him, and direct that he may be released from sustody.

Z. K.

Appeal accepted,

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 157 of 1920.

December 20, 1920.

Present:—Mr. Kennedy, J. C. and,

Mr. Madgaonkar, A. J. C.

EMPEROR-APPLICANT

tersus

SUKHAL ING - OPPONENT.

Criminal Procedure Code (Act V of 1893), ss. 123, \$97—Detention in prison—Failure to give security—Subsequent sentence, whether can be ordered to run after expiry of period of detention

An order detaining a person in prison under section 123, Criminal Procedure Code, until he gives security is not a sentence of imprisonment and, therefore, section 397 of the Criminal Procedure Code does not authorise a Magistrate to direct that a subsequent sentence should take effect on the expiry of the previous detention, [p. 192, col. 1.]

Mr. T. G. Elphinston, Public Prosecutor for Sind, for the Crown.

JUDGMENT.

Kennedy, J. U.—In this case the First Class Magistrate of Nausbahro ordered one Sakhalsing to give security for good behaviour. On his failing to do so, he directed him to be detained in rigorous imprisonment for twelve months under section 123 unless he furnished security. Suchalsing did not furnish security but, on the contrary,

SUJATALLI U. EMPEROS.

excaped from sustody and ran away. He was ultimately arrested and was tried for escaping from lawful sustody and sentenced to three months' rigorous imprisonment under section 225B, Indian Penal Code, the Magistrate directing that the sentence of three months should take effect on the expiry of the period for which accused was detained under Chapter VIII, vie., 12 months or till he, within that time, furnished security.

The Magistrate, on further consideration, found this order to be irregular and has now referred the matter here. It appears on the authority of the cases cited from this Court, as also in Bombay and other High Courts of India, that the order detain. ing a person who has failed to furnish security under Chapter VIII is not a sentence of imprisonment and, therefore, section 397 Procedure Code does of tha Criminal Magistrate to direct not authorise 8 that the subsequent sentence should take effect on the expiry of the previous detention under Chapter VIII. The Allababad High Court, it is true, has held a contrary view, viz., that such detention was a substantative sentence of imprisonment, it is not necessary for us to express any opinion as to this case, as we are bound by the rulings of our own Court, which are in accordance with the Bombay High Court ralings, and, therefore, this order of the First Class Magistrate is, as he himself points out, wrong. We, therefore, set aside so much of the order as directs that the sentence under section 225B of three months' rigorous imprisonment should take effect on expiry of the period that the accused is detained under section 123, Criminal Code, and direct that the Procedure sentence should take effect from the date of judgment.

MADGAONKAR, A. J. C.—I concur. In Emperor v. Pandhi (1) this Court held that a person committed to a prison or detained in prison under section 125 of the Code of Criminal Procedure until he gives security is not undergoing a sentence of imprisonment within the meaning of section 397 of that Code, and the view, though opposed to the decicion of the Allahabad High Court in

Emperor v. Tula Khan (2), is in accordance with the view of the Bombay High Court in Emperor v. Pishnu Balkrishna Ram (3) of the Madras High Court in Joghi Kannigan v. Emperor (4) and of the Panjab High Court in Queen-Empress v. Diwan Ohand (5). J. P.

Order partly set aside.

(2) 30 A. 334; A. W. N. (1908) 133; 5 A. L. J. 318; 7 Cr. L. J. 427.

(3) 17 Ind. Cas. 785; 37 B. 178; 14 Bom. L. R. 985; 1 Bom Cr. Cas. 209; 13 Cr. L. J. 849.

(4) 31 M. 515; 4 M. L. T. 223; 8 Cr. L. J. 402.

(5) 14 P. R. 1895 Cr.

BOMBAY HIGH COURT.

ORIMINAL APPLICATION No. 333 of 1921,

December 7, 1921.

Fresent:—Sir Norman Macleod, Kr.,

Chief Justice and Mr. Justice Shab.

SUJATALLI NYAMATALLI—

ACCUSED

versus

EMPEROR—Opposite Party.

Penal Code (Act XLV of 1860), s. 147—Riot—
Unlawful assembly—Leader of gang, liability of.

A conviction under section 147 of the Penal Code of the leader of a gang whose common object is to assault passers by, is not illegal.

Oriminal application from conviction and sentence passed by the Asting Second Presidency Magistrate, Bombay,

Mr. A. D. Janai, for the Assused.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.—We do not see any reason to interfere with the decision of the learned Magistrate. The accused was convicted of rioting under section 147 of the Indian Penal Code. On the evidence, it is clear that there was an unlawful assembly and, on the evidence, the Magistrate was satisfied that the accused was the leader of the gang whose common object was to assault the passers by. Rule discharged.

17. C. A.

Rule discharged.

^{(1) 4} Ind. Cas. 603; 3 S. L. R. 114; 11 Cr. L. J.

BASIMAN CHOWDHURAIN C. SHIB NABAYAN CHOWDHURY.

PRIVY COUNCIL.

APPEAL PROM THE PATRA HIGH COURT. |December 2, 1921.

Present: - Lord Backmaster, Lord Carson, Sir John Edge and Sir Lawrence Jenkins. Musammat SASIMAN CHOWDHURAIN

AND CTHERS-APPELLANTS

vertus

SHIB NARAYAN CHOWDHURY

AND OTHER! - RE PONDENTS.

Hindu Law-Will-Devise to widow-Construction

"Full proprietary rights"-Estate taken by widow

Alienation-Validity-"Malik," meaning of-Words
in Will, construction of.

A Hindu governed by the Mithila School of Hindu Law made a Will by which he directed that, after his death, his widows shall be heirs to all his immoveable properties and shall, in every way, exercis: full power and all proprietary rights over all the moveable and immoveable properties:

Held, that the widows took an absolute estate with

full powers of alienation. [p. 193, col. 1.]

It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a

Court in another case. [p. 195, col. 2.]

The term "malik", when used in a Will or other document as descriptive of the position which a devisee or donec is intended to hold, means an owner possessed of full proprietary rights, including a full right of alieuation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. [p. 147, col. 2.]

The meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator from which it may receive its

true shade of meaning [p. 197, col. 2.]

Appeal from a decree and judgment of the Patna High Court, reported as 39 Ind. Car., 755, affirming a decree of the Subordinate

Jadge, Darbhanga.

FAUTS .- The respondents, as the reversioners of one Bacheha Chowdhury, sued for a deslaration that certain alienations made. by the first appellant, widow of Bashcha Chowdbury, are inoperative beyond her life. The subject matter of the alienations was partly inherited by the first appellant from her husband and partly her own asquisitions. of savings from income of her husband's property. The appallants pleaded under the Will of Bachcha Chowdhury, the first appellent acquired absolute estate which she could validly alienate. The Trial Jadge and the High Court, on appeal, held that the widows took merely a Hindu widow's estate and decread the respondent's suit. Hence this appeal.

Messrs. De Gruyther, K. O., and Sen, for the Appellants. - Under the Will, the widow acquired an absolute estate. There is nothing in the context to out down the offect of the expressions used. The fact that the devisee is the widow is immaterial. Sura: mani v. Rabi Nath Opha (1), Fatch Chand v. Rup Chand (2), Moulvie Mahomed Shumsool Hooda v. Shewukram (3), Amarendra Nath Boss v. Shuralhany Dasi (4), Surss Chandra v. Lalit Mohan Dutta (5). Under the Mithila School of Hinda Law, the widows in any ease have absolute estate in the moveables. The Will also gave the devisees power. of alienation during life and this is suffisient to dispose of the present dispute.

Mr. Dube, for the Respondents. - The Will gives the widow rights as "heirs"; they annot take more than a widow's estate.

If it was intended that they should have greater powers, it would have been expressed without any ambiguity. The use of the word "malikiyat" as meaning "malik," is not conclusive. Moulvie Maho ned Shumsool Hooda v. Shewukram (3), Shib Lakshan Bhasat v. Srimati Tarangini Dasi (6), Janki v. Bhairon (7).

Mr. De Gruyther, K. O., replied.
JUDGMENT.

Sig John Edge.—The suit in which this appeal has arisen was brought on the 13th August 1912 in the Court of the Sabordinate Judge of Darbhanga, in Behar, by the plaintiffs, who are the presumptive reversioners of Bachcha Chowdhury, deceased, who in his lifetime was a landholder in and a resident of Mouzah Subhankarpur, in Tirboot. Bachcha Chowdhury died in 1865. The principal defendant is Musammat Sasiman Chowdhurain, who is the surviving widow of Bachcha Chowdhury. His other widow was Musammat Subast Chowdhurain;

(1) 35 I. A. 17; 12 C. W. N. 281; 5 A. L. J. 67; 18 M. L. J. 7; 10 Bom. L R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 30 A. 84 (P. C.).

(2) 37 Ind. Cas. 122; 43 I. A. 183; 38 A. 443; 18 . Bom L. R. 930; 20 M. L. T. 431; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M. W. N. 537; 26 C. L. J. 183 (P. C.)

(3) 2 I. A. 7; 14 B. L. R. 226; 23 W. R. 403; 3 Sar. P. C. J. 405 (P. C.).

(4) 5 Ind. Cas. 73; 14 C. W. N. 459.

(5) 31 Ind. Cas. 405; 22 O. L. J. 816; 20 C. W. N.

(6) 8 C. L. J. 20,

(7) 19 A. 133; A. W. N. (18)7) 4; 9 Ind. Dec. (N. s.)

SARIMAN CLOWDEDBAIN D. EHIB NABAYAN CHOWDHULY.

ebe died befere suit. Bachoba Chowdbury died presested of considerable moveable and immoveable properties, which, on his death, came into the possession of his widows. Part of Bacheba Chowdbury's immoveable property was ancestral, and the remainder of it had been purchased by him.

Musammat Subast, shortly before she died, excented, on the 12th February 1887, an instrument by which she bequeathed her half-share in the property to Musammat Sasiman.

The suit relates to the nature of the title of Musammat Sasiman to the immoveable properties of which her husband, Bacheha Chowdhury, had died possessed, and to the nature of her title to other immoveable properties which she and Musammat Sabaet. or one of them, acquired by purchase, it being alleged by the reversioners that those immoveable properties which were acquired by the Musammats were purchased by them with moneys saved from the usufrust of the immoveable properties of which Bachcha Chowdhury had died possessed. The object of the suit is to obtain a declaration that Musummat Sasiman neither had nor has any power to alienate any of the immoveable properties. Her right, if any, to alienate, except for necessity, depends upon the nature of her title. Musammat Seeiman and some of the other defendants are appellants here. The plaintiffs and others of the defendants are the respondents.

The Hindu family to which Bacheha Chowdhury had belonged was governed by the law of the Mithila behool of Hindu Law. Bacheba Chowdhury had separated from that family. The suit and this appeal depend upon the true construction of a testamentary document which, although deseribed as an atainama (deed of gift), must be regarded as a Hindu Will, which Bachcha Chowdhury made on the 5th of June 1864. On behalf of the plaintiffs it is contended that the Musammats took no greater interest in the immoveable property which had belonged to Bacheba Chowdhury in his lifetime than that allowed by the law of the Mithila to the widow of a separated and childless husband. On behalf of Musammat Sasiman and those elaiming under her it is coontended that she and Musammat Subast tok in that property under the Will a full, absolute, and heritable interest as

proprietors, with full rights of alienation, and not merely the interest of Hindu widows under the law of the Mithila. If her contention as to the construction of the Will is correct, this suit must fail, and should be dismissed, and it would not be necessary to consider whether the immoveable properties which were purchased by the Musammats, or either of them, were purchased with moneys derived by them after their busband's death from the usufruct of the immoveable properties which were left by him.

According to the official translation of the Will of the 5th June 1864 (15th Jeth, 1217, F.S.), Bacheba Chowdhury stated that:-

"I am Bacheha Chowdbury, resident of Mouza tubbankarpur, Pargana Hati, Zila Tirboot, "

He then mentioned lands, some of which were ancestral lands, and others of which be had purchased, and stated, as was the fact, that,-

The ancestral and purchased properties are held and possessed by me, without partieipation or interference on the part of any person"-

and proceeded,-"I, the declarant, have no issue; I have, to obtain bliss in the next world, caused to be sunk several ponds, and have constructed a temple of Sri Murli Manchar Ji within the compound of my own house, at a considerable cost; I often remain ill, although at present I am well, still on account of having no shild, and placing no certainty in life, I intend to go on pilgrimage to Kashi and other places. Therefore, I, the declarant, of my own accord and free will, in order to avoid future disputes and to perpetuate my name, gave all the mouses in entirety or in part, both aneestral and purchased, thika properties, and all goods, and assets, articles of copper and silver, elephant, oxen, she buffaloes, and all other properties, to both my first and second wives, Musammat Subast Chowdhurain and Musammat Sasiman Chowdhurain, who after my death will be heirs to all the moveable and immoveable properties. It is desired that the said Musammats by holding possession and ossupation of all the moveable and immoveable properties should pay the Government revenue thereof, and they should collect rant of, BASIMAN CHOWDHURAIN D. SHIB NARAYAN CHOWDHURY.

and keep watch over, the mouses either in entirety or in part and scattered lands, orehard, oxen, and elephant, etc., and they should give alms and charities. The said Musammats after my death, shall have, in every way, full power and all proprietary rights over all the moveable and immoveable properties, and they should, under the deed executed by me, pay, annually, Rs. 360 to Musammat Lachhmi Chowdhurain, widow of my brother, Dalar Chowdhury, until her death for her maintenance, and by this deed the said Musammats should get their names resorded in the Government sherists in the cloumns of proprietors. To this, I the declarant, neither have nor shall have, any objection. I have, therefore, given into writing these few words by way of a deed of atainama so that they may be of use when required."

Their Lordships have quoted from the translation which was made of the Will by the official translator in India, but it is admitted on babalf of the parties to this appeal that the vernasular word which has been translated as "gave" should have

been translated as "give."

The important words in the Will which, in the official translation have been rendered as giving to the Musammats after the testtator's death "in every way, full power and all propertietary rights," are in the vernaealar Kuli o Kuh haqug malkiyat har hal akhtear Mosammat mazkuran ko hasil hai, and were understood by the Trial Judge as a declaration by the testator of the rights which the Musammats would have in the properties by inheritance after his death, and not as giving them any greater right in the properties, or implying that they should have any greater right, such as a right of alienation, except for necessity. The Trial Judge, by his decree of the 9th April 1914, made a declaration in favour of the plaintiffs as reversioners. From that decree Musammat Sasiman appealed to the High Court,

The appeal to the High Court was heard by Chapman and Ros, Ji., and was dismissed by the desree of that Court on the 23rd February 1917. The leading judg. ment in the High Court was delivered by Ros, J., with which Chapman, J., consurred, Mr. Justice Ros was of opinion that in pue reespect the official translation of the

Will of the 5th June 1864, was not quite accurate, In his judgment he said,-

"A more assurate translation of clause beginning the said Musammats after my death' would be-'And in respect of all the moveables and immoveables after my death all and complete rights, the power of a landbolder in every eireumstance, acernes to the said Musammats.' The Urdu words which I have translated accrnes' are 'hasil hai.' The Urda word which I have translated 'of a landholder' is 'mali. kiyat.' There is no such word in the language. Either the long a is a mistake or the word is a manufactured word, The point has been pressed at some length in the argument. It is not, to my mind, 'Milkiat' or 'Malikiat' would material. equally imply something appertaining to a malik! The word 'malik' means literally one who holds milk or land. The translation, with the amendments which I suggest,

represents the terms of the dead."

There does not appear to their Lordships to by any material difference in that respect between the official translation and that suggested by Mr. Justice Roe. In their Lordships' view they mean the same thing. But if they materially differ, their Lordships hold that they must accept the official translation as correct. translation was incorrect, there was ample opportunity to have it judicially corrected in the High Court after evidence as to its correctness or incorrectness had been taken and recorded in the Court in which the correctness of the official translation was shallenged. The Judicial Committee has no means of enquiring into the correstness of an official translation of a docament in a vernacular language of India, except by sending the case back to the Court with a direction to make such enquiry. It is not necessary to adopt that course in this case.

The following desisions, which it has been contended should guide their Lordships in construing this Will, have been eited in argument at the Bar. Lordships may observe that it is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case. Their Lordships will briefly refer to the BASIMAN CHOWDRURAIN C. SHIB NARAYAN CHOWDRURY.

decisions which have been cited, in the order of their dates.

Hooda v. Shewukram (3), which came on appeal from the High Court of Calcutte, and related to the construction of a testamentary document executed by Roy Hurnarain, a Hindu of Behar, the Board held that.—

"In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are enabled to alienate."

The Board, having regard to those considerations, and to the document as a whole, all the expressions of which should be taken together, beld that Harnarain, in using the expression "except Musammat Rance Dhun Kowar aforesaid, none other is or shall be my beir or malik." intended that Rance Dhun Kowar should take in his property 'a life-interest immediately suceeeding him, without that interest being shared by her daughters or by any other person," but that she should not take an absolute estate which she should have power to dispose of absolutely. The Board so decided, although it held that there were expressions in the document which, if they stood alone, showed that Hurnarain intend. ed to make an absolute gift to Rance Dhun Kowar. She was the widow of Hurnarain's deceased con, by whom she had had two daughters, who were living at the date of the document, and were named in it.

In 1875, in Kollany Keer v. Luchmee Pershad (c), which depended on the construction of a Hindu Will, and came to the High Court at Calentta on appeal from a decree of the Subordinate Judge of Sarun, in the Patra Division of Bengal, and related to the title to immove able property, Romesh Chunder Mitter, J., in his judgment, from which the other

Judge who heard the appeal, Glover, J. did not discept, held.

"Therefore, the primary matter for our consideration is the language of the Will, or the words in which it is expressed. As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and his daugher. He says that, after his death, they shall be (maliks), and his entire estate shall devolve upon them."

Mr. Justice Mitter considered that there being nothing to show a contrary intention, the words which were used gave an absolute estate, and not merely the estate of a Hindu female, to the testator's widow and daughter.

In 1281, Sir Richard Garth, C. J., and Conningham, J., in Punchoo Money Dosses v. Troplucko Mchiney Dosses (9), which was an appeal from a decree of Wilkinson, J., in a suit on the original jurisdiction side of the High Court at Calentte, and related to a Hindu Will, held that the description in the Will of a devisee, a woman, as malik, did not recessarily import an intention of the testator that by his Will an absolute or proprietary interest should pass to her.

In 1897, in Lalit Mohun Singh Roy v. Chukkun Lal Rey (10), which was an appeal from a decree of the High Court at Calcutta, which had reversed a decree of the District Court of Hooghly in a suit which related to Hindu Will, the Board held that the words of gitt in the Will to the effect that the dones "become owner (malik) of all my estate and properties" conferred an heritable and alienable cetate in the absence of a context indicating a different meaning.

In 1907, in Suramani v. Rabi Nath Oha (1), in an appeal from a decree of the High Court at allahabad, which had affirmed a decree of the Subordinate Judge of Gorakhpur, in a suit which related to a deed of gift or testamentary instrument, by which a Hindu gave to his first and second wives and

^{(9) :0} C. 242; 8 Ind. Jur. 450; 5 Ind. Dec. (N. s.)

^{220.} (10) 24 I. A. 73; 24 C. 834; 1 C. W. N. 387; 7 Sar. P. C. J. 165; 12 Ind Dec. (N. s.) 1224 (P. C.).

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daughter in law, respectively, certain immoveable property, reserving to himself a a life interest, but directing that after his death they shall be "malik na khud ikhtiyar (owners with proprietary rights)," the

Board said, -

"This case of Lilit Mohun Singh Roy v. Ohuk un Lal Roy (10) seems to adopt and apply the same view of the word 'molik' as was taken in the Calcutta case in 24 W. R., above sited [Kollany Reer v. Luchmee Pershad (8), with the result that in order to out down the full proprietary rights that the word imports, something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding eircomstances, or is relied upon by the respondents, but the fact that the dones (Surajmani) is a weman and a widow, which was expresely decided in the last mentioned easa not to suffice. while there is nothing in the context surrounding facts to displace the presump. tion of absolute ownership implied in the word 'malik,' the context does seem presumption strengthen the that intention was that 'malik' should bear its proper technical meaning."

In Musammat Sura mani v. Rabi Nath Oha, (1) the Subordinate Judge of Gorakbpur, who tried the suit, had held that turajmani took a Hindu widow's estate, and was incompetent to alienate it, and the High Court on the appeal held,—

"That under the Hindu Law, as interpreted up to the present, in the ease of immoveable property given or devised by a husband to his wife, the wife has no power to alienate, unless the power of alienation is conferred upon her in express terms. The learned Vakil for the appellants (Surajmani and others) contended that the words of the document we have to consider, and that we have sited above, did expressly convey such power, or at any rate that from them the intention of the executant to confer a power of alienation was evident. We cannot so hold."

In 1909, in Amarendra Nath Boss v. Shurashany Diei (4) Mookerjee, J., held that the expression "malik like myself" in a Hinda Will, as describing the position which the donee would occupy, was an indication that the testator intended the donee to take an absolute interest in the property

devised, but that the word "malik" by itself would not indicate that more than a limited interest was intended to be conferred.

In 1916, in Fatch Chand v. Rup Chand (2), in an appeal from a deeree of the High Court at Allahabad, which had varied a decree of the Subordinate Judge of Sabaranpur, in a suit which related to the title to immoveable property, the Board held that the words in a Hinda Will: "I have bequeathed Manza Khudda to Musammat Gomi . . after my death she shall be owner in possession (mulik o qubit) of the entire property in Manza Khudda aforesaid," conferred full ownership upon the devisee, there being in the Will, in the opinion of the Board, nothing from which a contrary intention of the testator should be inferred.

It appears from some of the decisions to which their Lordships have referred and from the jadgment of the Board in Bhaidas Shiedas v. Bai Gulab (11), that the term "malik," when used in a Will or other document as descriptive of the position which a devisee or donee is intended hold, has been held apt to describe owner possessed of full proprietary rights, including a full right of alienation, unless there is someting in the context or in the surrounding sireamstances to indicate that such full proprietary rights were not intended to be conferred, but the meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator from which it may receive its true shade of meaning, and their Lordships can find nothing in the quoted desisions contrary to this view.

Mr. Justice Chapman, in his consurring judgment in this suit, said: "As regards the word 'malik,' I trust that a word in such common everyday use in this part of the country (Behar) will not be converted by the desisions into a technical term of conveyancing.' At least outside the Presidency Towns of Calcutte, Madrae, and Bombay, the art of conveyancing is but little understood in India, and the drafting of documents, including

^{(11) 65} Ind. Car. 974; 49 I. A. 1, 26 C. W. N. 129, 15 L. W. 412, 20 A. L. J. 289, 42 M. L. J. 385 (P. C.).

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Wills, is generally of a very simple and inartificial character. See the observations of the Board in Gokaldas Gopaldas v. Puranmal Premsukh Das (12) and in Mahomed Ibrahim Hossein Khan v. Ambita Pershad Singh (13).

In the present case the term "malik" does not occur in the Will, but the word 'malkiyat," which has been rendered in the official translation as "all proprietary rights," does, and Mr. Justice Roe, who did not accept the official translation as literally quite accurate, considered that a mistake in the spelling of the word had been made, or that the word was a manufactured word. His opinion was that, whether the intended word was "milkyat" or "malikiyat," it meant the same thing—that is, the power of a landholder, and he stated that "malik" means, literally, one who holds land. Their Lordships cannot construe the words of the Will giving to the Musammats, as the testator's heirs, all his moveable and immoveable properties, as interpreted by the declaration that after his death they "shall have, in every way, full power and all proprietary rights over all the moveable and immoveable properties," as meaning anything less than that they should hold in his properties full and complete rights as proprietors, including full rights of alienation, and that was, their Lordships infer, what the testator intended.

Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed with costs, and the suit should be

dismissed with costs.

K. V. L. N. & J. P. Appeal allowed.

Solicitors for the Appellants, Messre, Watkins and Hunter.

Solieitors, for Respondents.—Mesers. W. W. Box & Co.

(12) 10 C. 1035;11 I. A. 126 at p. 133; 8 Ind. Jur. 326; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. s.) 692.

CALCUTTA HIGH COURT.

APPLICATION IN APPRAL FROM ORIGINAL CIVIL

No. 47 of 1921.

May 25, 1921.

Present:—Sir Lancelot Sanderson Kt., Chief
Justice and Mr. Justice Richardson.
OHATURBHUJ CHANDANMULL—
AND OTHERS—DEFENDANTS—APPLICANTS

BASDEO DAS DAGA—PLAINTIPF —
RESPONDENT,

Civil Procedure Code (Act V of 1908), O. XLI, r. 5

-Execution, stay of -High Court, Original SideApplication to whom to be made-Practice.

If a party, against whom judgment has been given on the Original Side, desires to obtain a stay of execution, pending an intended appeal, and desires in the first instance to apply on the Original Side, he must apply to the Judge who decided the case without unreasonable delay. [p. 199, col. 2.]

Mr. T. O. P. Gibbons, K. O., Advosate-General, and Mr. K. O. Bose, for the Applicants.

Mr. S. M. Boss, for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an application for an order that the execution of the decree, dated the 22nd of March 1921, be stayed until the final determination of the appeal, upon the appellants furnishing such security to the satisfaction of the Registrar and within such time as the Court may be pleased to direct.

The case was tried by my learned brother Mr. Justice Rankin, who, on the 22nd of March 1921, gave judgment in favour of the plaintiff for the sum of Rs. 41,131 (Rs. 41,000?). It was alleged by the appellants, though denied by the plaintiff, that negotiations with regard to settlement took place. They, however, same to nothing and the plaintiff applied in the ordinary course to the Master for execution of the decree.

Thereupon, on the 14th of April 1921, nearly a month after the judgment had been given by Mr. Justice Rankin, the appellants applied to Mr. Justice Greaves for stay of execution of the decree, pending the final determination of the intended appeal, and obtained an interim stay of the said execu.

^{396; 4} Sar. P. C. J. 543; 5 Ind. Dec. (N. 8.) 692.

(13) 14 Ind. Cas. 496; 39 I. A. 63; 11 M. L. T. 265;

(19:2) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R.

280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J.

846; 39 C. 527 (P. C.).

CHATURBHUJ CHANDINMULL U. BABDEO DAS DAGA.

tion; and then, after hearing the parties on the 22nd of April 1921, my learned brother Mr. Justice Greaves, made an order directing that upon the appellants paying in each ten thousand rupees by the 25th of April and another sum of ten thousand rapees within a week after, and the sum of rupees twently-one thousand within a month from that date the execution of the desree should be stayed. It was provided that the plaintiff would be at liberty to withdraw the sums, so to be deposited, on the plaint. iffs farnishing security, and that in default of payment of any one instalment the decres would be executed for the balance undeposited. The defendant-appellants deposited the two same of Rs. 10,000 but failed to deposit the sum of Rs. 21,000 within the month specified by the order. The defendant-appellants now apply to this Court for stay of the execution of the decree until the hearing of the appeal. When asked by the Court, the learned Counsel, for the plaintiff refused to consent to security being deposited by the appellants with the Regis. trar instead of eash, and he objected, for reasons which he stated, to any further time being granted. I do not say that this Court has no jurisdiction to stay execution of the decree if it fit. But in the eirenmetances of this ease, my learned brother and I are not prepared to stay the execution of this decree without the consent of the plaintiff. It is to be noticed that the plaintiff has obtained judgment for Rs. 41,000. The defendants have already obtained a concession by reason of the learned Judge's order that execution should be stayed upon terms which the learned Judge thought right and proper. Those terms have not been earried out. I know of no facts which should induce this Court to make an order extending the time or varying the order which the learned Judge made. It was urged by the learned Advosate-General, on behalf of the appellante, that in these days it is diffisult for people engaged in commerce to raise ready money. It seems to me that there are two considerations in respect of that. The first is that, if that allegation be true, it affords. an additional reason why the plaintiff should not be kept out of his money any longer. He has obtained a decree, and, for all I know, it may be just as important to the plaint.

iff, who is engaged in trade, to obtain each in respect of the amount found to be due to him as it is for the defendants not to pay the ready money. Secondly, the appellante in their petition stated that their firm's stock in trade, consisting mostly of jute in various places, would exceed a sum of rupees two lass, If that be true, then I do not understand why the defendant appellants should not be able to raise, on the security of their two lass of rapees worth of jute, a sum of Rs. 21,000 in order to comply with the order of the learned Judge. It is to be noticed that there is no ground for suggesting that any substantial loss would result to the appellants, who are now applying for stay of execution, unless the order were made, because the learned Judge had provided for that by the direction that if the plaintiff should take the money, which was to be deposited by the defendants with the Registrar, out of Court, then the plaintiff was to provide security in respect thereof.

For these reasons, in my judgment, this application must be dismissed with costs.

Before parting with this case I desire to make one or two observations of a general nature. It seems to me that the procedure which was adopted in this case was not the correct procedure. As I have already said during the argument. I have spoken to my learned brother Mr. Justice Greaves about the practice on the Original Side. inasmuch as it was stated by learned Counsel during the argument that the application for stay of execution in this case had to be made to Mr. Justice Greaves because he was taking all applications on the Original Side. Mr. Justice Greaves assures me that that is not so, and I desire it to be under. stood that, in future, if a party, against whom judgment has been given on the Original Side desires to obtain a stay of execution, pending an intended appeal, and desires in the first instance to apply on the Original Side, he must apply to the Judge who desided the ease. It is obvious that that is the right course to alopt, because the Judge who has decided the case would know all about it; he would have all the fasts in his mind and would be in a position to say whether, in that MADLU SUDAN SAHA CHAUDHURI U. DESENDRA MATH BARK-R.

particular case, execution cught to be stayed, If the application is made to another Judge, eitting in Chambers, it must be obvious that much time will be wasted by putting before the learned Judge all the material facts of the case on the one side and on the other, and, it must further be obvious, that he cannot be in such a good position to judge whether execution should be stayed as the learned Judge who tried the case. The Order in the Civil Procedure Code, Order XIII, rule 5 (2), to my mind slearly contemplates that that sourse should be adopted, because it provides: "Where an application is made for stay of execution of an appealable decree bcfore the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed."

The practice which obtains in England is, that if a party against whom judgment has been given, desires to obtain a stay of execution pending an intended appeal, he applies in the first instance to the Judge who tried the case except under special circumstances.

Further, the application must be made without unreasonable delay; that is provided by clause (b) of sub rule (3) of Order XLI, rule 5, of the Civil Procedure Code, viz, that the application has been made without unreasonable delay." Apart from the rule, it must be obvious that that is a wise and escential direction, the application should be made to the learned Judge who tried the case at a time when he still has the material facts in his mind. In the present case the judgment was delivered on the 22nd of March by Mr. Justice Rankin, but the application for stay of execution was not made until the 14th of April to Mr. Justice Greaves.

In future the practice which I have indicated as to an application for stay of execution on the Original Side pending an intended appeal (I limit my remarks to such an application) should be followed, viz, that the application for stay must ordinarily be made to the Judge who tried the case, and the application must be made without nurseson able delay. It may be that in an exceptional case and for special reasons it will be necessary to apply to a Judge other than the Judge who tried the case, but

the above mentioned practice is ordinarily to be followed.

RICHARDSON, J .- I entirely agree.

J. P.

Order accordingly.

CALCUTTA HIGH COURT.
APPEAL FAOM APPELLATE ORDER No. 90 or
1907.

January 14, 1908.

Present: -Mr. Justice Mitra and Mr. Justice
Casper: z.

MADHU SUDAN SAHA CHAUDHURI AND OTJERS-DEFENDANTS-APPELLANTS

DEBENDRA NATH SARKAR-PLAINTIFFS
-- RESPONDENT.

Landlord and tenant-Creation of intermediate tenure between putnidar and dur-patnidar, validity of -Suit by assignee of rent, maintainability of.

There is nothing in the policy of the law or custom of the country to prevent the creation of an intermediate tenure between a putnidar and a dur-putnidar. It is immaterial what name is given to it.

An intermediate tenure-holder who is merely an assignee of the rent is entitled to bring a suit for recovery of rent from the dur-putnidar.

Appeal against an order of the Subordinate Judge, Pabna and Bogra dated the 12th December 1906, reversing that of the Munsif, Bogra, Second Court, dated the 26th April 1906, and remanding the case to his Court for fresh trial.

Babu Priy isankar Majumdar, for the Appel-lant.

Biba Debendra Nath Bagchi, for the Re-

JUDGMENT.—There is no hing in the policy of the law or custom of the country to prevent the creation of an intermediate tenure between a putnitur and a dur-putni-

CHANDA SINGH U. AMBITSAR BARKING COMPARY.

dar. It is immaterial what name is given to it. The plaintiff sued in the character of an intermediate tenure-holder and he was merely an assignee of the rent. We do not see why a suit should not lie at his instance to recover rent from the dur. putr.idar. We accordingly dismiss this appeal with costs, one gold mohur.

B. N. & J. P.

Appeal dismissed.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 1156 OF 1917. November 5, 1921. Present :- Mr. Justice Chevis and Mr. Justice Harrison. OHANDA SINGH-DEFENDANT-APPELLART

VET8US

THE AMRITSAR BANKING COMPANY (FEROZEPORE BRANCH) THEOUGH E. D. DIGNASSE, THEIR LIQUIDATOR, LAHORE-PLAINTIPP, AND THE AMBITSAR NATIONAL IN. SURANCE COMPANY TOROUGH F E, BANGHAM,

THEIR L QUIDATOR, LAHORE-DEFENDANT-RESPONDENTA.

Evidence Act (1 of 1872), s. 91-Loan on security of hundi-Hundi inadmissible in evidence-Secondary evidence.

Where a loan is granted on the security of a hundi, the execution of the hundi being, however, postponed till a short time after the money is actually paid to the defendant, there is no cause of action independent of the hundi, and if the hundi is inadmissible in evidence for want of proper stamp, secondary evidence of the transaction is shut out by section 9 of the Evidence Act, and the plaintiff must fail. [p. 202, col 2.]

Baij Nath Das v. Salig Ram, 16 Ind. Cas. 83, not

followed.

becond appeal from a decree of the District Judge, Ferczepore, dated the 2nd March 1917, affirming that of the Sub-

ordinate Judge, Second Clase, Ferozepore, dated the 18th April 1916.

Mr. M. S. Bhagat, for the Appellant. Mr. S. K. Mukerii, for the Respondent.

JUDGMENT .- The plaintiffs in this care Banking are the National Company, Amritsar, and the principal defendant is Bhai Chanda Singh, a Pleader of Ferozepore. The second defendant, namely, the National Insurance and Banking Company, is only a proforma defendant. Bhai Chanda Singh applied to defendant No. 2 for a loar, and a reference to his application shows that in the column showing what security was offered, Bhai Chanda Singh stated the security as "personal scentity on a hundi payable after three monthe." The application was referred by the Manager of the National Insurance and Banking Company to the local Directors who sanctioned the loan, and, accordingly, the Bank paid the defendant Re. 2,200 less Rs. 44 deducted as interest in advance for three months. This payment was made on the 25th August 1913 and Bhai Chanda Singh thumb-marked the Bank Memorandum (see Exhibit P. 3). The same day Bhai Chanda Singh executed a hundi promissing to pay the Bank the sum of Rs. 2,200 after ninety days. The National Insurance and Banking Company subsequently assigned their elaim to the National Banking Company, Amrilear, who at first sued on the hundi, but finding that this suit would fail by reason of the hundi being insufficiently stamped, the plaintiffs put in an amended plaint in which they claimed simply to recover the money advanced with interest. The lower Courts having decreed the claim. Bhai Chanda Singh appeals to this Court, and on his behalf various pleas have been raised. We do not propose to deal with all those pleas as we opinion that the appeal can be decided merely with reference to one plea, which is as follows :--

On behalf of the appellant it is urged that the loan transaction was incorporated in the hundi, that the hundi is the only legal basis of the suit; that the hundi it elf is inadmissible for want of sufficient stamp, and that other evidence of the transaction is barred under section 91 of the Evidence Act. The learned District Judge holds that there was a separate transaction independent of CHANDA SINGS U. AMRITGAR BANKING COMPANY.

the execution of the hundi, and that the contract was not embodied at once in the hundi. The judgment proceeds: "Mohan Lal the Munshi of defendant, states that a vousher was only signed when the money was advanced and that no hundi was executed as no hundi paper was available. Ram Lal, another Munshi of the defendant, went on! and obtained stamp-paper and then sent the hundi to the ereditor. There was thus a transaction altogether separable from the execution of the hundi." We are quite prepared to accept the learned Judge's findings as to facts, but, taking the facts to be as stated by him, are unable to find that there was more than one contract between the parties. On the facts as found by the learned District Judge it was simply a case of a loan being grant. ed on the security of a hundi; the execution of the hundi being, however, postponed for certain reasons till a short time after the money had actually been paid to The original plaint defendant. recites that the defendant took the money and wrote a hundi. The amended plaint states that the defendant took the money on a voucher and promised to give a hundi and wrote and sent the hundi the same day. The voucher or memorandum itself contains no promise to pay and the defendant's application for a loan in which, as already stated, he spoke of a hundi as the security to be offered for the loan, leaves no doubt whatever that the agreement between the parties from the beginning was that the money should be advanced on the security of a hundi. In fact, the learned District Judge does not find otherwise. All that he says is that the contract was not embodied at once in the hundi and that thus there was a separate transaction independent of the execution of the hundi. Taking it as correct that the money was first paid and the hundi executed later on in the day, we are still unable to hold that there were two contracts and that the money was not advanced on the security of the hundi.

On behalf of the respondents it has been argued before us that the hundi was subsequently offered merely as a collaterel security. Now, had the case been that the money had been first advanced on the defendant's personal responsibility and that a sub-

sequent demand for better security had been made and the hundi then executed, doubt there would have been two different contracts between the parties, but as it is, we are quite unable to hold that there were any separate cantracts. We have been referred to Sheo Das v. Kanhaya Lal (1). There it was laid down that though, in certain cases, where a negotiable instrument, taken on assount of a pre existing debt, is inadmissible in evidence, the creditor may sue for the original consideration, yet, when the original cause of action is the instrument itself, and does not exist independently of it, the plaintiff cannot sue except upon the instrument. A similar ruling is Bakshi Ram Labhaya v. Kakaram (2), which lays down that whether there is a cause of action independent of the instrument upon which independent evidence may be given. depends upon the question whether plaintiff ean allege any contract as the basis of his suit which is not the contract reduced to the form of a document. See also Ganga Rom v. Amir Chand (3). A different view has no doubt been held in an Allababad decision published as Baij Nath Das v. Salig Ram (4), but in Civil Appeal No. 2865 of 1916 a Division Bench of this Court has refused to follow the Allahabad roling, and has adhered to the rulings of this Court, already referred to, and we have no hesitation in doing the same. There was in the present case no cause of action independent of the hundi, for it is clear that the mocey, even though advanced a short time before the actual execution of the hundi, was advanced on the security of the hundi and that the agreement between the parties was that the loan should be made in consideration of the hundi. We hold, therefore, that the plaintiffs have no sause of action independent of the hundi and as the hundi evidence inadmissible in section 91 of the Evidence Act forbids secondary evidence, the plaintiffs must fail.

We accept the appeal and, reversing the decisions of the lower Courts, we dismiss

^{(1) 61} P. R. 1888.

^{(2) 42} P. R. 1895.

^{(3) 66} P. R. 1903; 73 P. L. R. 1907; 127 P. W. R. 1906.

^{(4) 16} Ind. Cas. 33.

LACHMAN PRASAD O. LACHMESHWAR PRASAD.

the suit, but as the defendant succeeds on a purely technical ground and not on the merits, we leave the parties to bear their own costs in all Courts.

z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 160 of 1921,

January 10, 1922.

Present:—Mr. Justice Piggott and

Mr. Justice Walsh.

LACHMAN PRASAD—DEFENDANT—

APPELLANT

versus

LACHMESHWAR PRASAD AND OTARRS-PLAINTIPPS-RESPONDENTS.

Mortgage-Bale-deed executed subsequently in favour of mortgagee, effect of, on mortgage.

On 18th June 1908, G. S. executed a mortgage-deed in respect of five items of property in favour of L. P., and on the 25th August 1914 he executed a sale-deed in respect of this property in favour of B.P., the father of L. P., both living together as members of a joint family, and left in deposit with BP a sum sufficient to discharge the mortgage-debt. Previous to the sale-deed, however, on the 20th August 1914, three items of property comprised in the foregoing deeds were sold in execution of a simple money-decree against G. S., the purchasers purchasing the equity of redemption subject to the mortgage of 18th June 1908, L. P. brought the present suit on that mortgage:

Held, that the suit was not maintainable as the mortgage-deed of 18th June 1903 had been completely discharged by the execution of the sale-deed of 25th August 1914. [p. 204, col. 2.]

First appeal from an order of the District Judge, Pilibhit.

Mr. N. O. Vaish, for the Appellant. Mesers, Harnandan Frasad and Shiva Prasad Sinha, for the Respondents.

JUDGMENT.—This was a suit brought by the respondent, Lachmeshwar Prasad, on a mortgage deed of the 18th of June 1908. The defendants were Gokaran Singh, the mortgagor under the said deed, Bhola Singh and Lachman Prasad, impleaded as subsequent purchasers of a portion of the mortgaged property. The deed in question was for a sum of Rs. 7,000, interest to run

at 15 per cent. per annum, compoundable with eix monthly rests. Five items of property were bypothecated. In the third paragraph of the plaint it is stated that Bhairon Prasad, father of the plaintiff and a member of the same joint family, had subsequently acquired the equity of redemption in respect of two out of the five items of property. The plaintiff admits that the integrity of the mortgage had thereby been broken up. so that he is only entitled to claim proportionate amount of the mortgage-money against a proportionale amount of the security. He then submits an account showing that the sum due under the mortgage deed amounted on the date of the suit to Rs. 17,000. Thie, by a sum in proportion based upon a valuation of the five items of mortgaged property, he proceeds to apportion follows:-

Rs. 11,820.4.0 chargeable on the two items of property of which his father has become the purchaser.

Re, 5,179-12-0 chargeable against the three remaining items of property, which have, as a matter of fact, been purchased by the second and third defendants under circumstances to be presently noted.

Inasmuch as the market value of these properties is now less than the sum due from them under the mertgage, the plaintiff limits his claim to a sum of Rs. 4,000. The suit was contested by the third defendant, Lachman Pracad, who is the appellant now in this Court. The original mertgagor had no longer any further interest in the matter and apparently the other transferee, Bhola Singh, did not eccaider the property purshased by him of sufficient value to make it worth his while to contest the suit. Lashman Prasad pleaded, in effect, that the mortgage deed of the 18th of June 1908 had been completely discharged under the terms of a subsequent sale-deed of the 25th of August 1914. He made sundry allegations of bad faith against the plaintiff, or the plaintiff's father, and raised various affecting the merits questions which bave dispute not been gore The question main into. the pleadings, and the only one with which we are concerned here, is whether mortgage deed in suit was or was not discharged by a sale-deed of the 25th of August 1914. We have had to consider LACHMAN PRAS.D D. L.C. MESHWAR PRASAD.

the terms of that sale-deed earefully. It was by Gokaran Singh, the original mortgagor, in favour of Bhairon Prasad, who is described in the plaint as the father of the plaintiff, living jointly with him. The property consisted of all the five items envered by the mortgage-deed of June the 18th, 1908, and certain other properties besides. The consideration was stated at Rs. 30,000. Of this only Rs. 950 were actually paid to the vendor. A sum of Rs. 3,566 was left in the hands of the vendee Bhairon Prasad in full satisfaction of a decree held by him against the vandor Gokaran Singh. There remained a large item of Rs. 25,483, in respect of which it is stated that it is left in deposit with the vendes to discharge three previous mortgage bonds. One is this bond of June the 18th, 1905, which it is now sought to put in suit, and the other two are bonds in favour of Jagdamba Prasad, own brother of Bhairon Prasad. It so happened that at or about the time when this sale. deed was executed, certain properties bylonging to Gokaran Singh were under attachment in execution of simple money decrees. The austion-sale astually took place on the 20th of August 1914 five days prior to the execution of this saledeed. At this austion-sale three of the items of property comprised both in the mortgage-feed of June the 18th, 1908, and in the sale deed of August the 25th. 1914, were purchased by certain austion. purchasers, including the defendant appellant Lachman Prasad. These persons, no donbt, bid for and purchased the equity of redemption subject to the mortgage of June the 18th, 1908, which no one suggests to have been discharged before the 10th of August 1914, the date of the austion-sale. As the first Court has rightly remarked, Luchman Prasad, defendant, will be somewhat fortunate if the result of this litigation is to leave him in possession of the item or items of property purchased by him, without his having to contribute any portion of the mortgage debt. The question, however, is whether the present suit as brought is maintainable. The Trial Court held that the mortgage deed of June the 18th, 1908, had been completely discharged ly the execution of the sais-deed of August the 25th, 1914, so that no suit

could be maintained upon its basis. The learned District Judge in appeal has reversed this finding. He puts the point somewhat suriously; that is to say, be records a finding that the sale deed of the 25th of August 1914 does not bar the present suit. We can only understand him to have found that the mortgage in suit was not discharged, or, at any rate, was not completely discharged, by the aforesaid sale deed. On this finding the lower Ap. pellate Court has remanded the suit to the Court of first instance in order that a variety of other issues raised by the plead. ings may be gone into. The appeal before us being against the order of remand, we have simply to determine the question on which the two Courts below have differed. It is to he noise at ones that, for the purposes of argument, we have to treat the plaintiff Luchmeshwar Prasad and his father Bhairon Prasad as virtually one and the same person. This is, in substance, the position taken up by the plaintiff himself in the third paragraph of the plaint, to which we have referred, and the question has been disoursed on this basis in both the Coarts below. If Lashmeshwar Prayad, the mort. gagee under the deed of June the 18th, 1908, were a person totally unsonnected with Bhairon Prasad, the vendes under the deed of August the 25th, 1914, it is obvious that other considerations would necessarily arise. Under existing circumstances, when Bhairon Prasad covenanted to retain in his own hands out of the total purchase money of Rs. 30,000 a sum estimated as sufficient to pay off the mortgage of Jane the 18th, 1905, in favour of his own son, it seems to us that the Trial Court was right in holding that the said mortgage was thereby paid off and extinguished. No question would have arisen whatspever, had it not been for the fast that the equity of redemption with regard to the less important items of the mortgaged property had been put up for sile foar days before the execution of the sale-dead of August the 25th, 1914. To this extent no dont Biairon Prasad failed to reneire the fall consideration for which he had stipulated in return for the Rs. 30,000 sat forth as the parchase money under the sale deed, The conlingency was contemplated by the deed itself and a remedy

BHAGWAN BARBSE SINGH U. MANRIJI KUNWAR. provided in the event of its turning out that the vendor was unable to convey a good title in respect of the whole of the property purporting to be sold. Bhairon Prasad has elected not to avail himself of this remedy but to set up the claim that, in consequence of this partial failure of consideration, he himself has only partially discharged the debt due under the mortgage of June the 18th, 1903, and is entitled to maintain a suit for the balance. In argument before us cases have been quoted, such as that of Har Chandi Lal v. Sheorai Singh (1) and Ram Kishan Das v. Fakir Chana (2), in which questions arose as to the extinguishing of a prior mortgage on the execution of a subsequent mortgage. The former of the two sases was, on the face of it, a very peculiar The decision eventually arrived at was that the later covenant of mortgage which was pleaded as baving discharged an earlier mortgage, was wholly void and inoperative so far as that earlier mortgage was concerned, because the contract had been entered into with a person who bad no consern whatever in the mortgage property and no right to deal with the same. It seems to us that the case is altogether a different one from that now before us. In our opinion the Trial Court took the right view. Bhairon Prasad dicsharged the mortgage of the 18th of June 1:03, when he accepted the sale-deed of the 25th of August, 1914 in his own favour. There was a partial failure of sonsideration under that deed and for this an appropiate remedy was provided. The fact that Bhairon Prasad has passed over that remedy and has thought it more profitable to elaim to set up the mortgage of June the 18th, 1908, with its heavy rate of interest, cannot now affect the question whether the mortgage was or was not discharged by the execution of the sale deed.

We, therefore, set aside the order under appeal and restore the decree of the first

(1) 39 Ind, Cas. 343; 39 A. 178; 32 M. L. J. 241; 16 A. L. J. 223; 1 P. L W. 330; 5 L. W 502; (1917) M. W. N. 280; 25 C. L. J. 316; 21 M. L. T. 292; 21 C. W. N. 765; 19 Born. L. R. 444; 44 I. A. 60 (P. C.).

(2) 19 Ind. Cas. 18; 11 A. L. J. 386.

Court with costs in favour of the defendant-appellant throughout.

W. C. A.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 24 or 1921. April 27, 1921.

Present: - Mr. Dalal, A. J. C.

Ra:a BHAGWAN BAKHSH SINGH
PLAINTIFF-APPELLANT

tersus

Musammat MANRAJI KUNWAR
—Dependant—Respondent.

Limitation, extension of-Review, application for, effect of-Appeal.

A petition in appeal of necessity re-opens in a Court of higher jurisdiction matters decided by a Court of lower jurisdiction. An application for review, on the other hand, does not of necessity by the mere fact of its being filed re-open questions settled between the parties by the same Court The question whether an application for review will give a fresh starting time for limitation or not cannot be decided in the abstract but must depend on the facts of every case. If the application for review is not accepted and the fourt refuses to re-open the matter, no fresh starting point will be obtained by the applicant for the purpose of limitation, [p. 206, col. 1.]

Appeal from a decree of the Sabordinate Judge, Sultanpur, dated the 15th November 1920, upholding that of the Munsif, Sultanpur, dated the 30th June 1920.

Mr. Rudra Datt Sinha, for the Appellant. Mr. Ghulam Husain, for the Respondent.

JUDGMENT.—The two Courts below have found against the plaintiff on the question of law that his suit for declaration in the Civil Court was time barred under the provisions of Article 120 of the First Schedule to the Limitation Act. He failed to sjeet the defendant from a certain area of land in the Revenue Court where it was held that the defendant had rights in the land higher than those of a tenant. The final decision in the litigation was passed on the 10th of January 1913 by the Board of Revenue and the present cuit by the plaintiff

LACEMI PRASAD D. GORUL.

for a declaration that the defendant had no under-proprietary rights in the land was instituted on the 6th of June 1919. On these facts the plaintiff's suit was clearly time barred. He pleaded that it was within limitation on the ground that the right to sue accrued to him on 7th of June 1913 when an application of his to the Board of Revenue for a review of the judgment, dated 10th of January 1913, was dismissed. The real question at issue is one of fact whether by that application the matter in dispute between him and the defendant was re opened in the Revenue Courts or not. A review of judgment is not an ordinary process and does not of necessity ra-open questions already decided between the parties to a suit in which judgment was pronounced. matter in issue is only re-opened when the application for review is ascepted. In that respect an application for review differs from a petition in appeal. A petition in appeal of necessity re-opens in a Court of higher jurisdiction matters decided by a Court of lower jurisdiction, An application for review. on the other hand, does not of necessity by the mere fact of its being filed, re-open questions settled between the parties by the same Court. The question whether an application for review will give a fresh starting time for limitation or not cannot be decided in the abstract but must depend on the facts of every case. If the application for review is not assepted and the Court refuses to re open the matter no fresh starting point will be obtained by the applicant for the purposes of limitation. The order of the Senior Member of the Board of the 7th of Jone 1913 on the application for the review of the Board's judgment was "I desline to re-open the ease." Obviously, then, the application for review did not lead to a re-opening of the questions at issue between the parties. The decision of the 10th of January 1913 was the one which decided the points in issue between the parties and was not in any way affected by the application for review. That date started the period of limitation against the plaintiff and he did not obtain any privilege subsequently of starting the period of limitation from a later date. The decision of a Judge of this Court in Bans Gopal v. Shaheada Basdeo Singh (1) was

(1) 39 Ind. Cas. 428; 20 O. C. 126; 4 O. L. J. 122.

referred to but that dealt only with appeals and not with an application for review for the purpose of limitation.

This appeal is dismissed with costs.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 275 of 1917.

January 9, 1922.

Present:—Mr. Justice Rafique
and Mr. Justice Lindsay.

LACHMI PRASAD and others—

PLAINTIPFS—APPELLANTS

versus

GOKUL AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage-Several mortgages of one estate-Share in each mortgage specified-Transaction, whether one or several-Redemption.

A. procured a loan from nine persons and executed a single mortgage-deed in their favour in which was set out the share of each in a schedule attached to the deed, and specific portions of the property mortgaged were made security in favour of each of the Line mortgagees whose names were mentioned in the deed:

Held, that, for the purposes of redemption, the transaction did not amount to nine separate mort-gages and that there was no impediment in law to the redemption of such a mortgage by one suit. [p. 207, col. 1.]

First appeal from a decree of the Subordinate Judge, Gorakhpur.

Messre, B. E. O'Conor and Kamalakanta Verma for Mr. Iswar Saran, for the Appellants.

Dr. Surendro Nath Sen and Mr. Harnandan Prasad, for the Respondents,

JUDGMENT.—This very ancient appeal has come up before us to day after having been in the Court for $4\frac{1}{2}$ years.

The matter involved is a very simple one and the decision of the appeal need not occupy

us very long.

The appellants here were plaintiffs in the Court below and the suit they brought was for redemption of a mortgage executed on the 25th of May 1907. That mortgage was executed by two

BHUYANAPALLI SUBBATA U. RAJA OF YENCATAGIBI.

persons, Babu Nandan Pat and his brother's wife, Musammat Janki.

It is admitted that the plaintiffs in the present suit are subsequent mortgagees of the same property holding from the same mortgagors, and it was in their character as subsequent mortgagees that they elaimed their right to redeem this

mortgage.

Assording to the deed executed on the 25th of May 1907 a loan of Rs. 13,350 was advanced to the mortgagors by nine persons. The share of each of these joint mortgagees in the mortgage money is set out in a schedule attached to the deed. The security which the mortgagors offered for the loan was a share in a village which amounted to three appas ten pies and out of this share specific portions were made security in favour of each of the nine mortgagees whose names are mentioned in the deed.

It was expressly provided in the mortgage-deed that when the mortgagors came to redeem, the mortgage-money should be paid in a lump sum and all redemption proceedings should be taken at onee.

The learned Subordinate Judge in this ease has some to the conclusion that the soit as framed was not maintainable. His view of the transaction dated the 25th of May 1907 is, that it amounts to nine separate mortgages and that one suit for the redemption of all these mcrtgages is not maintainable.

On the face of it, this decision is clearly erroneous. There was a loan advanced by nine separate mortgagees in specific shares, and we know of no impediment in law to the redemption of such a mortgage by one suit framed in the manner in which the present suit was framed. The decree of the Court below sannot stand and must be reversed.

We allow the appeal, set aside the deeree of the Court below and send back the case to the Subordinate Judge of Gorakhpur for decision on the merits. It is to be hoped that, after all this enormous delay, this case will be brought there to a speedy conclusion.

The decree of the Court below is so obviously wrong that whatever the result in that Court may be, the plaintiffs-appellants

are entitled to have their costs here, including fees of the higher scale.

W. C. A.

Appeal allowed; Cause remanded.

MADRAS HIGH COURT. SECOND CIVIL APPEAL No. 1874 OF 1919. January 4, 1921.

Present :- Mr. Justice Spencer and Mr. Justice Ramesam. BHUVANAPALLI SUBBAYA-DEFENDANT -APPRILLANT

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Rajah VELUGOTI KRISHNA YACHENDRA VARU, RAJAH OF VENCATAGIRI-PLAINTIPP No. 1's REPRE-

SENTATIVE AND PLAINTIPP No. z-RESPONDENTS. Civil Procedure Code (Act V of 1908', ss. 102, 115 -Suit for arrears of kattubadi, whether of Small Cause nature-Second appeal-Suit tried on Original Side and decree confirmed in appeal-Revision by High Court-Provincial Small Cause Courts Act (IX of 1887), s. 33,

A suit for recovery of arrears of kattubadi is a suit of a small cause nature, and where it is under Rs. £00 in value no second appeal lies.

Where a Small Cause Court suit is tried on the Original Side and decreed and on appeal the decree is confirmed no equity arises in the defendant's favour to have the appellate decree set aside in revision by a High Court and get the case re-tried in a less formal manner as a Small Cause Court suit.

Kollipara Seetaparty v. Kankipaty Subbaya, 1 Ind. Cas. 548; 35 M. 328; 20 M.L.J 718; 6 M, L. T. 121 and Davlatsinghji v. Khachar Hamir Mon, 4 Ind. Cas. 830; 84 B, 171; 11 Bom. L. R. 1880, distinguished.

Second appeal against the decree of the Subordinate Judge, North Arcot, in Appeal Suit No. 35 of 1918, preferred against the decree of the District Munsif, Tirupathi in Original Suit No. 633 of 1916.

FAOTS appear from the judgment.

Mr. N. Ohandrasekhara Aiyar, for the Appellant .- The suit was tried by the District Munsif on the Original Side. He has exercised a jurisdiction not vested in him by law as he is a different Court while

BHAGIRATHI SHUKUL C. CHANDRA HARIHAR PATAK.

sitting on the Small Cause Side: Section 33 of the Provincial Small Cause Courts Act. The case should be remanded for trial on the Small Cause Side. Kollipara Sectupaty v. Kankipaty Subbaya (1) and Daulateingh; i v. Khachar Hamir Mon (2).

Mr. A. Krishnaswamy Aiyar, for the Respondent.—Here, the Munsit's decree was confirmed in appeal. There has been no prejudice to defendant. In the cases referred to there was a reversal of the decree.

JUDGMENT.—This suit to recover arrears of Kattubadi of less than Rs. 500 in amount is of a small cause nature and no second appeal lies. See Mullapudi Balakrishnayya v. Venkatanarasimha Appa Rau (3).

The appellants' Vakil asks us to hold that the District Munsif had no jurisdiction to try the suit on the Original Side seeing that under section 33, Provincial Small Cause Courts Act (IX of 1887), he is deemed to be a different Court from the same Court exercising small cause jurisdiction and suggests that we should interfere in revision and send the suit back for re trial on the Small Cause Side.

In this case, unlikes the cases dealt with in Kollipara Sectaraty v. Kankipaty Subbaya Da lateinghi (1)and ٧. Lhachar Hamir Mon (2), there was no reversal of the first Court's decree in appeal, and, therefore, no equity arises in the defendant's favour, to have the lower Appellate Court's decree set aside and get the case re-tried by the same Original Court in a less formal manner than it has already tried We must deeline to interfere in the manner suggested, seeing that the defendant has not been prejudiced by the course adopted by the District Munsif.

We diemiss this second appeal with

M. C. P.

J. P.

Appeal dismissed.

(1) 1 Ind Cas. 543; 33 M. 32?; 20 M. L. J. 718; 6 M. I. T. 121.

(2) 4 Ind. Cas. 830; 34 B. 171; 11 Bom. L. R, 1330,

(3) 19 M. 329; 6 Ind. Dec. (N. s.) 935.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 434 (F 1920.

January 10, 1922.

Present: -Mr. Justice Ryves and

Mr. Justice Gokul Prasad.

BHAGIRATHI SHUKUL—

PLAINTIFF—APPELLANT

te:sus

CHANDRA HARIHAR PATAK AND OTHERS
—DEFENDANTS—RESPONDENTS.

Plaint, misdescription of property in - Amendment effect of - Cause of action, whether offected.

Where by mistake the plaint in a suit for redemption wrongly describes the property as being situated in one village, whereas it is really situated in another, the Court should, on an application being made, allow the plaint to be amended, as such amendment would in no way alter the plaintiff's cause of action which was the non-payment of the mortgage-money, and the mere fact of a misdescription of the property, would not alter that cause of action. [p. 209, col. 1.]

Second appeal from a decree of the District Judge, Gorakhpur, confirming a decree of the Officiating Subordinate Judge, Basti.

Dr. Kailas Nath Katiu, Messre, Iswar Saran and Panna Lal, for the Appellant.

Mr. N. O. Vaish, for the Respondents.

JUDGMENT .- In our opinion this appeal plaintiff appellant muet succeed. The brought the suit on the basis of a mortgage, but by a misdescription in the plaint he put the share bypothecated as being situated in the village Jogia, although it was really situated in the village Udaipur. defendants are the mortgagors and descendants. The mortgagor did not defend the claim but his descendants raised the usual pleas that the bond was without consideration and was excented without any legal necessity. They also contested the factum of execution by the mortgagor. The suit was dismissed by the Trial Court on the finding that no legal necessity for the transfer had been made out. On appeal, however, a fresh complication arose. After the plaintiff appellant's argument was heard the case was adjourned at the respondents' instance for a few days. In the meanwhile, it was discovered that, although the property which was really mortgaged was situated in Udaipur, the plaintiff in fact described it as being situated in Jogia. What really

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bappered was that the money berrowed under the bypothesation bond in suit was for the purpose of purchasing a certain share in Jogia for the benefit of the joint family, and perhaps that is how the confusion arcre. Anyhow, the plaintiff applied to the lower Appellate Court for amendment by substituting the name of the correct village in place of the wrong one. The learned Judge, relying on the cases of Balkaran Upodhya v. Gaya Din Balwar (1), and Muhammad Sadiq v. Abdul Mejid (2), has disallowed the application and has dismissed the appeal. We think the Judge of the Court below was not justified in disallowing the application for amendment. Amendments of elerical mistakes have been allowed even in second appeals and this was eminently a case in which the plaintiff should not have been punished by dismissal of his suit simply because the Pleader's clark who wrote the plaint had committed a clerical error. The mortgage in suit was filed along with the plaint and showed quite clearly what the property really mortgaged was. Under these eircumstances, the amendment prayed for should have been allowed. This amendment would be in no way altering the cause of action of the plaintiff. The cause of action was the non payment of the mortgage and the mere fact that a misdessription of the property srept into the plaint does not alter the cause of action. We think the Court below was wrong in thinking that it had no power to allow the amendment. We allow the application for amendment of the plaint, dated the 5th of February 1920. We allow the appeal, set saide the decrees of the Courts below and remand the case to the Court of Grat inetance through the lower Appellate Court with directions to restore it to its original number and try and dispose of it assording to law. The defendants respondents will be entitled to their costs of this litigation up to date and the appellant will pay bis own costs of this appeal. The remaining costs incurred by the appellant will be costs in the cause.

- W; C. A.

Appeal allowed.

OALCUTTA HIGH COURT.

APPLICATION IN ORIGINAL CIVIL SUIT

No. 794 of 1909.

December 14, 1920.

Present:—Mr. Justice Rankin.

NARENDRA LAL KHAN—Applicant

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TARUBALA DASI-RESPONDENT

Attorney—Bills of costs—Lien—Limitation, bar of— Set-off—Limitation Act (IX of .908', construction of— Limitation bars remedy does not extinguish right.

In the case of a personal action for a debt, limitation merely bars the plaintiff from having the particular remedy by way of suit and does not extinguish the debt. [p 210, col. 1.]

Therefore, if an Attorney has any form of lien upon property in respect of his bills of costs, he can exercise that lien notwithstanding that, by the terms of the Limitation Act, he could not bring a

suit. [p. 210, col. 1.]

The bar of limitation applies to a claim of setoff by a defendant as if he were bringing an
independent suit of his own but where he is defending himself by way of set-off, if his claim was
not barred at the time of the issue of the plaint, he
may prosecute a set-off even though the time may
have clapsed before his filing, say, a written statement claiming the set-off. [p. 210, cols. 1 & 2.]

The .imitation Act being an Act of a restrictive character must be strictly construed. [p 213, col. 1.]

Mr. L. P. E. Pugh, for the Appellant. Baba Hirendra Nath Dutt, for the Respondent.

JUDGMENT.-This is an application by an Attorney under rule 59, Chapter XXXVIII. of the High Court Roles, for an order against his olient for payment of the sums amounting to Rs. 531-14 0 allowed on taxa. tion of four bills of costs in respect of non-contentious business. It appears that the Attorney also acted for the client in several other proceedings, being certain execution eases in one of which a considerable sum of money was recovered by the Attorney and was put into his hand on behalf of his elient. Differeness of opinion arose between the parties as to whather the particular or active lien of a Solicitor in respect of the sum of money es resieved was available for his costs in all or in only one of the execution matters, but by an order obtained from Mr. Justies Buskland the Attorney has susseed. ed in having it declared that his partienlar or active lien extends to all these contentious proceedings,

The main difficulty now is due to the fact that before the money in question was recieved by the Attorney over three years.

^{(1) 24} Ind. Cas. 225; 12 A. L. J. 635; 36 A. 370. (2) 10 Ind. Cas. 476; 8 A. L. J. 636; 33 A. 616.

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had elapsed eines the completion of the work comprised in each of the four bills of easts. The order of Mr. Jastice Brokland, as I construe it, merely directed that these bills of sosts should be taxed and that any moneys over and above the amount which in any event would be sufficient to satisfy the Attorney's slaim should be re-paid by the Attorney to the elient at once. It in no way decided bills of sosts were in whether these fast due from the elient to the Attorney or not, but it did deelare that to the extent to which these bills, when taxed, were due and payable the Attorney should have a right to a set off. In addition to the particular or active lien which an Attorney has upon monies which have been recovered in a suit, the Attorney has a general or rassive or retaining lien upon all moveables, deeds, documents, and so forth that come into his hands unless they come for a specific purpose which would be inconsistent with the right of retainer; but Mr. Justice Backland in this case has deficitely decided, as appears more clearly from his judgment than from the form of the order, that with regard to the four bills of easts in question, the Attorney has not got the right to exercise any lien.

Now, the law on the subject, so far as it is necessary to state it, stands thus. By section 28 of the Limitation Act of 1908 it is provided that 'on the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished"; but in the case of a personal action for a debt limitation merely bers the plaintiff from having the particular remedy by way of suit and does not extinguish the debt. Thue, if the Attorney has any form of lien upon property in respect of his bills of costs he can exercise that lien not withstanding that, by the terms of the Limitation Act, he could not bring a suit. The next proposition of law which is of some importance is this, that so far as the position of a defendant asserting a right of set off is concerned, the limita. tion bar does apply to him. It applies to him as if he were bringing an independent suit of his own, the only differ-

ence being that, where he is defending bimself by way of set off, if his elaim was not barred at the time of the issue of the plaint, he may prosecute a ret-off even although the time may have elapsed before his filing, say, a written statement elaiming the set-off. But with that exception as to the terminus ad quem of the period of time, it is the law in India as well as in England that limitation applies to a set-off. Now, in this ease, the question of passive lien or right of retainer having been disposed of by Justice Buckland's judgment and the right of set-off being subject to the principle of limitation, it is or may be a matter of real importance whether, under rule 59. I can make an order against the client for payment.

On the affidavits, which are very short, there is, in essential matters, no substantial dispute, the contention expends itself upon things which matter little now. The retainer, the fact that the work was done, and the proper charges therefor are all beyond dispute.

As regards one of the bills, an objection is mentioned in the Attorney's own affidavit. It refers to the bill for Rs. 287 in the matter of the Landors cetate. It. was not apparently taken before Mr. Justice Backland but is one of the objections mentioned or aired before the Taxing Officer. The objection is, that by the terms of the letter of retainer in this particular matter the Attorney was to look for his costs not to his client the prospective mortgagee, but to the prospective borrower or mortgagor. If any real case of this sort was disclosed, I should except this particular bill from my order, but on the terms of the latter it is as plain as possible that there is no foundation for the contention that the Attorney was to act upon the footing that his elient should not be liable for costs as distinct from the usual arrangement that the mortgagor shall pay the mortgagee's costs incidental to the loan. The letter has been set out in the Attorney's affidavit. The affidavit in answer says merely this- "I am advised that the contention of the Raja that the bill of costs re Landora estate is not payable by him is valid." I have no facts at all before me upon which I can be satisfied

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that there is in this matter any bong file or substantial dispute as to the existence or non-existence of a spasial bargain treen the Attorney and the slient, where do I find it stated that on such and such a date a verbal bargain was made to that effec; nowhere do I find in the affidavit of the respondent a case whose seriousness or bona fides can be investigat. ed to the effect that this Attorney was to act for the lender but was to look entirely to the borrower for these coats. There is no doubt, moreover, that the transaction fell through and neither the letter nor any. thing else in evidence discloses any at all for so extraordinary a bargain as that the Attorney should do work for a lender upon the terms that, even if the losn went off, the lender should not be answerable for his own costs. There is, in my opinion, no matter for enquiry; no matter which needs to be elusidated in a suit; the jurisdiction of the Court under the rale is not ousted by a mere statement from the lip; outwards disclosing a willingness on the part of the cilent to sontend something for which he can indicate no concrete case.

The bills of sosts were taxed and the Attorney retained a certain amount and refunded the surplus stating at the time to the elient that when the Jourt reassembled after the vacation he make an application for the purpose determining whether he was entitled pay himself out of the moneys so retained, The first objection with which the Attor ney is met is that he cannot get an order for payment under rule 59 basause he has already been paid. In my opinion there is no substance in that objection more particularly having regard to the fact that by his letters the Attorney has retained the moneys earefully setting out that he will apply to subordinate his right. How little substance there is in that objection may, I think, be clearly seen by considering it from the point of view of the client. The client claims that the money is his, that there is no debt, and that nothing the Attorney ean do will entitle him to appropriate that fund. Claiming that, he cannot be heard to say that an order for payment eannot be made against him because the Attorney has already been paid.

I some now to the question which arises by reason of the lapse of time between the completion of the work and the reseipt by the Attorney of the money. It is alleged by the Attorney in his affidavit that from time to time he had made out his bills of costs in respect of the various cases and matters including the four bills now in question and that he had made them over to his elient for examination. "I had also from time time asked Raja Narendra Lal Khan to pay me the said costs including those mentioned in the second paragraph and the said Raja Narendra Lal Khan had on several occasions personally requested me that I should wait until his dues should be realised in the said execu. tion cases and should take my costs out of the monies so realised, and in compliance with such request I did not take any steps to enforce payment of my said easts." The answer to that and the only answer. in the affidavit of Ramrati Mukherjee, the agent of the client, is,-"I admit that the said Babu Hirendra Nath Dutt made over certain untaxed bill; but have no knowledge that the said Raja Narendra Lal Khan personally requested him to wait for pay-, ment until his dues in the execution case be realised or that the said Raja suggested that the costs of the said Baba Hirendra. nath Dutt should be deducted from the costs when realised." In that state of affairs, there is no denial, no statement even, that the elient had informed the deponent that the statement of the Attorney, upon oath was untrue. I feel, therefore, both entitled and obliged to set upon the footing of its truth.

The first question which arises, therefore, is, whether upon uncontradicted matter there is not an answer to any objection based upon limitation. In my opinion the evidence of the Attorney is good and sufficient evidence of a verbal promise on the part of the client, a promise given for consideration to pay the Attorney when money was recovered in the execution cases. This view agrees with a principle whose illustrations are well known. "A promise to guarantee a debt if the creditor will give time to the principal debtor is in

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the first instance an offer. It becomes a binding promise when the condition of giving a specified time or a reasonable time has been performed" (Pollock on Contracts, 7th Edition, page 202). I see no answer upon the present evidence to this contention, but Mr. Pagh has contended that, if there is any spesial bargain of the sort, rule 59 cannot be applied. In my opinion, unless the special bargain is a matter of dispute, the rule is in no way inapplicable. It says nothing about the Attorney's retainer or about an original or subsequent bargain. The test ir, whether there are in the end only questions quiring to be elasidated in a suit. If not, the only other condition is that the application shall be one for payment of the amount of a taxed bill of costs.

On this view, it is unnecessary for me to consider the somewhat difficult questions that have been discussed upon the assumption that if the Attorney were to bring a suit for the recovery of this money, he would be debarred by the Limitation Act, but I will deal shortly, as an alternative method of disposing of this application, with the question on that footing.

It has been held by authority in this Court, following authority in the Bombay Court, that under the rule in question neither Article 84 nor Article 181 of the Limitation Act applies. Article 84 dces not apply, because the proceeding is not a suit. Article 121 does not apply, as Mr. Pagh for the respondent is constrained by the dseisions to admit, because this applieation is not an application contemplated by the Civil Procedure Code. The result is that rule 59 is technically free from any Statute of Limitation. This matter having been drawn to the attention of Mr. Justice Chaudhuri in this Court, in the ease of Lakhimoni Dassi v. Dicijendra Nath Mukher ee (1), that learned Judge makes this observation:

"If there is no special rule of limitation, discretion has to be executed in allowing such applications which are of a summary nature. The rule itself provides for an alternative relief, viz, relief by suit, and cuch a suit can only be instituted within

the time allowed under Article 84 of the Limitation Act and it, therefore, seems to me that in exercising discretion with regard to such applications, when a question of lapse of time is raised, it should be considered whether the time allowed by Article 84 ought not to be the time limit."

I observe that the learned Judge there used very guarded language and as his observation is only obiter this unnatural. 1 do not feel quite certain whether the inclination of his opinion was that the time limit should be imposed in all cases by an analogy drawn from Article 84 or that in every case it was a question to be considered as a matter of discretion upon the special facts. In any case, Mr. Pugh for the respondent contends that any discretion, in order to be sound, must be so restricted and controlled by analogy from the Limitation Act; and he adds the further contention that, save on this sondition, rule 59 of Chapter XXXVIII of the Rules of this Court is ultra vires. It appears that the substance of the Rule was introduced into this Court in 1905 from the rules of the Bombay Court which have contained this provision for over 40 years. It must be admitted also that Mr. Pogh has against him on both the contentions just mentioned the case of Wadia, Gandhy & Co. v. Furshotam Sivis (2), and a very considerable body of jadicial opinion therein cited. As to the rule being ultra vires I think it is either valid or invalid as it stands: it is not conditionally valid or conditionally invalid. I think it impossible to hold that, because the Limitation Act sets a limit only to suits and applications contemplated by the Civil Procedure Code and has provided none for other applications, therefore the High Court's power under its Charter to make rules to regulate proceedings can be exercised by providing special forms of opportunities of making applieations to the Court. There is nothing in the case of Chunilal Jethabhai v. Dhayabhai Amulakh (3), which warrants and countenances this contention. It was concerned with an appeal as to which specific pro-

^{(2) 32} B. 1; 9 Bom. L. R 503.

^{(3) 32} B, 14 9 Bom. L, R, 1139,

^{(1) 51} Ind. Cas. 941; 46 C. 249; 23 C. W. N. 478.

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vision had been made by the Limitation Ast.

The contention that under rule 59 any discretion, in order to be right, must be exercised only within the limits set by analogy from Artisle 84 is, I think, much more serious. One naturally assumes that the intention of the rule was not to enlarge the rights of any parties but to enable a more summary remedy to be given in cases which did not require the more elaborate procedure of a suit. bas, however, to be observed that when this rule was borrowed from Bombay, decisions in Bombay had for a considerable time been to the effect that the Limitation Act did not narrow what the Court under this rule ought to do. The case already sited, and the cases therein relied on, show that the Bombay High Court under this rule, have made orders either without enquiring into the question of limitation though raised, or in spite of the knowledge that limitation would have barred a suit. Farther, and apart from these cases, in the ease of Ramhari Sahu v. Madan Mohan Mitter (4), a Division Bench of this Court dealt with an application which could be regarded either as made under a rule of the Court which was technically free from any statutory limitation or as made under section 558 of the old Code which attracted Article 168 of the Limitation Act. The application was allowed though the matter was purely discretionary in nature and although under the Code it would have been barred. I do not think it open to me on the authorities to lay down an abstract or a priori rule to the effect that it is necessarily wrong to exereise this discretion in a case where a suit sould not susseed; any such rule must be laid down, if at all, by a higher tribunal. I think my discretion is to be exercised in the present state of the authorities upon the well known lines and in the well-established manner on the partionlar facts of each case. The Limitation Act", as was said in a case already cited [Chunilal Jethabhai v. Dahyabhai Amulakh (3)], "being an Act of a restrictive character must be strictly construed."

In the present case, it appears from

what I have said already that there is a special state of fasts strikingly in favour of the applicant. On an application such as this, I think it makes all the difference when a question of lapse of time is raised whether the Court is dealing with a position in which the facts are not really in controversy or with a matter as to which real and substantial dispute upon the facts is shown. If, upon examination, it appears that a real dispute exists as to facts, then not only would a suit be a safer form of remedy for other reasons but the principle of limitation is itself a highly desirable safeguard. Here, however, that is not so, and a very strong appeal to have the Court's discretion exercised in his favour is made by an Attorney who can show without serious challenge such a scurse of conduct on his client's part as I have here to deal with. The Statutes of Limitation, still less the principle of limitation, are not intended as an aid to unecnecionable conduct though necessarily in securing other ends they afford scope for this. In this case, I can see no other end to be secured, because I think the more summary remedy can be given safely upon unchallenged facts. The debt subsists; its justice is unimpeachable; the appeal to the analogy of Article 84 is on the unchallenged evidence of the Attorney made in circumstances which render it not merely shabby but discreditable. In that state of affairs, if it be a matter of discretion, I answer that if I have the power I have the will. I must be shown that statutory provision or resognised judicial principle forbids, J. voush judicial discretion tcaaso extending by analogy a restrictive Statute in sacrifice of the marits of the oase.

The application succeeds with costs.

J, P.

Application succeeded.

PARBATI O. SHYAM RIGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1150 of 1919.

January 6, 1922.

Present:—Mr. Justice Piggott and

Mr. Justice Walch.

PARBATI AND ANOTHER—DEFENDANTS

-APFELL:NTS

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Raia SHYAM RIKH AND OTHERS -- PLAINTIPPS -- RESPONSENTS.

Provincial Insolvency Act (III of 1907), applicability of, to proceedings under Agra Tenancy Act (II of 1901).

The provisions of the Provincial Insolvency Act do not apply so as to govern or affect the rights of a land-holder against his tenant enforceable by means of any suit or proceeding under the Agra Tenancy Act, nor do they bar a proceeding in execution of a decree before a Revenue Court against a tenant who subsequent to the decree is adjudicated an insolvent. [p. 15, col. 1.]

A landlord obtained decrees for arrears of rent against his tenant: the tenant was subsequently adjudicated an insolvent: the landlord thereafter, with the leave of the Insolvency Court, brought the present suit challenging the validity of certain transfers by his judgment-debtor, the tenant:

Held, that the suit was not maintainable and that the proper remedy of the landlord was, in the first place, to take out execution of his decrees in the Revenue Court as against any property which he alleged to be the property of his judgment-debtor, and, that if he met with any resistance, the question was one for the decision of the Execution Court, in respect of which either party aggrieved had a right to seek a determination by means of a regular suit. [p. 215, col. 1.]

Second appeal from a decree of the Additional Judge, Moradabad, confirming that of the Additional Subordinate Judge.

Dr. K. N. Kat u, Meeers. Radhakant Malaviya and Baleshri Prased, for the Appellants.

Mr. B. E. O' Conor, for the Respondents.
JUDGMENT.

Pigiott, J.—This is a second appeal by the defendants in a suit for a declaration. These defendants are the wife and the minor son of one Chatar Singh who has been adjudicated an inscivent. The paincipal respondent, the plaintiff in the suit, is a landholder who on various dates between the 7th of March and the 29th of March 1911 had obtained from a Revenue Court decrees for arrears of rent against the aforesaid Chatar Singh. After the latter had been adjudicated an insolvent, this decree-holder applied to the Insolvency Court, estensibly under the provisions of section 60 (2) of the Provincial Insolvency Act, No. 111 of 1907, for the leave

of the Court to institute the present suit. The object of this suit is to challenge the validity of two deeds of transfer, dated the 10th of July 1.08 and the 16th of May 1910, respectively, whereby Chatar Singh more than two years prior to his insolvency, had purport. ed to transfer immoveable property in favour of his wife and his minor son. The suit was resisted upon various grounds, but the particular point which has been principally argued before us was not taken in either of the Courts below, and the reason for this becomes obvious erough as we consider that point in detail. There were objections taken to the form of the suit and a plea of limitation was raised, but both the Courts balow have decided in favour of the plaintiff in respect of legal objections, as well as on the merits, and have granted him the decree for which he sought. Now, the desision of the lower Appellate Court in this case is dated December the 19th 1918. On the 4th of March 1921 a Full Bench of this Court pronounced its deeision in the case of Kalka Dos v. Gaj u Singh (i) in which the whole question of the relations between the jurisdiction of the Revenue Courts, constituted under the Local Tenancy Act, No. If of 1901, on the one hand, and the Courts acting urder the Provincial Incolverey Ast, No. III of 1907. was reconsidered and determined. There had been a previous decision of this Court, Raghubir Singh v. Ram Chandar (2), according to which a land-holder could not institute a suit for arrears of rent ander the provisions of the Tenancy Act against a tenant who had been adjudicated an insolvent. This was the precise point dealt with hy the Judges of this Court in the Full Banch on:e. They overrule the older decision and held that the Provincial Insolveney Act dil not apply at all so as to g vern or affect the rights of a land holder against his tenant, enforcible by means of any suit or proceeding under the Local Tenancy Act.

In the second appeal now before us the main argument addressed to us on behalf of the appellants has been based upon the principles laid down in this Fall Bench decision. It seemed to us obviously necessary to allow the point to be raised and

(2) 12 Ind. Cas. 927; 8 A. L. J. 1287; 31 A. 121,

^{(1) 62} Ind. Cas 837: 43 A. 510; 19 A. L. J. 439; 8 U. P. L. R. A. 73 F B.

PARBATI O. SHITAM RIGH.

argued. The question is one of jurisdiction, and it could not well have been raised in the Courts below in view of the state of the law as deelared by this Court prior to the Fall Bench decision of March the 4th, 1921. We are not prepared to dissent from or to eritieise the decision of the Fall Bench in Kalka Das v. Gaziu Singh (1). Assepting the law to be what is therein stated, it becomes beyond question that if the Provineial Insolveney Ast would not bar suit by a land holder against his tenant brought before a Revenue Court under the provisions of the Tenancy Act, neither sould it bar a prosseding in execution of a decree before such Court. The whole of the present action, therefore, has been misconceived. The proper remedy of the plaintiff-respondent was, in the first place, to take out execution of his decrees in the Revenue Court as against any property which he alleged to be the property of his judgment-debtor. present appellants, or either of them, had resisted the seizure of any such property on the ground that it belonged to them in virtue of a transfer made prior to the insolveney, a question would have been raised which the Execution Court could dealt with, in the first instance, and in respect of which either party aggricved by the desision of the Execution Court would have a right to seek a detarmination by means of a regular suit. The suit out of which the present appeal arises was brought with the leave of the Court for the benefit, not of the plaintiff respondent alone, but of the Receiver and of the entire body of ereditors, For the reasons stated, it seems clear to us that the suit was entirely misconssived and not maintainable at all in its present form. We must, therefore, allow this appeal, set aside the decress of both the Courts below and direct that the suit be dismissed in its entirety. We order assordingly, but, under the siroumstances of the ease, we think it only just to direct that both parties bear their own costs in all three Courts.

Walsh, J.—I entirely agree, but having regard to the exceptional circumstances of the case and the miscarriage which appears to have resulted up to the present moment, I propose to say a few words with reference to the course which, it seems to me,

is still open in law to remedy the misshief, and which, on the materials before us one ean of sourse say no more, I should be prepared to take if I were a Revenue Officer approached by the plaintiff for the appropriate remedy in spite of the serious lapse of time. Section 14 (2) of the Limitation bet provides that in computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief, shall be excluded where such proseeding is prosecuted in good faith in a Court which from defect of jurisdiction or other sause of a like nature is unable to entertain it. On the facts as found in the lower Courts, the wife and the son in this case are in truth the same party as the insolvent and this Court is unable to entertain the suit by reason of jurisdiction. As the law stands, it is quite elear that the jurisdiction of the Civil Courts, strictly so called, and of the Insolvency Court, res. pestively, on the one hand, and of the Revenue Court, on the other, are mutually exelusive. A decree-holder, who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies, is not a ereditor under the Provincial Insolveney Act in respect of his rent or desree. His deeree is not a provable debt. Those statements are the corollaries of the Fall Bench decision referred to by mg brother which was passed in March 1921.

Bat in this case the insolvent, who is the father of the minor transferes and the husband of the female transferes interests are attacked by this suit, was adjudisated insolvent in May 1913. On that date the decision which has been overruled, namely, Raghubir Singh v. Ram Chandar (2), which had been decided in Ostober 1911, stared the plaintiff in the face, and any member of the legal profession who had been consulted by the plaintiff,-having regard to the plaint in this suit and the difficulties of procedure one may fairly assume that the plaintiff was earefully advised, -calling himself a lawyer and paying any respect to the decisions of this Court, was bound to treat PARVATHI AMMAL C. BLAYAPERUMAL KONAR.

the law as set forth by that decision. The decision was as clear and emphatic upon the point as it was possible for a decision to be. It pointed out, erroneously as it now appears, that the Provincial Insclvency Aet prohibited any suit being brought against a person who is declared an insolvent. It went on to declare that a landlord was not a secured creditor, and that he was in exactly the same position as any other creditor and that he could only see's his remedy from the Insolvency Court. subject to any possible existing remedy by way of distress which the Insolvency Court might permit. Under those circumstances, an attempt by the present plaintiff to execute his decrees, or to have applied to the Revenue Court to act in the face of that decision. would have looked very much like an abuse of the process of the Court. He took, and in my opinion rightly took, the only step open to him under the circumstances. He applied to the Insolvency Court, which this Court had told him was the only Court which could entertain his slaim, and obtained the leave of the Insolvency Court to bring the very suit which we are now compelled to hold was misconseived. He framed a plaint with scrupplous care and accuracy and claimed reliefs earofully prepared according to the then Judge-made law, and for myself I do not besitate to say that if the decision in 1911 of this Court had not been overruled. that suit would have been, if established in fact, clearly maintainable. The result of the suit, so far se it went, was to establish a gross fraud in fast committed by the incolvent and his family upon the plaintiff and the other creditore, and to obtain from two Courts a decision in the plaintiff's favour which, it cannot be too often repeated, was justified by the then existing state of the decisions. It was only after the appeal which we are row disposing of was filed. that the Full Bench desision declared the law afresh and destroyed the whole founds. upon which the plaintiff's suit hed been based. It seems to me not only conscnent with justice, but appropriate to the intention of section 14, sub section (2) of the Limitation Act, if ever a care was appropriate to the terms of that ecotion, that the Revenue Court should corsider whe. ther under these cireumstances the plaintiff should not be allowed to seek a remedy

of which he had been deprived by the decision of this Court.

W. C. A.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 160 CF 1921.

November 29, 1921.

Fresent: - Justice Sir William Ayling, Kr., and Mr. Justice Venkatasubba Rao. PARVATHI AMMAL - APPELLANT

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ELAYAPERUMAL KONAR-RESPONDENT.

Guardians and Wards Act (VIII of 1820), s. 7 (3)

"Will," meaning of—Court, power of, to appoint
guardian of minor.

Inasmuch as the word 'Will' in section 7 (3) of the Guardians and Wards Act occurs in intimate collocation with the words "or other instruments" it must be interpreted as meaning a written Will. [p. 217, col. 1]

An appointment of a testamentary guardian stands in the way of the appointment of a statutory guardian by the Court but in the case of an appointment of a guardian by an oral testament a Court can ignore the appointment and make statutory appointment of its own if it considers best in the interests of the minor. [p. 217, col. 1.]

Appeal against an order of the District Court, Tinnevelly, in Original Petition No. 150 of 1920.

FACTS appear from the judgment.

Mr. A. Swaning dia Aiyar, for the Appellant.—The appellant was appointed guardian by an oral Will of the child's mother. She should be preferred to the respondent. The mother has devised the properties to the child. The District Judge should have enquired into this question. Section 7 of the Guardians and Wards Act is a statutory bar to the appointment.

Mesers. K. Jogannadha Aiyar and K. R. Rangaswani Aiyangar, for the Respondent.—
The word Will' in section 7 (3) refers to a written testament. The implication is elear from the words which follow 'or other instrument."
There is no bar to the exercise of the Court's jurisdiction to appoint a guardian where some one elee had been appointed under an oral Will.

RUKEA U. DAJIBA BHAU,

JUOGMENT .- The respondent in this case is the father of a minor girl and has, at his own request, been appointed statutory guardian of her person and property under Guardians and Wards Act. This order is appealed against by the child's maternal aunt who alleges that she was appointed guardian by an oral Will by the mother of the shild who is said to have bequeathed the prop erty in question to the shild. The Distriet Judge has not enquired into the fact of this appointment of the appellant and we think he is justified in refusing to do so provided he finds, as he seems to do, that the appointment of the father as guardian is for the benefit of the minor. Oar attention has been drawn to sections 6 and 7 of the Guardians and Wards Act and in particular to clause (3) of section 7 which says: "Where a guardian has been appointed by Will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of goardian appointed or deslared as aforesaid have ceased under the provisions of this Act." We think that the word "Will" in this sestion which occurs in such intimate colloeation with the words "or other instrument" must be interpreted as meaning a written Will; and it is only in such a case that the appointment of a testamentary guardian stands in the way of the appointment of a statutory guardian by the Court. But in other cases, that is to say, in the case of the appointment of a guardian by an oral tostament, it would seem to be open to the Court to ignore this appointment and make statutory appointment of its own if it considers best in the interests of the minor.

As regards the merits, we see no reason to differ from the view taken by the learned District Judge. The learned Vakil for the appellant has drawn our attention to an allegation by his elient that respondent—the father, dishonestly and fraudulently obtained a sale deed and a othi deed in his own name and not in that of the minor and has complained that the District Judge has not taken evidence on this allegation. There is nothing in the District Judge's order to indicate that any evidence was tendered hafore him and the allegation that the Judge

refused to take evidence is denied in the counter-affidavit.

Lastly, our attention is drawn to the last statement of the District Judge's order dated 18th January 1921. "The respondent will deliver to the petitioner the whole of the minor's property which is in her possession." It is suggested that this order is not justified by any provisions of the Act. But, however this may be, this direction is not embodied in the final order of appointment which is now made the subject of appeal and we see no reason to concern ourselves with the question of its legality.

The appeal is dismissed with costs.

M. C. P.

J. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S O JURT.

SECOND CIVIL APPEAL No. 291 or 1920. March 13, 1922. I resent: - Mr. Hallifax, A. J. C. KUKSA-APPELLAST

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DAJIBA BHAU-RESPONDENT.

Limitation Act (IX of 1903), s. 22, applicability of-Joinder of parties-Appeals-Civil Procedure Code (Act V of 1933), O. I, r. 10, O. XLI, r. 20 - Party against whom no relief claimed, whether can be joined as respondent in appeal-Cross-objection, admission of, after 30 days-Notice.

Section 22 of the Limitation Act does not prescribe any period of limitation for the joinder of a party to a suit under section 32 of the Civil Procodure Code of 1882 which is rule 10 of Order I of Civil Procedure Code, 1903) or to an appeal under section 55) of the old Code (which is rule 20 of Order XLI of the new Code; and there is nothing to prevent such a joinder in either a suit or appeal even after it is barred by time. [p. 219, col. 2.]

Section 23 of the Limitation Act applies to appeals as much as to suits in principle. But a suit in which a defendant is joined, after the period of limitation has expired, must necessarily be dismissed as against him. In an appeal, however, there may be possibly reasons justifying its admission after time under section 5 of the Limitation Act. p. 220, col. 1.

A party to a suit against whom the appellant claims no relief can be made a respondent to the

appeal. [p. 220, ool. 1.]

KUKSA U. DAJIBA BHAU,

A cross-objection can be admitted after the expiry of :0 days from the service of notice of the appeal on the respondent even though it be put in in the course of the arguments in appeal. [p. 2.0, col. 1.]

Mr. D. T. Mangulmurti, for the Appel-

Mr. V. R. Pandit, R. B. and Mr. W. R.

Puranik, for the Respondent.

JUDGMENT .- On the death of one Ganga Bai the plaintiffs sued for possession of the im. moveable roperty that had been in her posses. sion. The first two defendants admittedly had no title whatever to the portion of the property recorded as theirs, which they seem to have held, if they held it at all, on behalf of the third and fourth defendants. The two latter maintained that they had a good title to the property in their possession but the finding was against them. In the course of their pleadings in a written statement filed on the 26th of July 1919 they alleged that they were not in actual possession of certain jungles on the estate, which had been leased prior to their coming into possession by Ganga Bai to one Dajiba Boau under a lease expiring in the following year 1920; they urged that, therefore, Dajiba Bhau was a necessary party to the suit and ought to be joined as a defendant.

(2) It is elear that Dajiba Bhan's presence in the suit as a party was no more necessary than that of the large number of other persons who held portions of the property as statutory tenants or lessees under Ganga Rai, and that the plea was taken on behalf of the third and fourth defendants only for the purpose of delaying matters and embarrassing the opposite party. The plaintiffs naturally resisted the joinder of Bhau strenuously, but the third and fourth defendants insisted on it and the learned Subordinate Judge ordered that he should be joined as the fifth defendant. decree of the Court ordered that the first four defendants should give the plaintiffs possession of all the property they elaimed with the exception of about 33 acres, in which it was ordered that they were to have joint possession with the third and fourth detendants. It was also ordered that the first tour defendants should pay their own costs and that the third and fourth should pay those of the plaintiff. The only order in the decree affecting the fifth defendant Dajiba Bhau is that the plaintiffs are to pay his costs.

(3) Against this decree the plaintiffs filed Civil Appeal No. 12 of 1920 and the third and fourth defendants filed Civil Appral No. 24 of 1920 in the Court of the District Judge. The plaintiffs made Dajiba Bhau & respondent to their appeal as well as the third and fourth defendants, but these two defendants in their appeal joined the plaintiff only as respondents. Very much the greater part of the plaintiffs' appeal was directed against the order that they were to pay the costs incurred by Dajiba Bhau. Only the last of their eight grounds of appeal has reference to the one other matter of which they complained, the retention of the and fourth defendants possession with them of a part of the land. The third and fourth defendants attacked the whole deeree and, in particular, they urged that "the lower Court ought to have held that Musammat Ganga Bai had no right to lease out the Parsadi of the shares of defendants Nos. 3 and 4 to Dajiba Bhau, defendant No. 5." This matter was entirely outside the case even with Dajiba Bhau joined as a party, but it is, if possible, even more outside the scope of an appeal to which Bhau was made a party Dajiba not at all.

(+) The general remarks of the learned Di-triet Judge in regard to the joining of Dajiba Bhau do not show much understanding of the situation and are contradictory in several places. They need not, bowever, be discussed. His decision is summed up in the following words: "Dajiba Bhau will be discharged from the suit. It is somewhat difficult to decide how his costs ought to be met. As, however, I think that plaintiffs ought to have some to know about his claim over the jungle and that the other defendants were not in possession thereof before they launched this suit I order that plaintiffs do pay balf of Dajiba's costs in the lower Court and that Dajiba bear the rest himself." In regard to the main claim against the third and fourth defendants certain modifications were made in the decree of the First Court. I do not think it necessary to set out any reasons for saying that the orders of both the lower Courts in regard to the payment of Dijiba Bhan's costs are wrong and that the third and fourth defendants ought to have

RURSA O. DAJIBA BHAU.

been saddled with the whole of them, or for holding that the deeree of the lower Appellate Court would have to be altered to that extent in a properly instituted second

appeal.

(5) The plaintiffs filed two separate second appeals against these two appellate decrees, as they were bound to do, making the third and fourth defendants respondents in their appeal in regard to the case itself and Dajiba Bhau the only respondent in their appeal in regard to his sosts. The latter is the appeal now under emeideration, the other having been decided in accordance with admissions made by both parties. In this appeal it was rointed out to the learned Pleader for the appellants that he ought to have made the third and fourth defendants parties if he wished to shift the responsibility for the half of Dajiba Bhan's costs that he had been ordered to pay from his own shoulders to theirs. He then applied to have them joined as respondents under rule 20 of Order XLI of the Civil Proesdure Code, and this was done, but it was long after the expiry of the period during which be could have filed an appeal against them. He explained that he was confused by having to file two separate appeals and made a mistage in the matter of the persone impleaded in each, which he urged ought to be considered a sufficient reason for admitting his appeal against the third and fourth defendants after time under section 5 of the Limitation Act, He added, however, that it was no part of his duty to see that Dajiba Bhau was paid his costs by some other person; it was Dajiba Bhan's own business to see to that and the plaintiffs are concerned only to show that they ought not to be made to pay them; at the same time, if the appellants can obtain a decree transferring the liability for the sosts to the shoulders of the third and fourth defeadants, they would prefer that to a decree merely exonerating themselves, as they appreciate the unfairness of making Dajiba Bhau pay even the half that he has already been ordered to pay, though naturally not to the extent of being willing to Day him themselves.

(6) For the third and fourth defendants it is of course pleaded that the appeal against them is barred by time. They were at first represented in this Court by the

learned Counsel who appeared for Dajiba Bhau before they were joined, and he began by supporting this contention that the appeal against them was barred by time realised later however that if it was, Dajiha Bhan would have to pay his own costs, as it was impossible to support the order that the plaintiffs should pay them. He then made over the case for the third and fourth defendants to another practitioner and on behalf of Dajiba Bhan alone supported the appeal.

(7) There has been a good deal of argument about the bearing of sestion 22 of the Limitation Ass on the matter in issue, Of the rulings quoted, I need mention only the Full Banah rulings of Calsutta and Allahabad in Ram Kinkar Biswas v. Akhil Chandra Chaudhuri (1) and Bindeshri Naik v. Ganga Saran Sahu (2) The effect of all the cases, except a few of the earliear Calcutta cases which have been overruled, is the same, and it is this. Section 22 of the Limitation Act does not prescribe any period of limitation for the joinder of a party to a suit ucder sestion 32 of the Civil Procedure Code of 1832 (which is rule 10 of Order I of the Code of 190s) or to an appeal under section 535 of the old Code (which is rule 20 of Order XLI of the new Code) and there is nothing to prevent such a joinder in either a suit or appeal even after it is barred by time. The section says nothing about an appeal, and all it lays down in respect of snits is that one in which a party is subsequently joined shall be considered as instituted against that party on the date of the joinder. Whether it was barred by time against that party on that date or not is a question which eestion 22 does not touch. With respect, I would say that all this seems apparent from the very plain words of the section.

(8) There has also been some controversy as to whethersestion 22 of the Limitation Act applies to joinder in appeals as well as to joinder in saits. In words it eartainly does not, but I sanuot see what other principle sould be followed in regard to appeals than that stated in that section as to be followed in regard to suits. Indeed, if that sestion

^{(1) 85} C. 519; 11 C. W. N. 353; 5 C. L. J. 243; 2 M. L. T. 1.57 (F. B.).

^{(4) 14} A. 15 1; A. W. N. (1893) 18; 7 Ind. Dec. (N. s.) 433 (F. B.).

ABDUL SAMAD U. SASISULDIN.

had never been enacted I find it difficult to imagine what other principle would have been followed in regard to suits. Section 22 undoubtedly applies to appeals as much as to suits in principle, if not in words. But there is a difference in the result, arising out of the application of section 5 of the same Act to appeals and not to suits. A suit in which a defendant is joined after the period of limitation has expired must necessarily be dismissed as against him. In an appeal, however, there may possibly be reasons justifying its admission after time under section 5.

section 5. (9) I hold then that, by the principle enunciated in regard to suits in section 22 of the Limitation Act, the appeal against the third and fourth defendants was instituted after the expiry of the period allowed for its institution. But I am of opinion that the eause shown by the learned Pleader for the appellante, which I have set out above, for its admission after time is sufficient, Undoubledly, the proper course would have been for the respondent Dajiba Bhau to file here crossobjection to the decree under rule 22 of Order XLI, contending that, in case it should be held that the plaintiffs were not liable to pay his costs, they ought to be made payable by the third and fourth defendants who had unnecessarily hapled him into Court. That a party to the suit against whom the appellant claimed no relief could be made a respondent to the appeal in this way was decided by a Bench of this Coort of which I was a member in Abdul Rahim v. Panda Shankarnoth, decided on the 12th of February 1921. It is also clear from the words of rule 22 of of Order XIII that such a cross. objection can be admitted after the expiry of thirty days from service of notice of the appeal on the respondent, so that if one had been put in even during the argument of the appeal, it might possibly have been admitted. I dcubt, however, whether sufficient reason could be said to exist in this ease for making such a consession. But if appellants press their application for the admission of their appeal against the third and fourth defendants after time and appear entitled to have it admitted. the fact that their application is entirely in the interests of some other person and its granting will do them no good canrot take away that right.

(10) For all these reasons, I condone the delay in the filing of the appeal against the third and fourth defendants who are the second and third respondents, and order that the decree of the lower Appellate Court shall be modified to the extent of making half the costs of the fifth defendant Dajiba Bhau in the First Court payable by the third and fourth defendants and not bу the plaintiffs. All his costs and those of the plaintiffs in the lower Aprellate Court and in this Court will also be paid by the third and fourth defend. ants.

G. R. D.

Decree modified.

OALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 408
CF 1920.

December 12, 1921.

Present:-Justice Sir N. R. Chatterjea, Kr., and Mr. Justice Panton.

ABDUL SAMAD MONDAL -PLAINTIFF
- APPELLANT

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BASIRUDDIN CHAUDHURY AND OTHERS
-DEFENDANTS-RESPONDENTS.

Occupancy holding, non-transferable, sale of, in execution of decree-Civil Procedure Code (Act V of 1908), O. XXI, r. 90 - Sale, how set aside.

Having regard to the view taken by the Special Bench in the case of Chandra Binode Kundu v. Ala Bux (1), the principle enunciated in the case of Dayamoyi v Ananda Mohan Roy Chowdhuri (2), that a transfer of the whole or part of an occupancy holding is operative against the raiyat where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside, can no longer be maintained. [p. 221, col. 2.]

Order XXI, rule 90 of the Code of Civil Procedure not only covers a case of material irregularity but also a case of fraud in publishing or conducting

the sale. [p. 221, col. 2]

Appeal against a decree of the Officiating Subordinate Judge, Dinajpore, dated the 29th of November 1919, reversing that of the Munsif, Additional Court, at Balurghat, dated the 28th of June 1918.

^{(1) 58} Ind. Cas, 353; 31 C. L. 510; 24 C. W. N. 818; 48 C. 184 (S. B. .

^{(2) 27} Ind. Cas. 61; 20 C. L. J. 52; 16 C. W. N. 971; 42 C. 172.

ABDUL SAMAD U. BASIRUDDIN,

FAOTS appear from the judgment.

Baba Mohini Mohan Chakraburtty (with him Babu Jatindra Mohan Chowdhury), for the Appellant .- The plaintiff is the appellant, The appeal arises out of a suit for possession. Plaintiff is the auction purchaser at a sale held in execution of a rent-decree. holding sold was a non-transferable cesupancy holding and the sale was by a co. sharer landlerd for his share of the rent. The defendant having resisted, the present suit has been brought. The defence was that the sale was irregular and void. The First Court decreed the suit. On appeal it has been dismissed. The defendant tried to set aside the sale in the execution proseadings but he failed there. Therefore, he cannot now, after the confirmation of sale, object to my taking possession. Refers to Order XXI, rule 92, Civil Procedure Code. So that at the date of his defense he had no right of suit, He had knowledge of the sale when he same to know of the present suit. Even admitting that he could raise in defence there is no finding sufficient to dismiss my suit. The defendant having omitted to make the application within one month after date of service of summors of this suit, he has failed to get it set aside and, therefore, his right of suit is passed. Refers to Chandra Binode Kundu v. Ala Bux (1), as regards the finding of the Judge that the sale was fraudulent I submit he has wrongly thrown the burden of proof on me. The defendant ought to have addused evidence as to fraud in service of summons. I am a bonu file purchaser for value and should not suffer.

Moulvi A. K. Faslul Huq, for the Respondents.—The finding of the Executing Court cannot operate as res judicata in the present suit. On the findings of the learned Judge it cannot be said that the defendant failed to apply within time. The finding is that the whole thing is fraudulent from start to finish. I had not lost my might of suit when I filed my defence in this suit as my application to set aside sale was pending before the Executing Court.

Babu Mohini Mohan Chakraburtty, replied in brief.

JUDGMENT,-The defendant had a non-transferable occupancy holding which

was put up to sale and purchased by the plaintiff. The plaintiff, however, obtained symbolical possession and not actual possession. He thereupon brought the present suit for declaration of his right by purchase and for possession of the land com Bafore entering prised in the holding. into his defenes, the defendant applied under Order XXI, rule 90 and section 47 of the Code for setting aside the sale, That application was dismissed by the Court before the present suit was decided by the Court of first instance. The Court of first instance decreed the suit in favour of the plaintiff, the auction purchaser.

Oa appeal the learned District Judge held that the sale was not binding as the tenant was not an "asquissing party." He observes: "The defendant might have avoided the sale for the mere asking of it by a petition." Evidently he relied upon one of the principles enunciated in the case of Dayamoyi v. Anania Mohan Roy Chowdhuri (2), vie., that the transfer of the whole or part of an oseupancy holding is operative against the raigat where it is made involuntarily and the raigot with knowledge fails or omits to have the sale set aside. The learned Subordinate Judge says that the defendant was not aware of the sale which could have been set aside for the mere asking and as the defendant was in possession, he was entitled to resist the plaintiff's claim. The principle however, upon which he relied, can no longer be maintained, having regard to the view taken by the Special Bench in the ease of Chanira Binode Kundu v. Ala Buz (1), which modifies the decision in Dayamoyi's case (2).

The defendant was thus in the same position as any other judgment debtor and could have taken steps to have the sale set aside in the ordinary way. He did apply under Order XXI, rule 90 and seation 47 of the Code. Now, Order XXI, rule 50 not only covers a case of material irregularity but also a case of fraud in publishing or conducting the sale. That application was dismissed and, that being so, and the sale not being otherwise invalid, we do not see how it can be held

^{(1) 58} Ind. Cas. 353; 31 C. L. J. 510; 24 C. W. N. 818; 48 C. 184 (S. B.).

^{(2) 27} Jud. Cus. 61, 20 C. L. J. 54 18 C. W. N. 971, 42 C. 172.

ANJUMAN.UN.NISA D. ASBIQ ALI,

to be invalid in the present suit brought by the plaintiff.

The result is, that the desree of the lower Appellate Court is set aside and that of the Court of first instance restored. Each party to bear its own costs throughout.

B. N.

Decree set aside.

OUDH JUDICIAL COMMISS:ONER'S

COURT,

FIRST CIVIL APPEAL No. 47 of 1919.

March 11, 1921.

Fresent:—Mr. Daniels, A. J. C. and

Mr. Lyle, A. J. C.

Musammat AN. UMAN UN. NISA—

DEPENDANT - APPELLANT

Shaikh ASH Q ALI AND OTHERS—PLAINTIFFS,
Musammat NASIM-UN-NISA—DEPENDANT
—RESPONDENTS.

Evidence Act (I of 1.72), s. 13-Judgment between third parties, when relevant-Civil Procedure Code (Act V of 504), O. X, r. 1-Pleadings - Examination of parties-Duty of Court-Evidence, value of, determination of.

A. obtained certain property under a gift. By virtue of the ownership of this property A brought a suit for pre-emption against B. and obtained a decree. In a suit by C. against A. in which the question was whether the gift in favour of A was a real gift or was a merely fictitious transaction:

Held, that the judgment in the pre-emption suit was relevant under section 13 of the Evidence Act as an instance in which A.'s right under the gift was

asserted and enforced, [p 22, col. 1.]

The proper way of clearing up pleadings after the plaint and written statement have been filed is that prescribed by Order X, rule; ivil Procedure Code. The ourt must, under that rule, at the first hearing of the suit, ascertain from each party or his Pleader whother he admits or denies the allegations of fact made by the opposite party except where such admissions or denials are already contained in the written pleadings and must record such admissions or denials. A written replication is not a substitute for this oral examination of the parties and their Pleaders, and it is of the urmost importance for the purpose of doing justice between the parties that this oral examination should be duly and carefully carried out by the Court, [p. 287, col, 1.]

Men, without deliberately intending to falsify facts, are extremely prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination [p. 23], col. 2.]

Judge, Lieknow, dated the 31st July 1-19.

Mesers. Muhammad Wasim and Haidar Husain, for the Appellant.

Mesers. E. R. Kedwai, Niamat Ullah and Abdul Rauf, for Respondents Nos. 1.3.

JUDGMENT.—Oa 27th February 1903 Shaish Mashaq Ali executed a deed of gift of his entire property in favour of his elder daughter, Musammat Anjaman un-nisa, the first defendant, who had been left a widow and was living with him. The property covered by the deed of gift ineluded an eight-annas share in two villages, Rasulpur and Karsanda, 61 bighas 17 biswas chakdiri land in Amethi, 15 bighas of sir land in Manza Garni Mustafabad, and other miscellaneous properties. The dead of gift was attested by no less than thirteen witnesses. It was registered three days after its execution at the Registration Office at Mobanialganj in the Lucknow district, within the limits of which the villages of Rasulpur and Amethi are situated. Immediately after registration of the deed of gitt five applications for mutation of names were presented in respect of the different items of the landed property comprised in the gift. The usual notices were issued and the name of Musammat Aujuman un nisa was recorded as owner in postession of all these properties by order of the Assistant Collector. The donor Mashuq Ali was lambardar of Karsanda. At the time of the gift an eight annas share in this village was owned by Mashoq Ali. The other eight-annas had originally belonged to Shaikh Ashiq Ali, the first plaintiff in this suit, but in the year 18 8 he had granted it to his son Dildar Hasain by means of a deed of gift. Notice was served on D.Har Husain in connection with the lambardari proceedings and he made a statement that he did not wish to be appointed limbardir and Musammat Anjaman an nisa was duly appoint. ed limbirlar by the Revenue Court on 23rd September 1903. Prior to this, on the day after the gift, cartain tenants of Manza Kareanda had been called up and kabalay its execused by them in the name of the doues. In fast the proceedings in this case contain

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an express admission by the plaintiffs that everything was done which was necessary to complete the gift by delivery of passession. Mashuq Ali died in the year 1914. Not only did the first defendant admittedly remain in undisputed possession of the properties for three years after that date but the rents of her share in the village of Rasulpur, of which Dildar Husain was lambardar, were actually paid over to her by Dildar Hasain during this period. In 1916 Musammat Anjumanun nisa contracted a second marriage with a gentleman named Muharam Ali. Thereafter, on 25th June 1917, the present suit was filed, by Ashiq Ali and two other plaintiffs for possession of the property and mesne profits. The second plaintiff, Chaudhri Athar Ali, is a transferee of a portion of the property from Ashiq Ali. The third plaintiff, Musammat Said un nies, is Mashuq Ali's daughter. She has obtained a sale deed of their respective rights from Mashuq Ali's two surviving younger daughters, Musammat Shafq un-ni-a and Busammat Nasim-un-niss, who are arrayed as defendants in the case. The property was elaimed by right of inheritance from Mashuq Ali and the plaint was entirely silent as to the deed of gift, though Ashiq Ali and his nicess were certainly aware of its existence from the year of its execution. The defend. ant naturally set up the gift and alleged that she was in possession of the property under it up to the time of the suit. The plaintiffs thereupon filed a replication denying the gift altogether but setting up in paragraph 24 an alternative case in the following terms :-

"If the deed relied upon by the defendant No. 1 be proved to have been actually completed according to law still it appears to be, on the face of, it a wrong and a fictitions (galat wa numnishi) proceeding which may have been taken on some ground of temporary expediency but which was never actually enforced nor can any same person mean to enforce such a ded as is fully evident from subsequent declarations and behaviour of Shaikh Mashua Ali himself."

The learned Subordinate Judge has accepted the plea contained in this paragraph and decreed the suit on the ground that the gift was a fictitious transaction and that Machua Ali had no intention of parting with the ownership of the property. He hases this souslusion on a finding that Machua Ali

the gift as before. It being at first admitted that if the deed was genuine everything necessary to give effect to it by delivery of possession was done, the Coart proceeds to find the deed not genuine on the ground that possession was never delivered. The defendant also set up a family enstom, supported by entries in the wajib ut arais of the different villages, by which brothers are debarred from inheritance in the presence of daughters. This issue has also been found against her. From this decision Musammat Anjuman-un-nica appeals.

The case was decided mainly on the evidence addused by the defendent and on the documentary evidence. The execution of the gift baving been denied, the evidence of the defendants was resorded first. With the excaption of three witnesses, Muhammad Wazir Khan, P. W. No. 59, and the two Police Officers, Inspector Shafiqui Hasan and Sub-Inspector Nazim Ali, the learned Subordinate Judge has not relied, to any large extent, on the oral evidence of the plaintiffs. Of the two Police witnesses he says: "These two witnesses are not of much help to the plaintiff on the question of management and possession of the property. But whatever they have said I have no doubt is strictly true." The remaining oral eyidenee adduced by the plaintiffs is sammed up in the follow. ing paragraph :--

"There would, of course, be found exaggerations and even fabrication in the statements of the plaintiffs' witnesses including
Dildar, who does not seem to be very
scrupulous in adhering to the truth. But I
am perfectly entitled to give credence to
the extent to which it is supported by
documentary evidence and the s'atements of
impartial and reliable witnesses."

The learned Subordinate Judge who heard the defendant's evidence was transferred while the case was proceeding so that only the oral evidence of the plaintiffs was recorded by the learned Subordinate Judge who desided the case. In considering the severe criticisms passed by the learned Subordinate Judge on the defendant's evidence in his judge on the defendant's evidence in mind that none of these witnesses were examined before him and that he had only the written record of their evidence to go upon.

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In this Court also the respondents rely mainly on documentary evidence. Such selections of the plaintiffs' oral evidence as have been laid before us with a view to showing what their case was do not impress us as in any way reliable.

The following pedigres will serve to elucidate the relationship of the parties:-



The ease for the appellant, Musammat Apjuman un nica, is so strong that it is difficult to understand any Court decreeing the suit against ber.

The deed, as we have already seer, was attested by thirteen witnesses. These in-

(a) the Patwaris of Rasulpar, Karsanda and Amethi, the villages within which the great bulk of the property was situated,

(b) Ajudbia Prasad, the agent who was

managing the property,

(c) Muhammad Rissat Ali, the father inlaw of the donor's second daughter, Said unniss, who is now the third plaintiff in the ease, and

(d) two substantial tenants of the estate, Bhawani and Sahibdin,

The remaining witnesses were friends or relatives of the donor. The donor appears also to have taken steps to inform his married daughters or their husbands of this intention with a view to getting their assent to it.

Exhibit A 194 is a letter from Shafiq unnies to Mashuq Ali saying that she has heard from her sister that Mashuq Ali is going to make a gift to his eldest daughter and that it was a good thing that he should do so.

Exhibit A 195 is the letter of Shafquan-nisa to Said-an-nisa informing the latter to the same effect and saying it is not known who will be the mukhtar. These letters are undated.

Exhibit A 199 of 7th February 1903 is by Naim Ullah, husband of the youngest daughter Nasim-un-nisa, to her father saying that she has heard about the deed of gift (which had not then been executed but was in contemplation) in favour of her eldest sister and is delighted to hear of it. She saggests that there ought to be a partition to prevent disputes in future. (At the time of the gift the property was held jointly by Mashuq Ali and his nephew Dildar Husan). She also suggests that it will be a good thing for the old forinda to continue to manage the property.

Exhibit A 197 is a letter from Chaudhri Nabi Jan, busband of Shafiq un nisa, also stating that he has heard with great pleasure about the deed and suggests himself, Naim Ullab, and Ashraf Ali, i.e., the husbands of the three surviving daughters, as attesting witnesses. This letter was dated February the 27th and, therefore, must have reached Mashuq Ali after the execution of the deed, though probably before regietration. Shaikh Aznat Ullah, father of Naim Ullah and taluqdar of Saidanpur, has deposed that Mashug Ali asked him prior to the execution of the deed of gift if he had any objection to it and he said he had not.

Mashuq Ali in the deed itself states as his reason for giving his property to his eldest daughter to the exclusion of her sisters that, while she is a shildless widow, her sisters Shafq un nisa, and Nasim un nisa are married into well-to do families and do not stand in need of any benefit from his property nor can they live in his residential house. This is corroborated by the evidence of Shaikh Azmat Ullah. He says that when telling him of the intended gift, Mashuq Ali said that he, the witness, was well off and so was Chaudhri Nabi Jan, the husband of Shafq un niss, and that they did not stand in need of his property. The witness replied that he was not so well off that he did not eare about getting ANJAMAN. UN-NISL U. ASBIQ ALI.

additional property-an answer which has altogether misrepresented by the learned Subordinate Judge in his judgment-but in reply to direct A question whether he objected to the deed of gift be said that he did not. Mashuq Ali's second daughter, Said-un-nisa, had a son Fasabat Ali. It is stated in the deed of gift that Anjuman un-nisa having children herself has made Fasahat Ali her heir and betrothed him to Quiear un nise, the daughter of her deceased sister Badr un nisa. By this arrangement Mashuq Ali hoped that his house would continue to be compied generation after generation and that the descendants of Said-un-nisa and Badr-un nies would also ultimately be bonefted by the property he was bestowing on Anjaman nn nisa, Fasahat Ali and Quisarun-nisa were both young children at the date of the gift and the projected marriage in fact never came off, but there is some indication that Fasabat Ali stood at one time in special relation to Anjuman-unniss in that his first observance of the Ramzan fast, an important occasion in the life of a Muhammadan boy, took place at the residential house referred to in the deed (tide syidence of Musammat Said-un-nisa). It is admitted that this was not the case with any of the donor's other grandsons.

So much for the circumstances attending the execution of the gift. We now some to

Mashaq Ali's subsequent condust.

On the very day after execution of the deed of gift Musammat Apjuman-un-nisa was taken by her father to Karsanda, four miles from Amethi, in order that the change of ownership and possession which had taken place might be publicly, recognised by certain tenants presenting sears or making an advance payment of rent (skagun) to her or executing kabuliyats in her name. Some doubt has been throwq on this evidence by the learned Subordinate Judge on the ground that it would be unnatural for Mashuq Ali to sit by while money was presented to the defendant or kabuliyats executed in her name. This is to ignore the whole purpose of transaction, which was to afford a public indication of the fact that Musammat Anjuman nies had now become the owner of the property in place of her father, A

similar seremony was gone through on the occasion of the gift to Dildar Husain-(Evidence of Dildar Husain, on page 849). Another criticism is that Ure ceremonies were taking place at Amethi for three or four days at the time of the gift. These seremonies admittedly take place at night and the distance of four miles to Karsanda is not so great as to render it in any way improbable that the journey should have been taken as alleged. In dealing with this incident, as in other parts of the judgment, the learned Sabordinate Judge in some instances misrepresents the effect of the evidence. He says, for instance, that evidence of Sant Bakhsh negatives the execution of any kabuliyat at Karsanda. What the witness actually says is that be stayed about an hour and saw nazars presented by six or seven tenants but that kabuliyats were not executed while he was there.

Several of the kabuliyats which were executed on that occasion have been put in. They are admittedly written out by Ajudhia Prasad who was then looking after the Karsanda property as general agent. Ajudhia Prasad died in the year 1907 so that it is impossible to suggest that they have been fabricated for the purpose of this case. Indeed, the Subordinate Judge himself finds that the fast "that these documents came into existence on that date, i, e., 23th February 1903, is not seriously disputed by the plaintiffs" (on page 899). It appears to us, therefore, that the reasons given by the learned Subordinate Judge for easting doubt on this part of the defendant's case are altogether without weight.

We have already referred to the fact that the document was registered three days after its execution and that mutation of names was applied for and obtained in respect of all the properties before the end of March 1903. Mashuq Ali was separately examined on path in connection with each of the five applications for mutation and on each occasion he states in slightly varying language that he has made a gift of his property to Anjuman un niss and put her in possession and that he desires her name to be recorded in the Revenue Records.

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The lambardari proceedings by which the appellant was appointed lambardar of Karsanda in place of her father are also important. Her appointment as lambardar was by no means a necessary consequence of the deed of gift or of mutation having been effected in her favour. The Circulars of the Board of Revenue relating to the appointment of lambardars, issued under section 2.44 (f) of the U. P. Land Revenue Act, 1901, and having the force of law, prescribe that—

"no minor or female shall be appointed to be a lambardar unless special reasons exist for making such an appointment, or unless no co-sharer less ineligible for the appointment is available."

The rules also prescribe, as the learned Subordinate Judge himself points out, that no person should be appointed to be a lambardar who is not a so-sharer in the mahal and in pessession of his share. If, therefore. the defendant had not been in possession of the share transferred to her by the gift, or if Dildar Hussin, the son of the first plaintiff, one of his principal witnesses, and the owner of the other half share in the villige, bad objected, she could not have been appointed. So far was this from being the case that Dildar Husain who now comes forward to assert that the gift is a figritious transaction appeared before the Sub-Divisional Officer of the pargana and declared that he would not accept the lambardarship of the village.

On 21st March, while the mutation proceedings were pending, Anjuman un nica executed a power-of-attorney for the management of the property, she berself being a pardanashin lady. This power of at crosy was in favour of five persons. Lala Ajudhia Praiad, who had been already managing the property on Mashuq Ali's behalf, and his son Nand Lal were the persons who were actually to collect the rents and look after the property. The other three persons, Riseat Ali, Nasir Alı and Sajjad Ali were relatives of the family whose names are said to have been put in for the purpose of check and enpervision. As we have seen from the correspondence already referred to, the question of the appointment of a mukhtar had been under consideration even before the deed was executed. This deed also was duly registered. The Sab-Registrar attended at the defendant's residence. She was identified behind the parda by two of her couring, Shamehad Ali and Asaf-uz-ziman, and acknowledged the execution of the deed of her own accord and volition.

From that time forward and down to Mashuq Ali's death every transaction relating to the management of the property was conducted in the name of the defendant as owner. The fact that the revenue receipts stand in her name is not of primary importance as this would necessarily follow from her name being recorded in the Patwari's papers. Of more importance is the fact that the rents were collected on her behalf by Ajudbia Prasad and after his death by Nand Laland that leaves and rent rescipts were given in her name. Anjuman-un-pisa herself was illiterate and much has been made of the fact that on one or two leases and other documents Mashuq Ali signed her name for her even going so far as to write "by ber own pen." They do not seem to have been very particular in the matter of signing for one another in this family, for in his deposition of 23rd January Dilder Hussin states with reference to a certain receipt-

"Exhibit A 280 I find is written by my nucle and the signature of my father has also been made by him, and he used to do this not infrequently."

This circumstance, however, is of very little assistance to the plaintiffs. It rather goes to show that, throughout, and even when he himself was giving a receipt or signing a lease, Mashuq Ali regarded his daughter and not himself as the person to whom the property belonged.

House tax was paid in respect of the ancestral house at Amethi and here also the entries are all in the name of the defendant. In one instance, Exhibit A 153, the money was actually paid in on her behalf by the plaintiff Ashiq Ali and in another instance, Exhibit A 149, through his son Dildar Hugain. In one solitary instance, Exhibit 39, a receipt for Rs. 3 of 1st November 1904 was given in the name of Mashuq Ali.

Certain suits in the Rent Courts have been relied on. These are discounted by the plaintiffs on the ground that any proceedings in the Revenue Court must necessarily be taken in the name of the recorded proprietor. There is, however, one suit in the Civil Court which is of some importance,

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Exhibit A 25 is the plaint in that case. In 1907 the defendant fled a suit for preemption against Karim Bakhsh and Ala Bakbsh in respect of a share in Garhi Mustafabad. She brought this suit in virtue of the title acquired under the gift and in reliance on the fact that she was in possession under it. No objection was taken by the defendants in that suit on the ground that the gift in her name was fictitious or that ehe was not in possession. On the contrary, they admitted her right and ber suit was decreed, It may be said, no doubt, that the defendants in that ease were third parties but the transaction is certainly relevant under section 13 of the Evidence Act as an instance in which the defendant's right was asserted and enforced. The suit was actually prosecuted by Dildar Husain as he himelf admits. order to raise the money necessary to pay for the pre-empted property the defendant executed a mortgage of that property (Ex hibit A 27) in fayour of one Arehad Ali. The plaint in the case was signed on the defendant's behalf by her father but she certainly knew all about it and the execution of the mortgage in favour of Arshad Ali was necessarily her own act. After her father's death the defendant re-sold the property at a profit which has gone into her own pocket (vide erass-examination of Dildar Husain et o. page :62). We mention these sireumstances because of a suggestion put forward in argument on behalf of the plaint. iffs that the pre emption proceedings were merely carried on in the defendant's name without her having any knowledge of or interest in them.

The private assounts of income and expenditure prepared by the karinda from the execution of the deed up to Mashuq Ali's death were all prepared in the name of the defendant. If the deed was fistitious there was no need to keep up appearances in these private accounts. Much stress has been laid by the learned Advocate for the respondents on the fact that the sighas from which these accounts were prepared have not been put in. Nand Lal says in his evidence that a large number of papers. were destroyed after Ajudhia Prasad's death. The siahas were merely the rough material from which the account of income and expenditure was prepared and there was no

particular reason why they should have been preserved. Nand Lal is a very partisan witness and the learned Counsel for the appellant has frankly stated that he is not prepared to rely on his evidence except where it is corroborated. In this particular instance his evidence is probable in itself and there is no reason why it should not be true.

Certain cha dari or under proprietary lands were included in the deed of gift. The rent of these was paid to the superior proprietor Mirza Muhammad Abhas. The receipts, Exhibits A 159 to A 175, have been produced and they are all in the name of Musammat Anjuman-un-nisa. Mansab Ali Khan, the agent of the superior proprietor, has been called as a witness and he swears that Mashuq Ali himself told him that he had made a gift of the property to his daughter and that the entries should be made in her name.

In support of the defendant's case two letters of Ajudhia Pracad to Mashuq Ali and three letters of Nand Lal to the defendant herself have been relied upon. All these letters are attacked by the plaintiffs as forgeries. They entain direct recognition of the defendant's title and of the fact that the karind is acting as her agents. The two letters of Ajudhia Prasad are in his handwriting and are proved to bear his signature. Exhibit A 210 is a very brief letter merely stating that if a new patta of certain land is given to one Tilak it will result in loss to the defendant. Echibit A 209 is longer and refers to several transactions in connection with the management. The reasons given by the learned Subordinate Judge for rejecting it are-

(1) that it mentions certain land as having been granted to Chheda Lodh on Rs. 10 as paid in the previous year with an enhancement of Rs. 2. The lease was executed for the year 1315 Faeli, whereas there was no tenancy of Chheda Lodh in the year 1314 and, therefore, there could be no enhancement;

(2) that according to the previous lesse. Exhibit A 233, the previous rent was Rs. 9 and not Rs. 10;

(3) that the letter appears to mention the

defendant's name too often, and

(4) that it is difficult to believe that Ajudbia Prasad could have asked for the directions of defendant,

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The learned Subordinate Judge admits that the bandwriting of the letters bears strong resemblance to the admitted bandwrit. ing of Ajudhia Prasad. The last two reasons given by the learned Subordinate Judge are matters of opinion, but the first two are demoretratably wrong and indeed the fasts referred to lend strong support to the genuineness of the letter. Chheda Lodb, it is true, was not resorded as tenant in Faeli 1313 but his father Ganga Lidb was so record. ed (Exhibit A 62) on a rent of Rs 9 0.6. The same document shows that in Fasli 1314 an enhancement of Re. 1 was made bringing the rent up to Rs. 10 0 6. Finally, a further enhancement of Rs. 2 was made and in the wasilbog; for 1315 Fasli, Exhibit A 61, we find the rent given as Rs. 120.6. With regard to the letter of Nand Lil the learned Subordinate Judge remarks at o. page 30 of his judgment that the learned Conneel bas conceded that it would not be safe to rely on Nand Lal's letters in support of his ease. The learned Coursel disputes this admission, and, whatever may have been the position taken up in the Court below, the letters have been discussed in detail in this Court by Coursel on both sides and the appellant's Counsel has been at considerable pains to show that the statements of fact made in them are in accordance with the facts proved from the wasilbagis and other doenmentary evidence. In view, however, of the learned Subordinate Judge's statement we refrain from examining them in detail in this judgment. It is common ground that both the plaintiff Ashiq Ali and his son Dildar Husain repeatedly asknowledged the title of the defendant both during Mashiq Ali's lifetime and after his death. In the ease of Ashiq Ali there is a receipt, Exhibit A 265, dated 2cth July 191, for the sale of mahur erop of Musammat Aujuman unnisa's shere which is admittedly in his handwriting and he acknowledged her title in this evidence in the Mutation Court in connection with the cale to Hira Lal which is referred to elsewhere. In one instance in 1909 house tax was raid by him on her behalf as appears from the receipt Exhibit A 153. These transactions were all in the lifetime of Mashuq Ali. After Mashuq Ali's death we have some half dezen letters addressed by Ashiq Ali to the defendant hercelf, all of which clearly asknowledge her

title to the property. In one of them he sends her her share of the under proprietary rent. In others he speaks of the sale of the produce of her share in groves in Rasulpur. In another he asks that the amount due to her and to Dildar Husain on account of sale of mango erop should be spent in repairs to the bouse. The learned Subordinate Judge indeed propounds the question: "Why did Ashiq Ali state orally, in writing in Court and out of Court, that Mashuq Ali had excented the gift and the defendant was the owner of the property?" (o. page 954) but though he devotes several pages to its disenssion it is difficult to find in them any sort of reason why these admissions should have been made if the fact was otherwise.

The learned Subordinate Judge on page 89 of the printed judgment notices the fact that Ashiq Ali has not stepped into the witness. box to explain his admissions, but says that this is to some extent exensible because Ashiq Ali has been proved to be very old acd to have lost a good deal of his powers of memory, sight and reasoning. alleged proof rests on a statement of Dildar Husain in examination-in-chief that his father was 84 years of age, weak in body and mind and destitute of eye-sight and that he has not been in his proper senses during the past six months. When pressed in crossexamination as to the basis of the last state. ments he said that his only reasons were -

(1) that Ashiq Ali made a mistake as to whether an allowance sent to him had been for the month of October or November, but afterwards agreed with Dildar Husain and said that he had forgotten and that Dildar Husain was right on the point, and

(2) that when questions were put to him, he no doubt answered the questions but went on to talk about other things which did not bear

on the subject.

He was obliged to admit that within the last three months his father had attended Court on eight or ten cosseions in connection with a case regarding a deficiency of stampduty. It also appears from another passage in his evidence that Ashiq Ali must have instructed his Pleader as to the preparation of the replication. Dildar Husain denies that he himself had anything to do with it and easy that his father had stated to him that he was going to the Pleader to get the replication prepared. His father also helped

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Ashraf Ali to draw up the list of moveable

property attached to the plaint.

Dildar Hussin almits (o. page 852) baving done several acts which if unexplained would go to show that he accepted the dead as a gennine and real transaction. He admits, for instance, having written kabuliyate in the defendant's favour on behalf of tenents and having paid house tax in her name. In an earlier portion of his evidence he admits that after the death of Mashuq Ali defendant has been receiving the share of the profits of the property from the havinda. He entinues—

"There have been Zamindari dues received by me after the death of Piare Sahib. I took half of such things and gave the other

half to the defendant No. 1."

The explanation he offers is that he did these acts against his interest by his unale's direction because if he had not done so his unels might have become alive to the danger that Dildar Hasain might afterwards seek to impeach the gift and to the necessity of completing it by a genuine delivery of possession. He professes to have maintained this Mashiavelian policy during the whole of the eleven years which elapsed between the execution of the gift and Mashuq Ali's death. This explanation would have been difficult to accept even if the admissions in question had been confined to Mashuq Ali's lifetime. breaks down hopelessly when we find that they were continued even after Mashuq Ali's death when there was no motive for maintaining the deseption any longer.

In view of all this evidence, the burden of proving that the gift was fictitions lay heavily on the plaintiffs. This is conceded by the learned Subordinate Judge in the earlier portion of his judgment (o. page 10).

"It is contended," he says, that there being a registered deed of gift in favour of the defendant, and there being such evidence as has already been detailed in support of the defendant having been exercising acts of ownership with respect to the property in enit it lies upon the plaintiffs to show by very cogent evidence that the gift is fictitions and benami and was never given effect to. There can be no doubt of the correctness of this contention."

What in fact have the plaintiff: proved? Merely that the management of the property remained mainly in the hands of Mashuq

Ali. It is common ground between the parties that this was the case. It was indeed only natural that it should be so. The defendant was a pardanashin lady incapacitated by her position from looking after the property in person.

She is, moreover, illiterate except to the extent of haing able to sign her name in Hindi. She owed her possession of the property to the generosity of her father to whom she would naturally look, and it would be most unlikely that she should either quastion his management or attempt to put a sheek on his expenditure. She says, on the first day of her examination, that she had no one except her father to advise and help her in managing the gifted property and that the karindas used to render assounts to her father and he explained them to her. Nand Lal ones brought the accounts to her direct after Ajudbia Prasad's death. She referred him to her father. At the conclusion of her evidence she was questioned by the Court as to whether any accounts were ever kept as ber father and she neew ted her and eaid-

"My father never called for any account from me. I never called for any account from my father. He was my father. How I could call for an account from him? I never raised any objection whenever my father asked me to give him any sum for expenses after the execution of the deed of gft. I could not raise any objection as he

was my own father."

We have already seen that Mashuq Ali from the time of the gift right down to his death constantly acknowledged his daughter's title to the property by granting receipts, paying rent and revenue and doing all other acts of management in her name and that the private assounts of income and expenditure were also kept in her name. The instances addnesd to show that he ever claimed to dispose of the properly in his own right are of the most flimsy description. Exhibit 52. for instance, is a letter in which he says that he is sending one anna six pies (the equivalent of three half pense) for the price of kerosine oil for the shrine "for my share." The letter is undated and the inference drawn by the learned Subordinate Judge as to its date being subsequent to the gift is presarious, but even if it be taken that it was subsequent to the gift it would be absurd to

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attach any importance to a casual expression of this kind with reference to a petty payment for the lighting of a shrine. Another instance is with reference to a theft of nine sovereigns and Rs. 90 which took place at the family house in 1908 from a looked box. The box was on a portion of a roof where Mashuq Ali was sleeping and sould apparent. ly be approached only through the canana portion of the house as that is how the thief is said to have got in. Two letters from Mashuq Ali, one to Ashiq Ali and the other to Dildar Hussin, have been produced with reference to this transaction. Reliance is placed on these letters for two purposes, first that in one of the letters he speaks of the box as "my box" and the property as "my property," and secondly as contradicting the defendant when she says that each in hand used to be kept inside the sanana in her charge. The letter hardly be said to support the second inference seeing that the thief admittedly broke into the sanana in order to commit the theft. As regards the general question whether the money was kept in the canana, it is a very common practice for this to be done for reasons of security even if the lady were not the owner of it. As regards the first point, even if the money was estate money it was for the time being in Mashuq Ali's sharge and it would be highly risky to draw any inference as to the nature of the gift from the fact that te tells his brother or his nephew that his box has been broken into and money stolen. Another supposed instance was a letter of Nand Lal, dated 23th February 1914, Exhibit 76, in which, when sending the monthly pay amounting to Rs. 40, he says that one rupee is already in deposit with the defendant so he sends only the balance Rs. 39. It is unnecessary to consider this further as the learned Subordinate Judge has himself rejected the explanation offered by the plaintiffe. This letter is really in favour of the defendant and not against her.

It should be mentioned here that the method of remitting money both in the time of Ajudhia Prasad and of Nand Lal was to send a fixed monthly amount called "Tankhwah" or pay to each of the ecowners of the property, remiting the balance after making up the accounts at

the close of the year. The amount so fixed was not always the same but it was always a definite amount which the karinda had to send.

Exhibit 19 is a relinquishment of a single field purporting to be executed by two tenants Dwarks and Debi in respect of one plot of land and field in the Tab. sil in accordance with the Oudh Act. It asks for notice to be served on Ashshe Sahib and Piare Sahib, i.e., Ashiq Ali and Mashnq Ali. Dwarks is slive but has not been called and it is only the fact that the dosument was formally filed hefore the Tabsildar that makes it admissible at all. One cannot but be struck by the contrast between the importance which the learned Subordinate Judge attaches to this document, to which neither Mashuq Ali por Ashiq Ali were parties, as a solemn proceeding in Court" in which Machuq Ali's title was recognised, and the easy way in which he brushes aside all the numerous proceedings in Court which recognise and support the title of the defendant.

The three instances on which most stress is laid are—

(a) a joint sale deed of 13 biswas by Mashuq Ali and Ashiq Ali in favour of Hira Lal;

(b) a deposition dated 23rd April 1909, Exhibit 118, of Mashaq Ali in a pre emption suit, and

(c) three statements of receipt and expenditure of the under-proprietary land, Exhibits 23 to 25.

The first two transactions are also relied on by the defendant as admissions in her favour. In the case of the sale deed mutation was only effected in respect of Ashiq Ali's half share in the property and was rejected in respect of Musammet Anjaman. uc-nisa's share. Ashiq Ali was examined in the case and admitted that Mashra Ali did not own the half share which the deed purported to transfer as his but had transferred The vendee himself it to his daughter. seems to have been aware that there was some flow ic the transaction for he said that if half the share had been given away prior to his sale deed mutation might be effected in respect of the other half Both these statements are on the record, Exhibits A254 and A253, as is also the mutation order affecting mutation in respect of 61 biswas

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only. We have no information as to how it same to be executed; we do know that when the matter came into the Court the defendant's right was asknowledged and was given effect. It is equally difficult to see how the plaintiffs can draw any advantage from Exhibit 118, Mashuq Ali was examined as a witness in a pre-emption case between third parties with reference to a disputed sale of property in Amethi. He did in several passages speak of his brother and himself as being joint owners but in the very same deposition he went on to say that he was no longer owner, having given all his property in Amethi to his daughter Musammat Anjuman-un nisa.

The importance of Exhibits 23 to 25 is that they purport to speak of the share of Mashuq Ali and that they bear his signature. Their genuineness is disputed both here and in the Court below. It is urged by the defendant that the plaintiffs have got hold of some old statement of assount prior to gift in which the date of the year was not given and added a date subsequent to the gift. In support of this it is pointed out—

(1) that the portion containing the mention of the year, especially in the case of Exhibit 23, may easily have been added afterwards and is clearly in different ink and added after the signature of Mashuq Ali,

(2) that the Exhibit 23 purports to be for the whole year ending May : 5th, 1914, and Exhibit 24 for two months of the same year, and

(3) that the entries regarding payments of rent from tenants do not correspond at all with those recorded in the Patwari's sighas.

The learned Subordinate Judge himself (o. page 53 of his judgment) is not prepared to rely on Exhibit 23 as a genuine document and we think that the genuineness of all three is open to grave suspicion.

The suggestion of the plaintiffs is that Mashuq Ali used to appropriate the pay as his own. In this connection we have on the record a letter, Exhibit 32, of 21st August 1919 written by Mashuq Ali from Sandila to Ashiq Ali at Amethi in which he tells the latter to get the rest of the pay from Nand Lil, and after paying Ra 3 to the sipuli Makend to send the balance to the defendant. The learned Subordinate Judge's

ordinary. He attaches no importance to the fact that the pay was said to be sent to the defendant, but, on the other hand, he considers that Machua Ali ought to have told Ashia Ali, who was at Amethi, to take instructions from the defendant, who was at Lucknow, as to what to do with the pay. In this connection it may be noted that though the karindas Ajudhia Pracad and Nand Lal may have on one or two occasions written loosely to Machua Ali about sending "your pay," Mashua Ali never speaks of the pay as his own. He speaks of the pay.

The oral evidence of Muhammad Wazir Khan, Honorary Assistant Collector, is also relied on by the learned Subordinate Judge. This witness admits that he has no personal knowledge regarding the question of possession but he deposes to a statement said to have been made by Mashuq Ali between 1:08 and 1910 in these words—

"I am still in the same way owner and in possession," meaning that he continued to be owner and in possession of the property before the gift. Assuming the witness to be entirely honest in what he saye, it would obviously be dangerous to rely on his being able to reproduce exactly from memory the effect of a remark made to him in conversation nine or ten years before he was called on to give evidence. As Mr Taylor says in his back on Evidence (Volume I, page 446);—

"Men, without deliberately intensing to falsify facts, are extremely prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination.

The theory adopted by the Subordinate Judge, and pressed in this Court, to explain away this mass of evidence, is that the deed of gift was intended to operate as a Will. This was not the theory put forward by the plaintiffs themselves in the Court below. In their replication, as we have seen, they merely suggested that the deed of gift was executed as a temporary expedient. As to what the temporary nesessity was which led to its execution the pleadings are entirely silent. During the progress of the case the plaintiffs put forward through the mouth of the third plaintiff Musammat Said-un-n a the case which the learned Sabordin a Judge describes as the theory of a age at ANJAMAN-UN-NISA U. ASBIQ ALI.

trust. In her examination in chief Mus.m. mat Said un nies originally cenied the gift altogether as will appear from the following extract from her evidence:—

"To my knowledge, my father never in fact gave any of his property to the defectiont No. 1." Later on, she modified this by saying that she came to know from her father and from the first defendant that her father got a Setitions deed executed in favour of the latter. On the second day of her crossexamination she declared that she did not know whether this deed was a sale deed or a mortgage deed or a deed of gift and that she did not know that it was a deed of gift until the written statements of the defendants were filed. On a subsequent date ebe said that her father told her that he had taken an oath from the first defendant that after his death she would divide the property between herself and her sieters. This conversation she represents as having taken place before the actual execution of the deed. The learned Subordinate Judge bimself holds (on page 953) that this case of a scoret agreement to divide the property was quite an after-thought and that it was inconsistent with the position originally taken by the plaintiffs. He points out that the first suggestion of the theory comes in evidence of Dildar Husain and that it was considerably improved upon by Musammat Said-un-nisa who followed. Notwithstanding this, he expresses more so the opinion that though the story had been found to be untrue "it is likely that it has some basis of reality." By this he means, he proceeded to explain that Mashuq Ali may have entertained the idea of depriving Ashiq Ali of his share in the inheritance. He continues-

"But this idea must have been confined to the mind of Mashua Ali and I am not prepared, in view of the state of the plaintiff's pleadings noticed above, to hold that it was materialised by Mashua Ali in the way alleged by the plaintiffs in obtaining an oath and agreement from the defendant No. 1."

We may note that the evidence in support of a secret trust has been wholly discarded by the learned Advocate for the respondent in this Court.

The learned Subordinate Judge assumes, without any warrant except his own idea of what Mathuq Ali would or would not be likely to have done, that "it is impossible

to conceive that he should have reconciled himself to the idea of locking up to the defendant-his daughter and dependant till then-for money to satisfy his require. ments." (on page 926). He alludes to the fact that the Hanafi Law does not allow a Will in favour of an beir. Whether Mashing Ali intended to benefit his daughter or to deprive Ashiq Ali of his share in the property after his death, these objects could be served by the execution of a fictitions deed of gift. He, therefore, considers it "not unlikely" that Mashuq Ali intended the deed to operate as a Will but executed it as a gift in order to evade the provisions of the Muhammadan Law. Tois theory he considers will meet the of both parties as to the motive of the deed. It does not seem to have struck the learned Subordinate Judge that it was equally possible and much more likely that Mashuq Ali was really doing what he purported to do and that knowing that if he wanted his daughter to get his property he must make it over to her in his lifetime be decided to take the risk, feeling sure that his daughter whom he loved and who owed her title to the property to his generosity, would not allow him to suffer for having done so. He must have known quite well that any attempt to execute a Will under cover of a fictitious gift would run the gravest risk of being sot aside.

The theory that the deed was a fictitious transaction only intended to some into operation on Mashuq Ali's death breaks down in several directions. As we have already seer, it is inconsistent with the conduct of the plaintiffs in allowing the defendant to take possession of the property without opposition on his death and to realise the entire income. If the defendant had already been in peaceable and undisputed possession of the property for eleven years, as was in fact the case, that possession would naturally not be affected by Mashuq Ali's death. It was far otherwise if she had never had any real possession at all and Dildar Husain had been keeping quiet for eleven years in order to lull Mashuq Ali into a false scenrity. point has been already dealt with and need not be further elaborated.

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In the second place, Mashuq Ali's motives in executing the deed are clearly stated in the document itself.

The fact that his married daughters were well off, though the Subordinate Judge throws doubt on it, has not been seriously disputed in this Court. Indeed, in another portion of his judgment, page 94 of the printed judgment, he says that the defend. ant's case may be taken as being true in this respect that Mashuq Ali sonsidered that the busbands of his daughters were well provided for. It is also undisputed that, by reason of their marriage, they could not continue to reside in the ancestral house as he desired. If there were not the true motives which is flaenced him, what other motives can be set in their place for his desiring to disinherit his younger daughters, of whom he Was admittedly fond, after his death? An attempt was made in the Court below to suggest a reason, but it has been found to be false and has now been abandoned.

Finally, the evidence of Mashuq having entertained any desire to injure Ashiq Ali by depriving him of his right of inheritance to one-third of the propertyassuming that Ashiq Ali was not already deprived of that right by family eustomis of the lightest. There is evidence that at the time of the gift to Dildar Husain in 1898 Mashuq Ali expressed displeasure at it on the ground that Dildar Husain's mother was of a lower status than her husband. One witness says that Mashuq Ali spoke of Dildar Husain as being illegitimate but his legitimacy is not questioned by either party in this case. The suggestion that Mashuq Ali went so far as to oppose mutation in Dildar Hassin's favour rests on the doubtful recollection of Bhagwat Prasad Kanungo after an interval of twenty years. But it does not follow that because Mashuq Ali was displeased in 1898, he still continued to be so five years later in 1903. The learned Subordinate Judge admits that the relations between Mashuq Ali and bis brother and nephew were in 1903 perfectly friendly so far at least as outward appearances went. We have no letter relating to that precise period, but from the time when eprrespondence does begin it is beyond question that the relations between the three were not only in outward appearance but in reality, perfectly friendly and affectionate right down to Mashuq Ali's death. Dilder Husain admits at the close of his cross-examination that never until the present suit did his father express, or to his knowledge entertain, a desire to get the property in suit. Musammat Said-un-niss in connection with her story of a sceret trust admits that it was only after the defendant's second marriage that the notion of filing a suit to dispute her title was entertained.

The judgment of the learned Subordinate Judge is unduly prolix and contains much unnecessary repetition. After saying that no question of law remains to be decided, it devotes some ten pages of disenssion of various rulings with a view to extract eireumstances favourable to the plaintiffs or to distinguish rulings which appear to favour the defendants. The judgment bas unfortunately much graver faults. only is it full of the most transparent special pleadings but in many passages it seriously misrepresents the effect of the evidence. For the first ten pages or so the judgment seems to be leading up to a deeree in favour of the defendant. Then follows an attack on the defendant which is in many respects grossly unfair. Her evidence is discounted on the ground that she was examined as the last instead of the first of the witnesses called on her behalf, while the fact that Dildar Husain was examined last of the plaintiffs' witnesses examined in Court and Said-unnisa the third plaintiff was examined still later on emmission is passed over almost without comment, Achiq Ali, as we have seep, never appeared as a witness at all. From this point onward instances reckless or unfounded statements may be found on almost every page of the printed judgment. It is said that in part of her evidence the defendant lays claim to know everything even the minutest details of her property. This eriticiem is not borne out by a perusal of her evidence and no attempt has been made in this Court to justify it. In arguing that she could not have held possession after the gift because of her ignorance of many details of the property the learned Subordinate Judge evidently felt the diffiABJAMAN-UN MEA O. ASEIQ ALI.

oulty that this argument proves too much, If ignorance of detail disproves her posses. sion it would equally disprove her possession for the three years after Mashuq Ali's death during which there is no dispute that she was in possession. This difficulty is passed over with the remark that, in any ease, this argument does not relieve having been placed her from position of consistency. Later on, on page 35, he returns to the charge and ignoring the fallacy of argument based on her ignorance says that it shows the real state of affairs in the lifetime of Mashuq Ali. (This and all subsequent references to the judgment

refer to the page of the printed judgment). Her statement that she received rent from Ajudhia Prasad in respect of the Garbi Mustafabad land sultivated by him is attacked on the ground that, instead of paying the amount in eash, Ajudhia Prasad set it off against his salary. The amount of the rent was regularly credited on the receipt side of her account. Her statement is said to aim at showing that ede thoroughly went into the accounts. All she says is that her father explained the accounts to ber. The word "thoroughly" is an interpolation of the learned Sab. ordinate Judge. It is suggested that about the property beknows nothing cause she says that she has no grove in Amethi proper, whereas she has hereelf spoken of her father selling the produce of the groves in Amethi and Chamertola. This is most unfair. As the deed itself shows the groves are not in Amethi proper but either in the chakdari land or in the included villages of Chamartola and Ghuskai. It is said that the case set up by her is that she signed all the papers after the gift, a statement that she never made anywhere in the course of her long examination. She said, indeed, in one place that her father signed rarely for her when she asked him, referring apparently to his eigning her name on her behalf which he did on several occasions and is said to have done in the pre-emption case referred to in the next sentence. She has, however, stated very clearly that all acts of manage. ment were done by her father and Nand Lal, and she clearly could not be coguieant of all doonments signed by him in the course of management. For instance, the

says, with reference to the produce of the groves, sometimes receipts were signed by her and sometimes by her father (on page 565). Theo, again, it is said on page 35 of the judg. ment that wherever in this ignorance of affairs any assertion of fasts is made it would be found to be inassarate, if not absolutely false," and the portion of her evidence from pages 545 to 571 is referred to in support of this statement. The most important statement of fast in regard to the property contained in these pages is with regard to the land revenue which she says was formerly Rs. 975 and now amounts to Rs. 925. As a matter of fast, the revenue was Bs. 972 13 0 in 1903 (Erhibit A 40) and Rs. 925 50 in 1908-9 (Exhibit A 46). As a matter of fact, it is surprising, considering that she as a parda. nashin lady depends on others for the administration of her property, how much she does know of it. As an instance of the minuteness of her cross-examination she was asked how many trees there were in a particular grove. She replied, naturally enough, that she had not seen it and did not know.

The statement is reiterated again and again in various forms that she denies that her father had any hand in the management of the property after the gift. This was never at any time her case. Even in the opening statement of her Counsel, which had been quoted in ext. nso in an earlier part of the judgment, it was said that, while collections in Karsanda and Rasulpur were made by the karindas, collections for the Amethi property were made by Mashaq Ali, either in person or through the servants of the defendant. Because in a single instance a woman who had been refused permission to build on her land appealed to her direct as woman to woman to give her the permission, it is said, page 34, that this is the elearest possible indication of the position being set up by her that Mashuq Ali would not after the gift do any thing about the management of the property on his own authority and whenever he did so the defendant either ratified it or overrode his decision.

Walle dealing with this part of the case we may remark that the defendant's evidence does contain here and there statements which appear to be untrue. The most important are perhaps—

(1) her denial that she knew of the existence of Musamnat Sundar, a prostitute-

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who was kept by her father for many years, and the latter's son Yusuf, and

(2) her statement that Mashuq Ali never drew more than Rs. 25 a month so far as she is aware for personal expenses.

With regard to the first of these statements there is a good deal of excuse to be made for her. It is natural that a woman of good family and virtuous sharaster would be relustant to admit knowledge of a family seandal affecting her father. We think that in fact she must have known of it but that Musammat Sundar and her shildren were allowed to reside openly at the anesstral house when they came to Amethi, as some of the plaintiffs' witnesses assert, is a statement which we sannot possibly accept. The Subordinate Judge's summent on this part of the case strikes us as one of the most amszing in the whole course of the judgment:-

"That the defendant should deny to have ever heard the names of Sundar, Yusuf and Jilayya (Jilayya was Yusuf's wife) prozes conclusively her having unscrupulously attered lies and falsehood on all the points the revelation of which may have the

tendency to weaken her case."

The second statement is certainly untrue, but it must be remembered that she kept no accounts and that her evidence is that her father was at liberty to draw whatever money he needed at any time. Sometimes he told her why he needed it and sometimes he did not.

When everything has been said against her evidence that can be said, she is a more reliable witness than either Dildar Husain or

the third plaintiff Said-un-nisa.

A similar strain of inaccuracy and tendency to exaggerate every point which can be made against the defendant runs through the remainder of the judgment. "Imagine the extent to which the mendacity of the witness has gone," says the learned Subordinate Judge, because Naud Lal declined the responsibility of identifying a signature made in a character which be is unable to read. On the same page we have the remarkable statement, already noticed, that failure to prove certain documents is conclusive proof that they are forgeries. On page 51 it is stated as a reason for not accepting a certain document that the writer Amjad Ali "has not been

stated to be dead." His death was proved by Nand Lal (on page 204). This particular error is not indeed of great importance as it is easy to make an overeight of this kird in dealing with a bulky record. On page 52 we fird it stated that the execution of the mulhtarnama had no bearing on the question whether the defendant or her father was the real employer of the muthtar appointed noder it. On page 59 it is said that Mashuq Ali " occasionally expressed that the defendant's presence with him had been a financial burden to him." On one solitary occasion Mashuq Ali said in a letter that the expense of a partieuter visit had been greater because his daughter had accompanied him. On pages 67 to 71 the fact that the deed was attested by a number of witnesses and executed with much formality and that Mashua Ali tork sare to consult his other daughters and their husbands is used as an argument that there must have been some sipister design behind the transaction. page 73 it is said that "Nezir Husain constitutes himself as the sole legal resort of Mashuq Ali" and that "he reproduces from memory the fall contents of the deed." Neither of these statements is borne out by the record.

The portion of the judgment dealing with the evidence of Naim Ullah, the husband of Mashuq Ali's youngest daughter, and of Naim Ullah's father Shaikh Azmat Ullah is full of incourate and unfounded statements. We select a few of these by way of illustration. Shaikh Azmat Ullah, a Talukdar paying some Rs. 4,000 a year as land revenue, is attacked as baving no scruples on the subject of truth because he could not remember the names of the attesting witnesses of a deed he admitted having executed in favour of his second wife, and on the suppos. ed ground that he tried to suppress the existence of deeds executed by his second wife in favour of her sons. These deeds have not the slightest bearing on the present ease and not only had the witness to motive for attempting to suppress them but his evidence gives no indication of his having tried to do so. He himself had executed three deads of gift in favour of his recond wife and he stated that, so far as he remillested, she had s Iready executed a deed in favour of her cone but be was not sure whether the deed was executed with his knowledge and AFJAMAN-UN-NISA U. ASHIQ ALI.

consent. An attempt is made to use Azmat Ullah's gifts in favour of his second wife as showing that he and his sons are not well off as they represent. It is said that out of the estate paying Rs. 4,000 land revenue Azmat Ullah executed gifts in favour of his second wife yielding Rs. 1,700 per annum ignoring the fact that the land revenue stated by the witness is exclusive of his self. acquired property and that two out of the three properties comprised in the first gift were self-acquired property. All these deeds are subsequent to the deed in suit, so this could not effect Az nat Ullah's or Naim Ullah's financial position at the time of its execution.

Naim Ullah is said to be a person getting only R3. 16 a month because his father states that he give him an allowance of R2. 200 per aroum for clothes again ignoring the very next sentence, in Az mat Ullah's deposition which reads—

"If he requires anything for his other expenses I give him the requisite sum."

On page 70 of the judgment the defence is attacked for not producing the letter in reply to which Naim Ullah's letter, Exhibit A 199, ascenting to the gift to defendant was written although Naim Ullah in reply to the Court had stated that he did not preserve the letter in reply to which Exhibit A 199 was written.

One or two more instances must suffige. They are of some importance as they bear on the genuineness of the motives in the gift. The learned Sabordinate Judge says (page 79)—

"To my mind the omission of the circumstances of widowhood of the defendant from the reasons given for the deed is vary significant. Though Mashuq Ali gave all the reasons, real and imaginary, for making the deed appear real, he did not give this reason, which would have been probable."

This is a direct miss atement. Almost at the outset of the deed Mashnq Ali says -

"Out of the four daughters who are alive my oldest daughter Anjuman un nisa is a childless widow: I am now old in age and, therefore, it has struck me that I should make any such arrangement in respect of my property, etc."

Again, when he comes to the actual gift, he cays-

"I, therefore, with this view have proposed that I should make gift of my entire property specified below in favour of my daughter Anjuman-un nisa, who is a widow who being childless has made, etc."

On the following page the learned Subordi-

nate Judge says -

The defendant No. 1 was questioned by the Court on this point on the last page of her

deposition and said-

"The marriage of Quisar un nisa and Fasahat Ali have not yet taken place. There was formerly a talk of their being married together, but now their parents do not agree to their marriage."

It was left for the Court to put this question as the plaintiffs, though they crossexamined the defendant at very great length, had put no question to her on this point.

There is one other point not directly connected with the merits of the appeal on which we think it desirable to say a few words. It is with reference to the pleadings. On 30th June, before written statements had been filed, the Court ordered written state. ments to be filed on 8th August, replication on 14th August, and fixed 17th August for The date of issues was subsequently changed to 17th September. On that the proceedings contained only a statement of Shaikh Shabarshah Husain, Pleader for the plaintiffs, that they did not press their plea contained in paragraph 27 of their replication, namely, that even if the gift had been completed by delivery of possession they were entitled to repudiate it under the Muhammadan Liw. The parties or their Pleaders were not examined generally with reference to the pleadings as required by Order X, rule 1. In several cases which have come under our notice we have observed a tendency on the part of the suberlinate Courts to loss sight of two important provisions of the Code of Civil Procedure, those contained in O der Vil, rule 9, and those contained in Order X, rale 1. The former provision lays down that no pleadings

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subsequent to the written statement of a defendant other than by way of defence to a set off shall be presented except by the leave of the Court upon such terms as the Court thinks fit. In this case a date was fixed for a replication as a matter of sourse before the written statement of the defendant had been filed and before it could possibly be known whether any further written pleading would be necessary. The proper way of clear. ing up the pleadings after the plaint and written statement have been filed is that prescribed by Order X, rule 1, the provisions of which are peremptory. The Court must, under that rule, at the first hearing of the suit, assertain from each party or his Pleader whether he admits or denies the allegations of fact made by the opposite party except where such admissions or denials are already contained in the written pleadings and must record such admissions or denials. A written replication is not a substitute for this oral examination of the parties and their Pleaders and it is of the utmost importance for the purpose of doing justice between the parties that this oral examination should be duly and earefully earried out by the Court.

This care is so clear on the main issue that it is unnecessary to go into the question of custom. The deed of gift was made with the utmost formality after communication with the persons most immediately idterested. In view of the matters stated in the deed it was quite natural that Mashuq Ali should wish to make a gift of the property to the defendant in her lifetime. The gift was followed by the most public and formal delivery of possession and was asted on, without any dispute by the persone now seeking to set it seide, for a period of eleven years during Mashuq Ali's lifetime and for a period of nearly three years after his death. Mashuq Ali took a leading part in the management of the property up till his death but he did so professedly on his daughter's behalf and in her name, and her title was repeatedly recognised, toth in Mashuq Ali's lifetime and after his death, alike by Ashiq Ali and by his son. Ashiq Ali has not come into the witness box to explain his admission and the explanation given by Dildar Husain is manifestly false. False also is the story put forward by Said-un nisa to account for the execution of the deed consistently with the ease set up

by her. Mashuq Ali, through whom the plaintiffs claim, admitted the defendant's title and possession in the slearest possible way both in "solemn proceedings in Court." to use the phrase of the learned Subordinate Judge, in his sworn evidence in the muta. tion ease, and subsequently by giving receipts and signing leases on her behalf. possession was further recognised by the fact of her appointment as lambardar of Karsanda in place of her father, and indeed from the time of the gift the whole administration of the property, including the payment of house-tax for the ancestral house, was thenesforward sarried on in behalf. and on her name ber plaintiffs have utterly failed to show that the deed was a fictitious and unreal transaction and their suit should have been dismissed by the Court below.

We accordingly allow the appeal and dismiss the suit with costs in both Courts.

Z. 6.

Appeal allowed,

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1050 or 1920.

November 29, 1921.

Present:—Mr. Justice Kumaraswami
Sastri and Mr. Justice Devadoss.

Sastri and Mr. Justice Devadoss.

Kari AMIR SAHIB alias Kaji

MUHAMMAD JEHANGIR SAHIB—

DIFENDANT No. 1—APPELLANT

versus

Kajee MUHAMAD OLI AHMAD SAHIB
AND OTHERS - PLAINTIFFS AND DEFENDANTS
Nos. 2 to 4 - Respondents.

Possessory title - Ouster of person in possession by person with no better title or with equal title—Right of person dispossessed to be restored to possession.

A person in possession of property even without a title thereto if dispossessed by another with no better right is entitled to get back possession on the strength of his possessory title. If the person who is dispossessed has an equal title with the person dispossessing the Courts should give them joint possession. [p. 228, col. 21 p. 239, col. 1.]

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Second appeal against the decree of the Court of the Additional Subordinate Judge. Coimbatore, in Appeal Sait No. 30 of 1919, preferred against the decree of the Court of the District Mansif, Tirapar, in Original Sait No. 725 of 1918.

Mr. K. S. Krishnaswami Aiyangar, for the Appellant.

Mr. I. P. Narayana Menon, for Respondent No. 1.

JUDGMENT.-This appeal arises out of a suit filed by the first respondent against the appellant and others for resovery of posses. sion of the mosque and Idge mentioned in the plaint. The plaintiff's grandfather and the first defendant's father were brothe s. ease for the plaintiff was that the morque and idga were places where persons who formed his father's jama were entitled to offer prayers and perform other religious esremonies and were in possession of his father till his death; that after his father's death he (the plaintiff) was appointed Kazi, (the business of the office of Kazi being con dusted by a deputy during his minority) and was in possession; that the first defendant took wrongful possession of the mosque and Idga under colour of his appointment as Kazi by the Government; and that the plaint. iff is, therefore, entitled to possession and mesne profits as elaimed in the plaint. The first defendant denied the appointment of the plaintiff as K zi and pleaded that he was the duly appointed Kazi and Pesh Imam and had been doing the necessary duries; that he was entitled to possession of the mosque and Idga; that the suit was barred by limitation and that the mosque and Idga were places which all the Mahammadans were entitled to use. Toe District Mansif dismissed the plaintiff's sait holding that the plaintiff did not prove his title. On appeal the Sabordinate Judge was of opinion that both the plaintiff and the first defendant were entitled to possession and management of the mosque and idga and he passed a decree for joint possession in favour of the plaintiff and the first defendant. Against this decree the first defendant has filed the present second appeal and the plaintiff has filed a memorandan of objections elaiming exelusive possession. We are of opinion that the desision of the Sabordinate Judge is right.

As regards the mosque and the Idga, it appears from Exhibit H, which is a statement

made by the first defendant so long ago as 1:05, that the mosque and the Idga were buils and dedicated during the time of the Nawabs by the ancestors of the plaintiff and the first defendant. It is not disputed that the mosque and the Idga were in the possession of the ancestors of the parties ever since they were founded. Moideen Sahib, the great. grandfather of the first defendant, Jahangir bahib, his grandfather, Siraj-ud-Dia Sahib, his uncle, and Ghulam Moiteen, father of the plaintiff, were in possession and management of the mosque and Idga and also of the in im lands which were attached to the offise of K zi. Having regard to these fasts and to the fact that the mosque and Idga were built and owned by the ancestors of the parties, the reasonable presumption is that the office is hereditary in the family and that possession and enjoyment have been in the family since the foundation. The plaintiff was a minor about 10 years old when his father Ghulam Moidean died. The first defendant thereupon applied to the Government to be appointed Kazi and he was so appointed; but this would not, under the Kazis Act; XII of 1880, give the first defendant any rights as against the plaintiff. In 1863 the inam lands were enfracchised in the name of the plaintiff's father and it appears from Eshibit D that the plaintiff's father was put in possession of the musque on the 8th of August 1833. That he was in possession till his death is not disputed. He died on the 28th of April 190; and the first defendant was appointed Kazi in 1904. The attempt of the first defendant to get the patta of the inam lands transferred in his own name was unsuccessful as the Government held that, under the Kazis Act, he had no right to the lands. For some time after the death of the plaint. iff's father, plaintiff's first witness Sheik Mobideen Sahib, his brother-in law, was in possession of and was looking after the morque and Idga on behalf of the plaintiff. The first defendant, under colour of his appoint. ment as Kazi, applied under the Oriminal Procedure Oode to the Stationary Sab-Magistrate of Unimbatore and he was success. fal in keeping Sheik Mihideen Sihib out of the mosque and getting passession. It seems to us that, apart from any other question in the ease, the plaintiff who was in possession is entitled to get back possession from the first defendant on the strength of his posses.

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sory title unless the first defendant can show an equal or better right. In the former case the plaintiff would be entitled to joint possession and in the latter case he would have no right to retain possession. In Mustapha Saheb v. Sontha Pillai (1) it was held that a person who is custed by another who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the onster even though that postession was without any title and that section y of the Specific Relief Act does not take away such right. In Narayana Row v. Dharmachar (2) it was held that possession is good title against everybody except the true owner and that the effect of section 9 of the Specific Relief Act is that a person dispossessed otherwise than in due course of law is entitled to be reinstated even against the defendant who is a true owner. A similar view was taken in Vythialinga Padayachi v. I onnusuami Padayachi (3). As poseession and management of the mosque and Idga were in the family ever since they were founded over 200 years ago, it cannot be said that the plaintiff, who is a descendant of the senior branch, has no right to possession and management of that, the first defendant has got a better title than the plaintiff. The mere appointment of the first defendant as Kazi by the Government will not give him any superior claim as against the plaintiff. So far as the office of Kazi goes, any person can be appointed Kazi and it has been proved in the present case that the plaintiff has been performing the duties of the office of Kazi ever since he attained majority. A great deal of confusion has arisen owing to the fact that persons in possession of the mosque were also Kazis. The office of Kazi will not by itself give any right to the morque or Idga, What really happened seems to be that the offices of Kazi and Muttawali were till resently merged in the same person. We think the Sabordinate Judge was right in holding that it may be presumed on the facts of the present ease that the members of the plaint. iff's family were Kazis and Muttawallis. We are of opinion that, on the facts found by the Sabordinate Judge, the first defendant has no better right as Kazi than the plaintiff. Even

the plaintiff as Kazi during his minority was invalid, it has been found by the Subordinate Judge that the plaintiff has been officiating as Kazi for a section of the Muhammadan Community ever since he attained majority and that he has been solely enjoying the inam lands. There is, therefore, no reason why he should be excluded from the right which his father and ancestors enjoyed as regards the mosque and the Idga.

As regards the memoranda of objections the Subordinate Judge finds that plaintiff has not proved his exclusive rights and we

cannot disturb his finding.

The appeal and memoranda of objections are dismissed with costs.

M. C. P.

Appeal and Memo. of Objections dismissed.

NAGPUR JUDIOIAL COMMISSIONER'S COURT.

FULL BENCH.

FIRST CIVIL APPR.L No. 24-B of 1920. August 8, 1921.

Present:—Mr. Rozval, A. J. O., Mr. Dhobley, A. J. O. and Mr. Hallifax, A. J. O. in the Full Bench.

Mr. Kotval, A. J. O. and Mr. Prideaux,
A. J. O. at the Final Judgment.

DHUDABAL—DEFENDANT No. 2—

APPELLANT

tersus

NARAIN AND OTHE 48-PLAINTIPPS-RESPONDE 478.

Hindu Law-Mortgage by father—Suit by mortgaged —Sons not joined — Mortgage decree against father. Suit by sons to set aside decree — Want of legal necessity and antecedent debt—Pleas available to plaintiffs—Burden of proof.

In a suit by sons to set aside a mortgage decree passed against their father in respect of joint family property including their share in it in a suit to which they were not impleaded as parties, it is open to them to plead that part of the debt secured by the mortgage was not for legal necessity and the balance was not advanced for the satisfaction of an antecedent debt. [p. 246, col. 1, p. 252, col 2; p 253, col. 2.]

Per Hallijas, A J C.—The decision in Motiram v. Asaram (Ramgopal) 1) is correct and the plaintiffs in a suit to impeach a mortgage decree passed in a suit against their father to which they were not

^{(1) 28} M. 179; 8 Ind, Dec. (N. 8) 524.

^{(2) 28 1 514,}

^{(8) 83} Ind. Cas, 393; (1931) M. W. N. 243; 41 M.

^{(1) 58} Ind. Cas. 776; 16 N. L. R. 64,

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impleaded as parties are entitled to advance the plea that the debt was not for legal necessity, nor was it an antecedent debt of their father which bound them [p. 254, col. 1.]

The doctrine of reasonable satisfaction after due enquiry as to the propriety of an alienation of joint family property by the manager of the family must apply just as much to an antecedent debt of the father as to family necessities or pressure on the estate. [p. 255, col. 1.]

Per Kotical, A. J. C.—In a suit by sons for a declaration that the mortgage-decree passed against their father in suit to which they were not parties is not binding as against their share in the joint family property as the mortgage was not for legal necessity or for antecedent debts, they are entitled to challenge the decree on grounds personal to themselves and it is open to them to have the question tried whether the mortgage executed by

In such a suit the onus is on the defendant who seeks to enforce the mortgage either on the ground of legal necessity or on the ground of its being for

Per Dhobley, A. J. C.—The rights of co-parceners in a Hindu family consisting of a father and his son do not differ from those of a co-parcener of a like family consisting of undivided brothers. The son occupies the same position and possesses the same right against his father in respect of the ancestral property, as brothers have against each other in a joint family. [p. 247, col. 1]

Suraj Bunsi Koer v. Sheo Persad Singh, 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. 8) 705 (P. C.), followed.

It has been a settled law in Central Provinces and Berar that an alienation for value by a member of a joint Hindu family holds good to the extent of his own share in the property. [p. 247, col. 2,]

Mukund Ram Sukal v Ram Ratan, 2 N. L. R. 52 at p. 5%; Seth Kisanlai v. Nathu, 56 Ind. Cas. 44; 16 N. L. R. 131, followed.

No single co-parcener can alienate anything beyond his own share in the joint property, father being no exception to it When, however, a single co-parcener alienates the joint family property for necessary family purposes the alienation is binding upon the other members and upon the whole property covered by the alienation [p. 248, col 2.]

In a suit brought on a mortgage executed by the father, the son can call upon the mortgagee to show that the mortgage was for one of the two purposes either for legal necessity or for the satisfaction of an antecedent debt. The son's position is not injuriously affected by the mortgagee's omission to join him as a party to his mortgage suit and by the son being thus compelled to bring a separate suit for protecting his own interests. [p. 249, col 1]

In a suit brought by a person to avoid a mortdecree passed in a suit to which he was not
joined as party he is not confined to the plea that
the debt was borrowed for immoral purposes but
he can plead that there was no legal necessity for the loan or that no poration of it was an
antecedent debt [p. 249, col. 2.]

A loan made to the father on the occasion of a grant by him of the mortgage on the family restate

is not antecedent debt and the mortgage so created is not binding on the son's share in the property. [p. 250, col 1.]

The sale or charge by a father of joint family property in order to be binding on the son's shares should be made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. [p. 250, col. 2.]

The maxim that everybody is presumed to know law and that its ignorance is no excuse cannot be applied when it has to be decided whether a certain act was or was not bona fide [p. 25, col 2.]

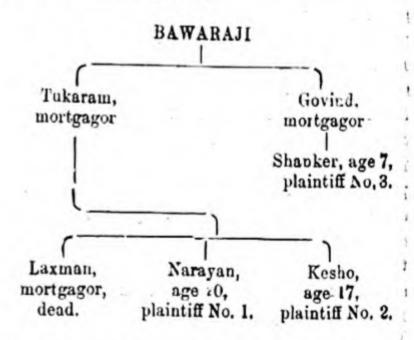
Appeal against the decree of the Additionenal District Judge, Amraoti, dated the 3th February 192) in Civil Suit No 16 of 1918.

Dr. H. S. Geur, for the Appellant. Mr. M. Gupta, for the Respondents.

FACTS appear from the following referring judgments:

Kotval, A. J. C.—(Nevember 3, 1920).—
The plaintiffs sue for a declaration that a decree obtained by Hiralal Sadaenkh, deceased husband of Ratnabai, defendant No. 1, and father of Dhudabai, defendant No. 2, on a mortgage was obtained by fraud and that it does not affect their shares in the mortgaged property.

2. The mortgagors and the plaintiffs are related as shown below:



3. The mortgage (Exhibit 2 D-2) was executed by Tukaram, Govind and Laxman for Rs 15,000 purporting to be made up as follows:—

"Rs. 5,000 to be paid to a prior mortgages Pralbad.

"Rs. 10,000 each borrowed for purposes of cultivation and payment of debts."

4. Suit No. 14 of 1915 was instituted by Hiralal against the mortgagors on the above mortgage on the 17th September 1915 and a preliminary decree was passed on the 11th November 1915. Hiralal having died.

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on the record. Ratnabai was brought on the record. Ratnabai applied for a final decree on the 7th March 1918. On the 4th July 1918 Dhudabai applied to be recorded as decree holder on the ground that she had become entitled to recover the decretal amount under her father's Will, and on Ratnabai's admission she was recorded as decree holder. A final decree for foreslosure was passed on the 6th August 1918. While these proceedings were going or, the present out was instituted on the 8th May 1918.

5. The lower Court has found that the decree in Suit No. 14 of 1915 was not obtained by fraud and that finding is not now challerged.

6. The grounds on which the declaration that the plaintiffs' shares in the mortgaged property were not affected was sought were .that the mortgage debt was incurred for immoral purposes and not for legal necessity, or for payment of antecedent debts or any other purpose binding on the plaintiffs' shares in the joint estate. In reply, the defendants stated that the mortgages had made bona fide inquiries regarding the necessity of the mortgage-debt and was satisfied that it was required for paying off antesedent debts and for cultivation expenses and improvements. They further pleaded that the plaintiffs were represented in Sait No. 14 of 1915 by the defendants actually impleaded who were all the adult members of the joint family and had no right to question those proceedings.

7. The lower Court has found that the plaintiffs had failed to prove that the debt was incurred for immorel purposes and that the defendants had failed to prove that it was incurred for legal necessity, or that Hiralal made the necessary inquiry and was satisfied that a real necessity existed, or that they were incurred to pay off antecedent debts, that is, personal debts incurred by the father independently of the scourity of the joint family property. The lower Court then observed:

The question, therefore, is whether in this state of evidence the plaintiff; can susceed. In fact the question is one of burden of proof. The burden of proving that the debts were contracted for immoral and illegal purposes was evidently on the plaintiff, and they must fail to one extent to which the claim is based on these grounds because

they have failed to dissharge the burden. But they can succeed even if it is shown that the debts were neither antesedent nor borrowed for the benefit of the family. Here the barden of proving that the money was borrowed to pay off antecedant debts or for the benefit of the family is on him or her who says so, and who on that ground wants that the alienation should be held binding on the plaintiffs who were not parties to the former sait and who eannot be said to have been represented in that sait by their fathers. sinse these are grounds personal to them and were not available to their fathers to contest the claim. In other words, the burden is on defendant No. 2 who says that the alienation is binding on the plaintiffs' shares because the debt was of a particular nature. It was for her to prove its nature, and as she has failed to prove it she cannot sussed in enforcing the mortgage against the plaintiffe' shares, and consequently plaintiffs must snessed in obtaining a declaration that the mortgage and the decree are not binding against their shares in the property."

- E. As held by a Bansh of this Court in Motivan v. Asyram (Ramgopal) (1), the plaintiffs are entitled to challenge the decree on grounds personal to themselves, and it is open to them in the present suit to have the question tried whether the mortgage executed by the father was binding upon them.
- 9. The question involved in this case is, as the lower Court has observed, one of burden of proof as to the antecedency of, or legal necessity for, the debt. Are the plaintiffs who have some into Court, to assail a mortgage-decree obtained against their fathers and have failed to prove that the debts were incurred for legal necessity, or were antecedent debts of the father, or is it necessary for the plaintiffs in order to succeed that they should prove that the debts were not antecedent or not incurred for legal necessity.

10. In Salu-Bim Chandra v. Bhun Singh (2) their Lordships of the Privy Council have laid down the principles which govern

^{(1) 53} Ind, Cas. 778; 16 N. L. R. 64. (2 39 Ind. Cas. 2.0; 31 A. 437; 21 C. W. N. 699; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C L. J. 1; 31 M. L. J. 14; (1917) M. W. N. 433; 22 M. L. T. 22; 6 L. W. 218; 44 L. A. 126 (P. C.).

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alienations of the joint family property by one so-pareeper :-

"Under the law of the Mitskehara the joint family property owned, as stated, by all the members of the family as co-pareeners, cannot be the subject of a gift, sale or mortgage by one co-pareener except with the consent, express or implied, of all the other co-pareeners. Any deed of gift, sale or mortgage granted by one co pareener in his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and its entirely stands free of it."

The law of Mistakshara has, however, given to the father in his eapacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to effect or to diapose of the joint property in respect of purposes denominated necessary purposes. The prineiple in regard to this is analogous to that of the power vested in the head of a religious endowment or muth, or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demand. ed, or the family interests justified, the expenditure, then those entitled to the estate are bound by transactions. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakehara. For where estate or family necessity exists, that necessity rests upon the so pareeners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded."

"But for the exception immediately to be noted, these two principles would cover the ground, and it would be clear that if the father of a family purported or presumed to mortgage or sell the joint family estate, the mortgage or sale would be entirely ineffectual."

"But while the principles as above set forth still stand, an appeal is made in this case to the following exception. Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that setate in order to meet such a debt, yet an exception has been made to cover the

ease of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded."

The onus is on the party who seeks to enforce or support the alienation either on the ground of legal necessity or on the ground of its being for an antesedent debt. Admittedly, if the sons had been joined as parties to the mortgage, suit they sould have shallenged the binding nature of the mortgage so far as their interests were coneerned and the mortgagees would have had to prove either legal necessity or that the debts were antecedent debts of the father. The question is, whether the passing of a deeres on the mortgage against the father in the absence of the sons absolves the mortgagees from discharging the burden that lay on them. There seems to be no reason why the burden should be thus shifted as a result of the mortgagee's default, intentional or unintentional, in their duty to make the sons parties to the suit. There are rulings which lay down that the son can in such a case avoid the alienation only by showing that the debts were incurred for immoral or illegal purposes. But they seem to be based on the pious obligation of e son to discharge his father's debts not tainted with immorality or illegality. The fathers Tokaram end Govind are alive and those rulings, therefore, can have no application after the decision of their Lordships of the Privy Council in the ease eited above, where it is said:

"It was argued that a mortgage was binding because of an obligation of religion and piety which is placed upon the sons and grandsone, under the Mitakehara Law, to discharge their father's debts. If, accordingly, he has incurred a debt, and the debt was not for immoral purposes the pious obligation resting upon the sons and grandsons to discharge this debt is in practice worked out by giving effect to any mortgage or sale of the family property in which they, with the father, its manager, were joint owners, so as to enable the debt to be discharged."

"Waile the father, however, remains in life the attempt to affect the sous' and DEUDABAI C. NARAIN.

grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt baving been traly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, the responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the ease founded merely upon pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive."

12. In turmanund v. Orumbah Koer (3) the mortgages from the father who was in possession of the mortgaged property after foreslosure was held not relieved from the burden of proving necessity or inquiring into its existence. I, therefore, consider that the onus was rightly laid on the defendants in this case.

13. The next point to decide is whether the defendants have proved that Hiralal made any inquiries which satisfied him that the mortgage debt was required for paying off antecedent debts or for necessary purposes.

14. Rs. 5,000 are said to have been paid by Hiralal to a prior mortgagee Prablad. I concur with the view that the lower Court has taken that this is not an antecedent debt since it is not one incurred by the father independently of the security of the joint family property. On this point my learned colleague and I have differed in First Appeal No. 41-B of 1919 Sheonarain v. Nathu (4)] and the matter has been referred to a third Judge,

15. As regards the inquiry about the necessity of the cash loan of Rs. 10,000 reliance is placed in appeal merely upon the recitals in the mortgage deed. The recital regarding this sum runs as follows:—

"Rs. 10,000, in words ten thousand, British surrensy, have been agreed to be taken

(8) W. R. 1864, 143. (4) 65 Ind. Cas. 786, before the Registering Officer. On receipt of the same there we shall have received the full consideration of rupees fifteen thousand, British currency, for purposes of our cultivation and for payment of debts due to others."

The recital by itself does not establish legal necessity, though it is evidence of the representation made by the mortgagor. There is no reliable evidence to show that Hiralal made any inquiries and was satisfied as to the truth of the representation. As the lower Court etates, if he had made any inquiry, something more than what is in the recital would have appeared in the mortgage-deed. I agree with the lower Court's finding on the point.

16. In my opinion the decree of the lower Court is correct and this appeal should be

dismissed,

Michair, A. J. C.—(November 3, 1920).—
The facts of this case are stated fully in the judgment of my learned brother Kotval. Tukaram is the father of plaintiffs Nos. I and 2 and Govind the father of plaintiff No. 3. Tukaram and Govind executed a mortgage in 1912. The mortgages instituted a suit in 1915 but did not implead the plaintiffs: he obtained a preliminary decree. The sons now seek to re-open that decree.

The only ground urged in this Court is that the mortgage was not executed for legal necessity. My learned brother, relying on Motiram v. Asaram (Ramgopal) (1), holds that it is open to the plaintiffs to raise the question whether the mortgage was executed for

nesessary purposes.

I have considerable diffilence in expressing my dissent both from my learned brother and from the ruling on which he relies. But I consider that it is my duty to base my decision on my view of the law.

Their Lordships of the Privy Council in Nanomi Babuasin v. Modhun Mohun (5) have

stated:-

"Destructive as it may be of the principle of independent co-parcenary rights in the sone, the decisions have for some time established the principle that the sons cannot set up their rights against their

^{(5) 13} C. 21 at p 35; 18 I. A. 1; 10 Ind. Jur. 161; 4 Sar, C. J. 683; 6 Ind. Dec. (N. s.) 510 (P. C.).

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father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

In the recent case, Sahu Ram Chandra v. Bhup Singh (2) this statement of the law has been quoted with approval.

In the present case the preliminary decree was the remedy of the creditors for a debt incurred in 1912. It appears to me, therefore, that the sons cannot impeach this decree if the debt existed and was not tainted with immorality.

I have carefully studied the reasoning of their Lordships on pages 36 and 37 of I, L, R. 13 Calentta [Nanomi Babuasin v. Modhun Mo. hun (5)]. Their Lordships referred to the case of Deendyal v. Jugleep Narain Singh (6). In that case the appellant seized and sold in exact. tion only the right, title and interest of the father. It is open to a father to obtain advances on the security of his undivided In such a case the creditor share alone. may obtain a decree and bring to sale the undivided share of the father. desree is conched in ambiguous it is open to the some to urge that, as a matter of fast, their undivided shares were never attached or sold. In Nanomi Babusiin v. Modhun Mohun (5) their Lordships hold that the debt for which the decree was made was a joint family debt and infer from this that the sale was of the entire estate. But it is elear that they do not contradict the statement of law on the previous page by holding that the creditor's remedy may be impeashed on the ground that the original debt was not incorred for legal necessity.

In Bhagbut Pershad Singh v. Girja Koer (7), the question I am considering is fally discussed. Their Lordships state:—

"It appears, therefore, from the decision that, in a case like the present, where sons claim against a purchaser of an accestral estate under an execution against their father upon a debt contracted by him, it is

necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to show that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity."

In my opinion, ther, it is sufficient in the present case to find that the fathers did incur a debt in 1912 and that this debt was not incurred for immoral purposes. In 1915 the fathers could have legally sold the joint family property to discharge such a debt. The creditors' remedy taken in 1915 cannot then be impeached.

In the case of Motiram v. Asaram (Ramgopal) (1) the father of the plaintiffs mortgaged the joint ancestral property in 1909. The creditor in a suit instituted on the basis of this mortgage brought the property to sale in 1917. My opinion, which I express with the greatest respect, is that this sale was a remedy of the creditor for his debts and could not be impeached on the ground that there was no legal necessity for the loan contracted in 1909.

The learned Judges who decided the case of Motiram v. Asiram (Ramgopal) (1) held that the plaintiffs were entitled to have the question tried as to whether the mortgage executed by the father was binding upon the sons. They allowed the plaintiffs to argue that the mortgage was not justified because there was no legal necessity for the loan. In my opinion the law laid down in Bhagbut Fershid Singh v. Gir a Koer (7) is clear and the question of legal necessity at the time of the original loan cannot be raised: for the purpose of deciding this appeal this question should be referred to a Full Bench.

If my intrepretation of Bhagbut Pershad Singht. Gir.a Koer (7) is accepted, it follows, in my opinion, and I understand in that of my learned brother, that the present appealm ust succeed and the suit must be dismissed.

If it be held that the ruling on the point in Motivam v. Asaram (Ramgopal) (1) should be followed, I see no reason to differ from the conclusion of my learned brother that the passing of a decree does not shift the burden of proof. I agree with the finding of my learned brother that enquiry about the necessity of the cash loan of Rs. 10,000 has not been proved. I am of opinion, however, that the mortgage debt due to Hiralal was an antecedent debt for reasons which I have

^{(6) 3} C. 198; 1 C. L. R. 4°; 4 I. A. 247; 3 Sar. P C. J. 730; 3 Suth. P, C. J. 468; 1 Ind. Jun. 604; 1 Ind. Dec (N. 8.) 715 (P. C.).

^{(7) 15} C. 717: 15 1. A 92; 12 Ind Jur. 289; 5 Sar. P. U. J. 186; 7 Ind. Dec. (N. s.) 1062 (P. C.).

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given at length in First Appeal No. 41-B of 1919 [Sheonarain v. Nathu (4)].

ORDER.

ROTVAL AND MACNAIR, A. J. Cs.— (No-ember 3, 1920).—As there is a difference of opinion among us, it is referred, under section 10, (b) (ii), Central Provinces Courts Act, to such other Judge as the Judicial Commissioner may appoint. The point of difference is stated in the judgment of Macnair, A. J. O.

Batter, O. J. O .- (December 16, 1920) .-As the reference includes the question of the correctness of the decision by a Bench of two Judges in Motiram v. Asaram (Ram. gopal) (1) the Judges would have done better to ask for a Fall Bench under section 9 of the Courts Act. Under rule 3 of Notification No. 29.483 A of 14th June 1917 the Judicial Commissioner may order any reference to be made by a Bench. It is accordingly ordered that the reference shall be heard by a Fall Bench consisting of Messrs, Hallifax, Madholkar and myself personally, or the A. J. C. who may join the Court if I am on leave.

ORDER.

Read the representation made by Mudholkar, A. J. O, to the effect that he appeared as Advocate for one of the parties to this appeal while the suit was pending in the Court of first instance.

DRAKE BROCKMAN, J. C.—(December 22, 1920).—The Full Bench constituted by my predecessor's order dated the 16th current will include Kotval, A. J. C., instead of Mudholkar, A. J. C.

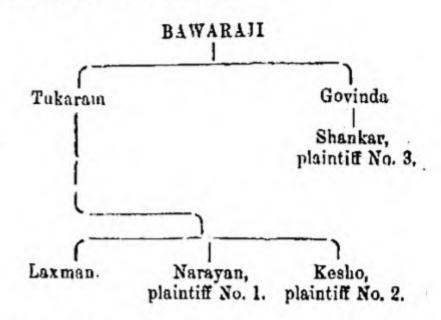
Deare-Brock Man, J. C.—(March 29, 1921).

The Full Bench as reconstituted above includes Mesers. Hallifax, Kotval and Prideaux, A. J. C's. I consider it desirable to place thereon a Hindu Judge, the question for decision being an important one of Hindu Liw. Rao Bahadar W. R. Dhobley is, therefore substituted for Mr. Prideaux.]

OPINION OF THE FULL BENCH.

DECELEY, A. J. O.—(July 14, 1921).—In order to understand the points of difference between the two learned Judges making this reference, it is necessary to state briefly the

fasts of the case. The family table of the plaintiffs is as given below:-



Oa 3rd March 1903 the two brothers, Tukaram and Govinda, exsented a mortgage. deed in favour of one Pralbad for Rs. 3,500, borrowed by them in cash, mortgaging under it certain fields belonging to the joint family, of the total area of about 70 acres. They and Tukaram's son Laxman, who was then alive, executed another mortgage deed on 15th April 1912 in favour of one Hiralal. who is now represented by the present defendant-appellant, for Rs. 15,000, Rs. 5,000 out of which went to satisfy the earlier mort. gage in favour of Pralhad, the balance being paid in cash to the mortgagor. Under this mortgage several fields belonging to the family, of an approximate area of 500 acres. were mortgaged. In Sait No. 14 of 1915 on the file of the Second Additional District Judge, Amraoti, the mortgage of 1912 was enforced and a preliminary decree was passed on 11th November 1915, which was on 8th August 1918 made final. To that suit, the present plaintiffs were not made parties.

2. In the meantime, the plaintiffs commensed their Suit No. 16 of the Court of the Additional District Judge, Amraoti, for a declaration that the decree obtained in Suit No. 14 of 1915 was not binding on them or on their shares in the mortgage property, on the ground that the mortgage-debt was not insurred for any logitimate or nesessary family purposes or for the payment of any anteredent debt of their fathers. susseeded in getting a deeros in the Trial Court, as prayed for by them, it being held that the debt was not proved to have been borrowed for such purposes as would make it legally binding on the plaintiffs or on their shares in the property mortgaged.

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There was a difference of opinion on two points between the learned Judges of this Court, who heard the defendant's appeal, Maenair, A. J. C., was of opinion that the plaintiff could not attack the decree or question its binding nature merely on the ground that the debt had not been incurred for legal necessity or for family purposes. According to him that ground was insufficient for exempting the plaintiffs' shares from the operation of the decree and in order to succeed it was necessary for them to show that the debt had been incurred for immoral or illegal purposes. This the First Court held they had not suseeded in proving. according to his view, the plaintiffs' suit was liable to be dismissed. Kotval, A.J.C., on he other hand, held that the plaintiffs were on the authority of Motiram v. Asaram (Ramgopal) (1) entitled to challenge the decree on grounds personal to themselves and that it was open to them in the present suit to have the question tried whether the mortgage executed by their fathers was binding upon them and their shares in the mortgage property. According to his view the plaint. iffs were entitled to succeed, if it was not shown that the debt had been incurred for legal necessity or for the payment of an antecedent debt of the fathers. There was, however, an agreement betweenthe two learned Judges on the question of the burden of proof. Assording to both of them, if the plaintiffs' suit was, on the grounds mentioned by them, tenable, the burden primarily lay upon the defendant to prove that the debt had been borrowed for legal necessity or for family purposes and it was not shifted merely because there was a deeree in her favour in the mortgage suit. They also agreed that the burden had not been discharged by the defendant and that, so far as the sum of Rs.10,000 the eash portion of the mortgage-money was concerned, legal necessity had not been established.

4. The second point on which the learned Judges differed was with reference to the item of Rs. 5,0.0 which went to satisfy the earlier mortgage. Macnair, A. J. C., held that this was what is in Hindu Law known as father's "antecedent" debt at the time of the second mortgage and that the alienation by way of the second mortgage made for paying off that debt bound to that extent the thole of the family property including the

sons' shares in it. This portion of the considertien was not an antecedent debt, when the mortgage of 1908 was executed, as the loan and the transfer by way of mortgage to seeme it were contemporaneous and formed in reality parts of one and the same transaction. See Hira Ram v. Ulhe Ram (8) and Dilli Singh v. Bina (9). The debt did not, according to the view of Kotval, A. J. O., become antecedent at the time of the execution of the second mortgage in 1912, as it had originally been borrowed on the security of the joint family property.

5. The points of difference between the two learned Judges have not been specifically put in the form of issues either in their separate judgments or in the order of reference. These may, however, be put as

under :-

(1) Are the plaintiffs in the present suit to be confined to the plea that the debt was borrowed for immoral purposes and can they not plead that there was no level necessity for the loan or that no portion of it was what is called an antecedent debt of their fathers?

(2) Was the sum of Rs. 5,000 an "antesedent" debt of their fathers at the time of the mortgage of 1912?

6. The questions raised here are not entirely new ones. They same up before the different High Courts and also before their Lordships of the Privy Council at different times in different forms and quite a bulky case law, not altogether uniform or consistent, has sprung up around them. The reported cases on the subject are too numerous and it will serve no useful purpose to refer to them all here. The whole law on the subject was practically overhauled in the well-known recent case of Sahu Bam Chandra v. Bhup Singh (2), and their Lord. ships of the Privy Council made in that ease one more attempt to settle the dispute finally. All the principal reported cases of the different High Courts in which diverse views were expressed were in that ease eited and fully considered and it appears that their Lordships intended to settle finally. not only the points directly involved in that particular ease, but also other important points closely connected with them

(8) 19 Ind. Cas. 861; 9 N. L. R. 74.

(9) 44 Ind Cas. 506; 14 N. L. R. 41 at p. 44.

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On which the views of the different High Courts were not in harmony. What they intended has not, however, been accomplished, as we find that in a subsequent ease, the Madras High Court considered their Lordships' observations on the subject as mere obiter dicta, not meant as an authoritative and final decision on all the points discussed there. I refer to the case of Armugham Chutty v. Muthu Koundan (10). Under these circumstances, it becomes necessary to consider carefully the questions raised.

7. The want of harmony in the views expressed at different times is to a certain extent due to the apparent sorfleting nature of the two principles of the Mitekshara School of Hindu Law bearing on the subject. These are:—

(i) The son gets an interest in the ancestral property by his mere birth and becomes an equal co-owner

along with his father and

(ii) The son is bound to pay the father's personal and private debts, unless these are incurred for purposes commonly known as illegal or immoral.

The father who has, before the son's birth, an absolute power of disposal over the ancestral property, is afterwards prevented by the express texts from alienating it, even his own share, except for sertain purposes which are usually designated as legal necessity or family purposes. The rights of so pareeners in a joint Hindu family consisting of a father and his son de not differ from those of the co parceners of a like family consisting of undivided brothers. The son occupies the same position and possesses the same rights against his father in respect of the ancestral property, as brothers have against each other in a joint family, see Suraj Bunsi Koer v. Sheo Persad Singh (11). The father does not possess any better rights as regards the alienation of the ancestral

(10) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 585; (1919) M. W. N. 409; 87 M. L. J. 166; 26 M. L. T. 96

(F. B.).
(11) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth
P. C. J. 589 4 C. L. B. 226; 2 Shome L. R. 242; 2
Ind. Dec. (N. S.) 705 (P.C.).

property. The son's ownership is not subordinate, but is so-ordinate. This is the principal feature of a joint family governed by the Mitskehara School, strictness of the rule bas, apparently on equitable grounds, been somewhat relaxed by some of our High Courts by giving effect to the alienations made by a coparsener to the extent of the alienor's share, the others still adhere to the original principle and declare the whole alie. nation void and inoperative. This Court has for a long time taken a view similar to that prevailing in Madrae and Bombay and it has been settled in our Provinces that an alienation for value by a member of a joint Hindu family holds good to the extent of his own share in the property 888 Mukund Ram Swal v. Ran Retin (12) and eases eited therein and also Kusanlal v. Nathu (13).

The rights of a son in a joint Hindu family do not thus differ from those of any other so-paresner. It is, however, settled law that the second principle mentioned above furnishes an important exception to this rule. The two principles-that a son takes a present vested interest jointly with his father in ancestral property, and that he is legally bound to pay his debts not ineurred for immoral purposes-apparently sorflet with each other, as, if the son be legally liable to pay the father's personal debts, if not immoral, it would seem as a matter of source to follow that the father has power to alienate the whole of the family property for such debts and that the son would not be able to question the alienation. It is this conflict between the two principles that has caused diffieulty in giving full effect to each of them. It appears to me that this diffioulty is to a certain extent due to the fact that what was, in my opinion, under the original texts merely a pious duty on the son's part has been declared to be a legal duty enforceable against him to the extent of the property taken by him through the father. The fact that under the old texts, the liability to satisfy the ansestor's debts was thrown only upon the son and the grandson and that it was

(12) 2 N. L. R. 52 at p. 58. .

^{(13) 58} Ind. Cas. 44, 16 N. L. R. 181;

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irrespentive of any assets left to them by the ancestor would show that it was intended merely to be a pious obligation. The liability of the grandson was limited to the payment of only the principal dobt and was not bound to pay any interest at all. Under the old Hinda Law the rule of damdupat prevailed and the son had, therefore to pay interest not exceeding the amount of the original debt. great grandeon had not to pay any portion of the grandfather's debt. Under the present law the liability of the son and the grandson in respect of the payment of interest is not in any way limited. There is also another oironmetanes worth mentioning in this connection. Under the old texts the son's liability for the payment of the father's debts arose only after the "If the father without father's death. paying a debt which is due dies or goes to a distant country or is attl eted with an incurable disease, then his debts must be paid by his son and son's son by reason of their somebip and grandsonship, even if no assets of the father or of the grandfather have been left"- see Yajnavalkya's Smriti, Chapter II, verse 50, and the Mitaksbara commentary on it. "The father having gone abroad, the son is not bound to pay his debt before the lapse of twenty years" Narada, I. 14; Shered Books of the East, Volume XXIII, Edition 1889, page 46. This period of twenty years was apparently fixed with a view to raise a presumption of the father's death. Bri. haspati also says that the debt of the father is to be paid by the son, if the father is no longer alive, see the same volume of Sacred Books of the East, page 32", verse 47. It will thus be seen that the original liability which the old texts upon the son for the payment of laid the father's debt has now been very much enlarged.

9. Strictly speaking, the two principles mentioned above are quite distinct, one from the other and the liability of a sen to pay the father's debt has nothing to do with his right as a co-owner in the ancestral property. As observed in the case of Sahu Ram Ohundra v. Bhup Singh (2), responsibility to meet the father's debts is one thing and the validity of a mortgage over the joint estate is quite another thing. The son may be liable

to pay the father's parsonal and private debts, but the validity and the binding contracter of a mortgage or other alienation by the father of the joint family property as against the son has to be determined by another test altogether and it is whether the alienation is for necessary family pur-If it be not for those purposes, it would not be strictly binding upon the son or his share in the joint ancestral property. The general rule is that no single co-parcener can alienate anything beyond his own share in the joint property, the father being no exception to it. When a single so parcerer alienates the joint family property for necessary family purposes, the alienation is binding upon the other members of the family and upon the whole property covered by the alienation. This is, strictly speaking, no exesption to the general rule mentioned above, as such an alienation must be considered to bave been made by the whole family for their joint benefit. , part from the express texts making such alieuations binding on the whole family, the question would seem to be governed by the ordinary law of agency. The real exception is in the case of an alienation made by the father for the payment of his personal and private debte, provided these are not tainted with immorality and provided also these are what is called " antecedent" debte, that is, debts already existing and outstanding at the time of the alienation and not raised at the time of the alienation and by means of it. It is now settled law recognised by a long series of reported cases that a mortgage of ancestral property belonging to a joint Hindu family governed by the Micakshara School is binding on the mortgagor's son, if it be justified by legal necessity or if it be for the payment of an antecedent debt of the mortgagor. The son either as a defendant in the mortgage suit brought by the mortgagee or as the plaintiff in the suit instituted by bimself cannot avoid the mortgage, unless. he shows that the antecedent debt was inentred for immoral purposee. He would have also to show that the mertgagee was aware of the immoral nature of the previous debt. If the existence of the previous debt or of the legal family necessity be not proved, the mertgagee would not be able to hold the son's share in the mortgage property liable, See DEUDABAI U. NARAIN.

Ganesh Dher v. Nind Lal (14), Hiraram v. Ush Rame (8), Dilli ringh v. Bina (8), Ratan. chant v. Sheocharan (15) and Ohantrades Singh v. Mata Frasa 1(16). la a suit brought on a mortgage executed by the father, the son ean, therefore, call upon the mortgagee to show that the mortgage was for one of the two purposes mentioned above, so as to be binding upon his share in the mortgage property. If the mortgage be found to have been for neither of these two purposes, the mortgagee would not be able to hold the son or his share in the mortgage property liable. If this would be a good deferee in the mortgage-suit, it is not understood how the son's position could be injuriously affected by the mortgagee's omission to join the son as a party to his mortgage suit and by the son being thus compelled to bring a separate suit for protesting his own interest. It is true that equitable considerations would arise in favour of a bona file transferes for value, such as auction-purchaser, and that in such eases, the son would have no remedy against him, unless he showed that the anteedent debts were of an immoral nature which he was not bound to pay. In the present case, however, there are no such equitable considerations in favour of the defendant, at least so far as the eash portion of the mortgage-money goes and her position has not in any way been improved by the mere fact that the foreslosurs decree has been made final in her favour and by the fact that in the present suit she happens to be the defendant, the sons being the plaintiffe. The grounds on which the attack an alienation made by the father are available to them both as a defence when they are defendants and as an attack when they are themselves sning as plaintiffs.

10. It is contended that the present plaintiffs should be considered to have been properly and sufficiently represented in the previous suit was not maintainable on grounds which the fathers could have raised in defence for the sons. The pleas raised by the plaintiffs now would have been foreign to the mortgage suit, as these had the effect

(14) 2 O. P. L. R. 284. (15) 51 Ind. Cas. 28, 15 N. L. R. 89. (16) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 268 (F. B), of claiming for the sons a paramount and superior title to the mortgage property, as against the mortgagors. The fathers sould not have raised these pleas in defence either for themselves or for the sons. In any case, they did not represent the sons in the mort. gare suit so far as the present pleas went and these are still available to the sons. If contention raised by the defendant were correct, the sons would not be able to maintain in a sait even on the ground that the debt was of an immoral nature. Though there has been a diversity amongst the several High Courts on other points, there is none as regards the son's right to avoid an alienation made by the father on the plea that debts for the satisfaction of which it was made, were immoral and that he was not bound to pay them.

11. The case of Nanomi Babuarin V. Modhun Mohan (5) relied upon by Mansanir. A J. C, in support of his view was discussed in Sahu Ran Chandra v. Bhup Singh (2) and it does not help the defendant. The observation made in Nanomi Babuasin v. Modhun Mohun (5) to the effect that the sons cannot set up their rights against their father's alienation for an antecedent debt or against ereditor's remedies for their debte, if not tainted with immorality, was fully considered by their Lordships, who held that it did not give any countenence to the idea that the joint family estate could be effectively sold or charged in such a manner as to bind the issue of the father except where the sale or charge bad been for diesharging an autecedent debt, when the ce it was advanced at the very time of the erestion of a charge. In my opinion the case of Motiram v. Asarum (Ramgopal) (1) correctly lays down that, in cases like the present one, the sons can re-open the mortgage decree on grounds personal to themselves and can avoid the mortgage by showing that it was given for a debt which was not binding on them under the Hinda Law.

My answer to the first question is that, in the present emit the plaintiffs are not confined to the plea that the debt was borrowed for immoral purposes, but that they camplead there was not legal necessity for the loan or that no portion of it was an antecedent debt.

12. The expression "antesedent deb: "does not ovenr anywhere in Hindu Law. It

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was in Chidambara Mudaliar v. Koothaperumal (17) held that there was no distinction in principle between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt was binding on the son and the enforcement of the secraity exonerated him from the burden of his father's debts. Similarly, in Maheswar Dutt v. Kishun Singh (18) no distinction was made between debts insurred to pay off antesedent debts and those insurred for present necessities. Banerji and Richards. JJ, saw no distinction in principle between a debt secured by a mortgage and an unsecured debt, see Chandradeo Singh v. Mata Prasad (16). The point need not be further pursued, as it has now been authoritatively settled by their Lordships of the Privy Council that a loan made to the father on the occasion of a grant by him of mortgage on the family estate is not an antecedent debt, and that the mortgage so created is not binding on the son's share in the property, see Sahu Ram Chandra v. Bhup Singh (2). Even in the ease of Arumugham Chetty v. Muthu Koundan (10), where the Madras High Court declined to accept the correctness and the authority of eertain observations made in the ease of Sahu Ram Chandra v. Bhup Singh (2) on other points, the finality of the above view, so far as the Courts in India are concerned, was accepted. The mortgage executed in 1905 in favour of Pralhad cannot, therefore, be said to have been executed for the payment of an antecedent debt. The transfer by way of mortgage was made for a each payment of an antecedent debt. The transfer by way of mortgage was made for a cash payment and it was not on that day an antecedent debt. It could not, therefore, be binding on the son's shares in the property. The question is, whether the second mortgage of 1912 was binding on them to the extent of the amount of the consideration which went to satisfy the earlier mortgage; in other words, the question is, whether the amount due on the earlier date was an "antecedent" debt in 1912 when the second mortgage was excented. Though the point did not directly and specifically arise in the case, their Lordships expressed

(17, 27 M. 326. (18) 34 C. 184; 11 C. W. N. 294; 5 C. L. J. 441. their views on it in elear and unambiguous terms, for the guidance of the Courts in India. In the Madras case of Arumugham Ohetty v. Muthu Koundan (10), already eited. the Fall Bench of that High Court considered these views as mere obiter and held in direct conflict therewith that an independent debt, neither illegal nor immoral, contracted by a Hindu father on the security of the joint family estate, antesedent to the mortgage sued on, was an "antecedent debt," so as to support a charge on the son's shares also, to the extent of the sams secured on the prior mortgage. That this is a direct conflict with the views expressed in Sahu Rim Chandra v Bhup Singh (2) would be clear from the following extract from their Lordships' judgment:-

"In their Lordhsips' opinion these expressions which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his ereditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, viz., that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position : under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might DHADUBAI C. NABAIN.

be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalize any
such transaction. The limits of the prinsiple of the exception have been thus set
forth because, in their Lordships' opinion,
they form a guide to the settlement of the
confict of authority, in India on the subject
of antecedent debt."

Thue, according to their Lordships, the sale or charge in order to be binding on the son's shares should be made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. There is no ambiguity or doubt left in the matter. This view was meant to settle finally the previous conflict on the subject of antecedent debt and was expressed in such definite terms so that it might be followed by the Courts in India. It will thus be seen that it was not an obiter of an ordinary nature and, coming as it does from such a high authority as Privy Conneil, it should be followed.

13. The view expressed in Sahu Ram Ohandra v. Shup Singh (2', apart from its high authority, appears to be strictly in accordance with the principles governing a joint Mitaksbara family. There is nothing "startling in the proposition that while an antecedent debt of a simple character can support a subsequent mortgage or sale of the son's share also in the ancestral property, the fact that the antecedent creditor got the additional scourity of a mortgage deprives the anbsequent alience of the right to rely upon the antecedent character of the debt discharged by the consideration paid for his alienation." The Hindu Law made the son liable for the father's personal and private debts, that is, debts which he could borrow on his The debts which personal eredit. the father borrows on the security of the whole of the joint family property sannot be said to be his personal debts. It is well-known that a person is able to borrow much more money on the security of immoveable property than that upon his personal credit. The debts which the father can borrow on his personal credit would be petty sums of money, as compared to what he would be able to borrow on the security of the whole of the immoveable property belonging to the family.

It could not have been intended that the son's liability under Hinda Law to pay off the father's debts should extend to such heavy debts. The son would not, therefore, be bound to pay the debt borrowed by the father on the security of the joint family property and the charge or mortgage so created by the father would not affect the son's share in it.

14. My answer to the second question, therefore, is that the sum of Rs. 5,000 due on the earlier mortgage was not an "antecedent" debt of the fathers at the time of the mortgage of 1912.

15. Though the grounds that the amount due under the earlier mortgage and paid off out of the consideration of the second mortgage was an antecedent debt and that the second mortgage was, therefore, to that extent, binding upon the son's shares in the mortgage property fail, there are certain equities in favour of the second mortgages. In such eases, bona nde transferess for value have always been given protection on equitconsiderations. As, for instance, when the joint ansestral family has gone out of the family under a conveyance given by the father for payment of his debts or under an execution sale for such debts, the sone cannot recover their share unless they show that the debts were contracted for immoral purposes and also that the tranferee had notice that they were so contracted. In the present ease the debt due under the earlier mortgage had already become overdue and there was a certainty of the prop. erty being foreslosed, if it was not re paid. The old mortgage was earrying interest at 15 per cent., while the money advanced under the second mortgage was 9 per eant. There was thus an actual pressure on the estate and the second mortgage was more advantageous. The second mortgages was not expected to know the subtle and nice distinctions regards the term "antecedent debt," which point there was neither certainty nor unanimity even amongst the lawyers. The maxim that every body is presumed to know law and that its ignorance is no excuse cannot be applied when we have to decide whether a sertain act was or was not bona fide. The first mortgage was excented by both the brothers, who were the only adult male members of the family then and the second mortgages must have honestly thought that DHUDABAI C. NARAIN.

borrowed for family purposes. He acted perfectly bona file. The case would certainly have been different, had he himself been the creditor and advanced money under the first mortgage. My opinion, therefore, is that on this ground the second mortgage is binding on the son's shares in the property to the extent of the amount borrowed for satisfying the first mortgage. I have to observe that this is not an entirely new point, but that it had been taken up in the pleadings in the Trial Court, though not in this form.

I had the advantage of reading the jadgment which my learned brother Hallifax proposes to deliver in this case and asserding to him there was another ground why the second mortgage should be held binding on the sons' shares to the extent of the amount which went to satisfy the earlier mortgage. It is that as under the earlier mortgage the father had charged only 70 acres of land which was much less than their share in the whole 50) acres belonging to the joint family; it was perfectly valid and enforceable to that extent and that the subsequent mortgage executed for paying up that debt was, there fore, binding on the sons' shares. With the utmost respect, I have to differ from my learned brother, as the view expressed by him does not commend itself to me. When the family property is not divided, no individual member can say that any particular share or any particular property belongs to him. In every bit of land belonging to the family, all members have their shares and interest. In the 'O agree of land, which the father's mortgage, the sons had their shares and those shares the fathers could not validly convey except for certain specified purposes already mentioned. Moreover, the fathers did not purport to mortgage the 70 acres of land, as their individual shares in the joint family property.

In my opinion, therefore, the fact that only a portion of the family land was mort-gaged under the mortgage of 1938 would not, in any way, affect the rights of the sons and would not make either of the two mortgages binding upon them or their shares in the joint property.

Kotvat, A. J. C.—(August 2, 1921).—My learned brother Masnair, A. J. U., and I differed on two points. The first one was whether Motiram .v. Asaram (Ramgopal) (1) was

rightly decided and whether the pleathat there was no legal necessity for the loan or that the amount of Rs. 5.000 due to Prablad was not an antecedent debt of their fathers could be raised by the plaintiffs in this suit. The second point which must be formulated with reference to our judgments in First Appeal No. 41 B of 1919 [Sheonarain v. Natiu (4)] was whether according to Sahu Ram Ohandra v. Bhup Singh (2), the mortgage debt due to Pralbad was an antecedent debt at the time of the mortgage of 1912.

On the first point I have very little to add to what I have already stated in my judg. The point of distinction between ment. Nanomi Bibuasin v. Molhun Mohun (5) and Bhagbut Pershad Singh v. Girja Kor (7), relied on by Masnair, A. J. C., and the present case is, that in those cases at the time of the institution of the suit the property had already passed out of the family, whereas here the property was then still in the possession of the family. The decree in Sait No. 14 of 1915 was, moreover, not the ramedy of the ereditor for his debts. It was merely a step towards the remedy: Kishen Chand v. Sohan Lal (1). My opinion on this point is that Motiran v. Asiram (Ramgopal) (1) was rightly decided and that in the present case the plaintiffs could raise the pleas, that there was no legal necessity for the loan and that the amount of Re. 5,000 due to Pralhad was not an anteredent debt of their fathers.

The only point referred in the present case was the first one. The second point did not form the subject of reference as it had already been referred in First Appeal No. 41 B of 1919 | Sheonarain v. Nathu (4)]. Both points, bowever, have been argued and dealt with by my learned colleagues and the Bench deciding the present case will have the advantage of their opinions. On this point I only wish to add that the view taken by me in my judgment in First Appeal No. 41-B of 1919 (Sheonaroin v. Nathu (4) where I have dealt with the matter at some length ti: , that, secording to Sahu Ram Chandra v. Bhup Singh (2), the mortgage-debt due to Pralhad was not an antecedent debt of the fathers of the plaintiffs is further sup-

^{(19) 59} Ind, Cas. 710; 2 L. 95; 48 P. W. R. 1921.

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ported by Sukhdeo Jha v. Ihapat Kamat (20).

HALLIPAN, A. J. C - (August 5, 1921) .- The learned Judges who made this reference and the learned Coursel who argued it were clearly under the impression that the main matter for decision by this Fell Bench was the somewhat thorny question of the correct interpretation of the judgment of their Lordships of the Privy Counsil in Sahu Ram Chandra v. Bhup Singh (2). I find, bowever, on examination of the case that a discussion of that question is not necessary for a decision of the points of difference between the two learned Judges. reference is of a difference of orinion made to a Single Judge under section 10 (b) (ii) of the Central Provinces Courts Act, not of a question of law made under section 9. As it involved the examination of the sourcetness of a published ruling of a Bench of this Court in Motiram v. Asaram (Ramgopal) (1), which a Single Judge or a Beach would be bound to follow, and also was considered to involve an examination of the Privy Council case already mentioned, it would perhaps have been simpler to refer it in the first place to a Full Bench under section 9. The difficulty was surmounted by an order of the Judicial Commissioner, passed under rule 3 of the rules relating to Benches published in Notification No. 29-489 A of the 14th of June 1917, that the reference should be heard by a Full Bench. That, however, does not alter the character of the reference. It is still one under section 10 (b) (ii), that is to say, a reference of the point or points on which a difference of opinion exists between the two learned Judges who made it, and that is all we have to deside.

(2) The points of difference have not been formulated, but from the judgments recorded I take them to be as follows:

1. In reference to the consideration of the mortgage of 1912, are the plaintiffs limited to the plea that the sum of Rs. 5,000 advanced to their fathers in 1908 was a debt incurred for immoral purposes, or can they plead that there was no legal necessity for the alienation in respect of

(20) 54 Ind. Cas. 946: 5 P. L. J. 120; 1 P. L. T. 49; (1920) Pat 67; 2 U. P. L. R. (Pat) 32.

the loan of Rs. 10,000 made in 1912 and that the amount of Rs. 5,000 advanced in 1908 could not properly be called in 1912 such an antecedent debt of their fathers as would be binding on their chares in the property?

2. If the plaintiffs can plead that the debt of Rs. 5,000 was not in 1912 such an anteredent debt of their fathers as was binding on their

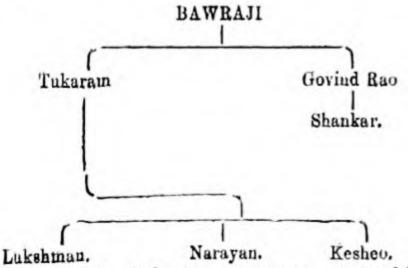
property, was it so or not?

Kotval, A. J. C., following Motiram v. Asaram (Ramgopal) (i) held that both the pleas mentioned were open to the plaintiffs and that on a proper interpretation of Sahu Ram Chandra v. Bhup Singh (2) the debt of Rs. 5.0.0 could not in 1912 be called an antecedent debt of the fathers because it had been secured by a mortgage of the family property when it was first incurred in 1:08. Masnair, A. J. C., was unable to agree with the ruling in Motiram v. Asaram (Ramgopal) (1) and was of opinion that the ruling of the Privy Conneil in Nanomi Babuasin v. Madhun Mohun (5) lays down that in a case like the present the sons can only take one ples and that is that any antecedent debt of their father's which forms a part of the consideration of the slienation by their father was incurred for immoral purposes. He differed also as to the proper interpretation of Sahu Ram Chandra v. Bhup Singh (2) and held that the debt of Rs. 5,000 was no less an antecedent debt of the fathers so as to bind the property merely because it had been essured on the family property before it was such a debt.

(3) As to the pleas that san be taken by the sons of a Hindu father in attacking a mortgage by him on which a decree has been obtained in a suit in which they were not impleaded, I am in entire agreement with the learned Judges who decided Motiram v. Asaram (Ramgoral) (1). Their decision is based on that of the Privy Council in Nanomi Babuasin v. Modhun Mohun (5) which Magnair, A. J. C., reads as restricting the sone to the one plea that their father's debt was immoral. It certainly does so restrict the sons in that ease, but the only question before their Lordships was of the way in which an admittedly existing debt due by their father at the time of the alienation might be assailed. They did not DHODABAI U. NARAIN.

lay down or even suggest by implication that the existence of the debt might not be disproved, or that a plea of want of legal necessity might not be taken in respect of any part of the concideration of the alienation that was not a pre existing debt.

- essential facts on which the (4) The desision was based were exactly the same in Bhagbut Pershad Singh v. Gir a Koer (7). The alienation was for a debt due by the father the previous existence of which was admitted, and their Lordships laid down that in such a case the only plea open to the sons was that the debt had been insurred for immoral purposes. Now the plea that the amount of Rs. 5,000 which formed a part of the consideration of the mortgage of 1912 was not binding on the estate according to the ruling in Sahu Ram Chandra v. Bhup Singh (2) is a plea that there was no existing "father's debt", and ean certainly be taken. I am of opinion, therefore, that the decision in Motiram v. Asaram (Ramgopal) (1) is correct, and that in the present case the plaintiffs are entitled to advance the plea that there was no legal nesessity in 1912 for their fathers to incur the debt of Rs. 10,000 and also the plea that in that year the amount of Rs. 5,000 due by their fathers was not an antecedent debt of their fathers so far as they were concerned, that is to say, that no antecedent debt of their fathers' which bound them was then in existence.
- (5) Before discussing the second point it is necessary to set down a few facts which do not appear in the judgments of the learned Judges who made the reference. The genealogy of the plaintiffs which is given by Kotval, A. J. C., may first be re-produced for convenience. It is this:



The first of the two mortgages with which we are concerned was executed by Tukaram

and Govind Ran on the 3rd of March 1908. In the plaint which was filed on the 8th of May 1918 Shankar is described as seven years of age, so that be cannot have been in existence or even in gremio matris in March 1908. The two mortgagors were, therefore, at that time owners of five. eighths of the joint family property, which, according to the personal law to which Hindus are subject in the Central Provinces and Berar, as well as in Bombay and Madras, they were competent to alienate. Even if Shankar had been in existence then the brothers Takaram and Govind Rao would have been owners of three eighths of the property.

(6) The property mortgaged in 1908 was three fields with a total area of 70.33 acres and a rental of Rs. 72. The mortgage which is the main subject of this suit was executed on the 15th of April 1912 by Tukaram, Govind Rao and Lakshman and comprises 22 fields, including only two of the three mortgaged in 1905, with a total area of 5,7.20 acres and a rental of Rs. 502-12-C. Now it is the basis of the plaintiffe' care that all the land mortgaged in 1912 was ancesteal property, so that the excess over the seventy acres previously mcr:gaged cannot have been acquired after 1908, and it was admitted before us that all the land mortgaged in 1912 was joint family property in 1908. One more fact bearing on the matters under discussion is this. The mortgage of the seventy acres in 1:08 was executed in favour of one Pralhad, and in 1912 Pralhad's mortgage was redeemed by the predecessor-in-interest of the defendant in this suit Rs. 5,000 in question, and the bond was taken back and has been produced.

(7) It follows, therefore, that in 1908, when Tukaram and Govind Rao alienated 70 acres, they were entitled, if they chose, to alienate no less than 317, (or at the least 190, even if Shankar had been in existence then) without the consent of the other members of the co parcenary body. It is probably true that an alienation by a member of a joint Hindu family of a specified item in the family property is good only to the extent of his share in that item, or rather in the equivalent of that item that might be allotted to him in a partition, even though the whole specified item is less than the chare he

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is entitled to alienate. This proposition is interpreted to mean that in this case if the mortgage of 1908 had been foreclosed the mortgages on partition could have got only five-eighths of seventy acres. It seems to me elear, however, that in such a case equity would require that the transferor should be compelled to make good his contract to the full extent of his capacity to do so. This seems to be the visw taken by Stanyon, A. J. O., in Mohanlal v Tet Chand (21) though that was not exactly the point considered in that case. If that view is correct, there is no farther question about the validity of the alienation of 1:12 in respect of the Rs. 5,000. Neither view of the meaning of the pronounce. ment in Sahu Ram Chandra v Bhup Singh (2) would make a debt by the father, secured not even partly on property belonging to else but entirely on property anybody belonging to himself, anything but an antecedent debt for payment of which he is entitled to alienate the joint property of himself and his cons.

(8) Another point of view is this. Even if we assept the view that the desision in Sahu Ram Chandra's case (2) means that what is undoubtedly in fact an antecedent debt of the father seases to be an antecedent debt binding on the sons merely because he secured it by a mortgage of his sons' shares along with his own, it seems to me the mortgagees in this case would be amply protected by the dostrine of reasonably satisfactory enquiry into the necessity for the alienation. This dostrine of reasonable satisfaction, after due enquiry as to the propriety of an alienation of joint family property by the manager of the family, must apply just as much to an antecedent father's debt as to family necessities or pressure on the estate. The mortgagess could searcely be expected to know anything about such a delicate point of law as that raised in the case, about which there is even now so much discussion, many years before it was enunciated by their Lordships of the Privy Conneil, whatever the true interpretation of their Lordships' enunciation may be, and at that time any person who ascertained that a Hindu father had been owing money for some years and had gone to the length of mortgaging the whole of his family prop-

erty for it, would have been quite justified in assuming, as all the Courts in India did, that this antesedent debt of his was one for which he could alienate their shares with his own in the joint property, whether the mortgage bound their shares in the property or not. These mortgagees assertained that Tukaram and Govind Rao actually owed Rs. 5,000 for which they had mortgaged only seventy agras of land out of a family estate of 500 in . which they knew these two co-parceners had more than a half share. They had, therefore, every reason to be quite satisfied that the sum of Rs. 5,000 was properly due by Tukaram and Govind Rao. and constituted a debt for which in 1912 they were fully entitled to alienate their three minor sons' shares in the family prop. erty.

(9) I cannot, indeed, see that they would have been in any worse position even if the previous mortgage had been of the entire family property. If they were satisfied that an unsecured father's debt existed it would not be for them to institute enquiries and make sure that the debt had not been insurred for immoral purposes before advancing money on the security of the family property for its re-payment. Similarly, if the previous debt was secured on the family property it would not be necessary for them to enquire whether the money has originally been borrowed for family necessity or the debt had been in existence as a father's debt before the mortgage was executed. They would be perfectly justified in assuming that it was so, for, to translate the familiar maxim of law, the chances are that what has been done has been done honestly and properly.

(10) For these two reasons, I hold, in respect of the second of the two matters of difference referred, that the sum of Rs. 5,000 which forms a part of the consideration of the mortgage of 1912 was then an antecedent debt due by Tukaram and Govind Rao, in payment of which they were entitled to alienate their sons' share in the joint family property.

HALLIFAX, KOTVAL AND DECELEY, A. J. Cs.—
(August 5, 1921).—For the reasons recorded in our separate judgments we are unanimously of opinion that it was open to the plaintiffs to plead that there was no legal necessity for the alienation of their shares in the

^{(21) 18-}Ind. Cas. 826, 9 N. L. R. 18.

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property in respect of the loan of Rs. 10,000 made in 1912 and no justification for it in respect of the amount of Rs. 5,000 advanced in 1908 for the reason that the sum was secured by a mortgage on their shares when it was first advanced. Two of us, forming a majority of the Fall Bench, are further of opinion that the mortgage of 1912 is binding on the whole property mortgaged in respect of the amount of Rs. 5,000 then paid in redemption of the mortgage of 1908.

FINAL JUDGMENT.

AND PRIDRACK, A. J. C.'s .-(August 8, 1921.)-The Fall Bensh has held that the desision in Metiram v. Asaram (Ramgopal) (1) is occreet and that the plaintiffs are entitled to advance the plea that there was no legal necessity for the lcan in 1912 and that the amount of Rs. 5,000 due to Pralhad was not an antesedent debt of their fathers. As regards the question whether, according to Sahu Ram Chandra v. Bhup Singh (2), the amount of Rs. 5,0(0 constituted an antecedent debt in 19.2 although the point was not directly referred, yet two of the Judges of the Fall Bench have held that it did not. We are also of the same opinion. The result is that the appeal must fail. It is dismissed with costs. G. B. D.

Appeal dismissed.

LAHORE H'GH COURT.

SECOND CIVIL APPEAL No. 1492 OF 1921.

December 6, 1921.

Present: - Mr. Justice Abdul Racof.

MUHAMMAD SAID—PLAINTIFF—

APPELLING

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ABDUL ALI-DEFENDANT-RESPONDENT.

Construction of document - Deed of gift-Right to recover compensation, whether assigned.

Defendant sold two shops and in the deed of sale covenanted that in case of eviction by the Municipality the vendee would be entitled to refund of the purchase money. The vendee made a gift of the shops in favour of the plaintiff and the deed of gift contained the following clause: "The donce like the donor will be bound by all the terms and all the rights to realise rents, to do repairs, etc., which

I had under this deed vest in the donee." Plaintiff was evicted from the shops by the Municipality and brought the present suit to recover the purchase, money from the defendant:

Heid, that the right to recover compensation had not been assigned to the plaintiff under the deed of gift and that his suit must, therefore, fail. [p. 257, col. 1.]

Second appeal from the decree of the District Judge, Delhi, dated the 21st March 1921, affirming that of the Muneif, First Class, Delhi, dated the 1st Ostober 1920.

Dr. Shuin ul Din, for the Appellant. Mr. M. Obedulla, for the Respondent.

JUDGMENT.-On the 19th July 1907, the defendant in this case transferred two shops or their aml in favour of the plaint iff appellant's father. In the sale deed there was entered a covenant to the effect that in case of eviction by the Municipality the vendee would by entitled to refund of the purchase money and also to recover the expenses of repairs. On the 23rd of November 1910 the vendee made a gift of the two shops in favour of his son, the plaintiff appellant before me. The plaintiff, however, was evicted by the Municipal Committee in August 19 9. He, therefore, preferred this claim for the refund of the purchase money plus Rs. 100 expenses insurred by his father in repairs. The suit was resisted on the ground that the right to recover the compensation or the purchase-money was not assigned under the deed of gift to the plaintiff, and that there being no privity of contract between the plaintiff and the defendant no suit of the nature brought by the plaintiff could be maintained. Both the Courts below have accepted the defence and have dismissed the suit. The plaintiff has come up in second appeal to this Coart and the main contention put forward on his behalf by his learned Counsel. Khalifa Shuja-ud Din, is that according to the correct construction of the deed of gift the right to recover compensation was also transferred to the plaintiff. I have read the deed of gift earefully and I do not find that there is anything in the deed which bears out the contention of the learned Connsel. The following words in the deed of gift are especially relied on by the learned loansel in support of his "Toe done like the argument, namely, donor will be board by all the terms

Z. K.

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and all the rights to realise rents, to do repairs, etc., which I had under this deed vest in the donee." I cannot hold that under this clause the right to recover compensation was also assigned to the plaintiff. In my opinion, the Courts below were right, and this appeal must be dismissed with costs. I order accordingly.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 270 B of 1920. January 23, 1922.

Present: -Mr. Prideaux, A. J. C.
BALOO AND OTHERS - DEPENDANTS APPELLANTS

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GODAWARIBAI AND OTHERS-PLAINTIPFS
-RESPONDENTS.

Hindu Law-Antecedent debt-Mortgage by father of family estate to secure loan-Sons, liability of.

A loan obtained by the father of a Hindu joint family on the security of a mortgage on the family estate is not an antecedent debt binding on

the sons. [p. 258, col. 1.]

Sahu Ram Chandra v. Bhup Singh, 89 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 83 M. L. J. 14; (1917) M. W. N. 489; 22 M. L. T. 22: 6 L. W. 218; 44 I. A. 126 (P. C.), Brij Narain Rai v. Mangla Prasad, 50 Ind. Cas. 101; 41 A. 235; 17 A. L. J. 249: 1 U. P. L. R. (A.) 49, Ram Singh v. Chet Ram, 51 Ind. Cas. 119; 41 A. 529; 1 U. P. L. R. (A.) 52; 17 A. L. J. 706, Sukhdeo Jha v. Jhapat Kamat, 54 Ind. Cas. 946; 5 P. L. J. 120; 1 P. L. T. 44; (1920) Pat. 67; 2 U. P. L. R. (Pat.) 39, Ratanchand v. Sheocharan, 51 Ind. Cas. 28; 15 N. L. R. 88 and Motiram v. Asaram (Ramgopal), 53 Ind. Cas. 776; 16 N. L. R. 64, relied ou.

Appeal against the decree passed by the District Judge, Akola, dated the 27th April 1920, in Civil Appeal No. 114 of 1919.

Mr. M. R. Bose and Mr. A. V. Khare, for the Respondents.

JUDGMENT.—The plaintiffs in this case, as the legal representatives of one Sardaribai, sued defendants Nov. 1 to 3 as the legal

representatives of the deseased Harisingh on a mortgage deed of 5th June 1913 elaiming Rs. 2,253 thereon. The 4th defendant was joined as the purchaser of some of the mortgaged property. The execution, consideration and valid attestation were denied by the first three defendants, and it was further denied that the plaintiffs are the heirs of Sardaribai. It was pleaded that the property mortgaged was the joint ansestral property of the mortgagor and the defendante, and that the mortgage was not binding on them. It was admitted that the property was joint and ancestral and plaintiffs stated that of the consideration of Rs. 1,200, Rs. 400 were borrowed for the payment of the decretal debt of one Bhairodas Laxmandas, Rs. 400 for payment of the mortgage-debt of Ramdban Brijraj, Rs. 40 paid in eash before execution and Rs. 360 paid before the Sub-Registrar. This was for cultivation purposes and for maintenance. It was pleaded that the amount having been advanced for the payment of antesedent debts and family purposes is binding.

The first Court found that Harisingh, defendants' father, did execute the deeds that consideration passed; that the deed was duly attested, that plaintiffs are the rightful owners of the document; that Rs. 400 was payable on a decree dated 31st July 1913 against the joint ancestral property, and another Rs. 400 were paid to discharge a mortgage debt on a previous mortgage, but that these two debts were not antecedent debts. A decree was eventually passed in plaintiff's favour for a sum of Rs. 2,794.6.0 against the one-fourth share of Harisingh alone in the

property.

On appeal the District Judge, West. Berar, finds that the sum of Rs. 800 above referred to were antecedent debts not shown to be either immoral or illegal and that this amount was binding. The decree of the first Court was modified and a clause added "that in case the defendants paid. Rs. 800 for principal and Rs. 800 for interest and costs of the first Court Rs. 236 2.0 and Rs. 208.10 for costs of appeal, the mortgage shall be considered redeemed and if the sum is not paid on or before the 17th day of July 1920, the defendants shall be debarred from all rights to redeem the property" and in the event of

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the defendants making the payment they would be entitled to redeem the one fourth share.

Defendants appeal here. It is contended that the Rs. 800 should not be deemed to have antecedently incurred. It has been held, in the well known case of Sahu Ram Cianara v. Bhup Singh (1) by their Lordships of the Privy Council that "a loan made to the father on the occasion of a grant by him of mortgage on the family estate is not an antecedent debt.' The same view has been maintained in Bri, Narain Rai v. Mangla Prasad (2) and in Ram Singh v. Chet Ram (3). Sukhdeo Jha v. Jhopat Kamat (4) is another ease on the same point. The same principle was affirmed in Ratanchand v. Sheocharan (5) and Motiram v. Asaram (Ramgopal) (6). In a recent case decided by a Foll Bench of this Court, Dhudabai v. Narain (7), the Allahabad view has been adopted.

It is pleaded for the respondents that, as regards the Rs. 400, the decretal debt, it should be held that legal necessity existed for that portion of consideration. It seems elear that the Rs. 400 due on the mortgage then existing is not antecedent debt and, therefore, sannot be held binding on the defendants' share of the estate. It has not been proved that the Rs. 400 paid in each were for family necessity or benefit and also that cannot be held as binding on the defendants' share. As regards the Rs. 400 sovered by the decree to satisfy which part of the consideration of the mortgage sued on went towards, the ease must be tried whether that payment amounts to family necessity or benefit. I must remand the case to the lower Appellate Court for a finding on that question and a fresh decision with advertence to the adove remarks.

That Court may, if it thinks fit, remand, the case to the Trial Court, for there is no specific issue on this point though the third issue might be said to cover it. Costs here will abide the result.

G, R. D.

Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3387 OF 1917.

December 7, 1920.

Present: —Mr. Justice LeRossignol and

Mr. Justice Campbell.

GURCHARAN SINGH, MINOR, SON AND

BEPRESENTATIVE OF HARNAM SINGH,

DECEASED, THAOUGH MANGAL SINGH

—PLAINIFF—APPELLANT

versus

SHIBDEV SINGH AND OTHERS--DEFENDANTS-RESPONDENTS.

Civil Procedure Code (Act V of 1909), ss. 96 (3), 104 (2), O. XXIII, r. 3, O. XLIII, r. 1 (m)—Compromise—Refusal of Trial Court to record—Recorded by Appellate Court—Decree—Appeal, whether lies,

During the pendency of a suit the defendants applied to the Trial Court to have an oral compromise recorded which they alleged had been arrived at between the parties The Court refused to record the compromise on the ground that all the parties had not joined the compromise Defendants appealed to the District Judge under Order XLIII, rule 1 (m) of the Civil Procedure Code. The District Judge held that all the parties had agreed to the compromise. On this a decree was passed in accordance with the terms of the compromise. The plaintiffs appealed to the High Court:

Held, (1 that the order of the District Judge recording the compromise was final under section 101 (2) of the Civil Procedure Code [p 26, col. 1]

(2) that it amounted to a final decision that all the parties had consented to the compromise; [p. 261, pol, 1,]

(2) 50 Ind. Cas. 101; 41 A. 235; 17 A. L. J. 249; 1

U. P. L. R. (A. 49.

(4) 54 Ind Cas. 946; 5 P. L J. 120; 1 P. L. T. 49; (1120) Pat. 67: 2 U. P. L. R. (Pat.) 39.

^{(1) 39} Ind. Cas. 280; 39 A. 437; 21 C. W. N. 693; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L J. 14; (1917) M. W. N. 439; 22 M, L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

^{(3) 51} Ind. Cas 119; 41 A. 529; 1 U. P. L. R. (A.) 52; 17 A. L. J. 706.

^{(6) 51} Ind. Cas. 28; 15 N. L. R 88. (6) 53 Ind. Cas. 776; 16 N. L. R. 64.

^{(1) 66} Ind. Cas. 239 (F. B.).

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(3) that, therefore, the decree which followed upon the compromise was a decree passed with the consent of the parties, within the meaning of section 96 (3) of the Civil Procedure Code, and no appeal lay against it. [p 261, col 1]

Ayyagari Veerasalingam v. Kovvuri Basivireddi, 25 Ind. (as. 56; 27 M. L. J. 173; 1 L W. 54; 18 M L. T. 125 and Renuka v. Onkar, 46 Ind. Cas. 775, dis-

sented from.

Second appeal from a decree of the District Judge, Sialkot, dated the 31st July 1917, reversing that of the Subordinate Judge, First Class, Sialkot, dated the 26th June 1916.

Kanwar Dalip Singh, for Bakshi Tek Chand, for the Appellant.

Lala Treath Ram, for the Respondents.

JUDGMENT,—This judgment will dispose of Appeals No. 3387 and 3382 which have been referred to a Division Bench for disposal on account of the law point involved.

Two suits were brought against Sardar Shibdeo Singh and others, managers of the Khalsa High School, Sialkot, in respect of 54 kanals 11 marlas of lands, the site of the High School. In one, the plaintiff was Harnam Singh, Mahant of the Durbar Baba Nanak Sahib. He alleged that he bad been induced to part with the land, which originally belonged to his shrine, under false pretences, that the defendants had not fulfilled an agreement to give over land in exchange for it, and that they should be dispossessed. The plaintiffs in the second suit were Hazura Singh and Fatch Singh, two pu aris of the same shrine. They also sued for dispossession of the defendants, and they further challenged the right of Mahant Harnam Singh to alienate. Mahant Harnam Singh as a defendant admitted the elaim of these plaintiffs but the other defendants contested both suits.

The saits were in the Court of the Sabordinate Judge. On the 2nd May 1916 two
of the contesting defendants, Shibdeo Singh
and Garbakhsh Singh, patitioned the Court
that the dispute in each case had been settled
by oral compromise. Harnam singh and
Fatch Singh denied having been parties
to any compromise and, after framing an
jesue on the point and recording evidence,

the Subordinate Judge decided that Harnam Singh and Fatch Singh were neither present nor represented when the alleged settlement was arrived at, and that they had not ratified it subsequently. Accordingly, he refused to record the compromise.

Shibdeo Singh, Kharak Singh and Gur-bakhsh Singh appealed to the District Judge, who found that there had been a valid compromise to which all parties to both suits had assented, set aside the order of the Subordinate Judge, and returned both cases with instructions to him to decide them in accordance with the compromise the terms of which he held to be those stated by Shibdeo Singh and Gurbakhsh Singh in their petition.

Both sets of plaintiffs appealed again to the Chief Court. The learned Judge before whom the appeals were placed held that no appeals lay by reason of section 104 (2), Civil Procedure Code, but in exercise of revisional power set aside the District Judge's orders of remand and directed him to dispose of the cases himself by recording the compromise and passing decrees in accordance with it.

with it.

This accordingly was done, and the plaintiffs have appealed ones more to this
Court against the decrees of the District
Judge.

The first point for decision is that deals with in the order of reference to a Division Bench, whether or not the appeals are barred by section 96 (3), which lays down that no appeal shall lie from a decree passed with the consent of parties.

The learned Counsel for the plaintiffs has commenced by pointing out that section 375 of the old Code of Civil Procedure has not been reproduced in entirety in the present Code and by distinguishing certain early authorities on that ground.

Section 375 ran as follows:-

"If a suit be adjusted wholly or in part by any lawful agreement or compromise or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith ac

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ar as it relates to the suit, and such decree hall be final, so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction."

The section, with the words underlined (italicized) omitted, with the substitution for the first four words of the words "where it is proved to the satisfaction of the Court that a suit has been," and with one or two other unimportant verbal alterations, appears in the 1908 Code as Order X III, rule 3. The portion underlined has been replaced by section 96 (3) "No appeal shall lie from a decree passed by the Court with the consent of parties."

the discussion of Conneel next sites law the in Renuka Untar (1). ٧. admittedly differing ease in its facts from the present cases) to support an argument that the alteration of the old law has the result that decrees made in pursuance of Order XXIII, rule 3, are not necessarily final, and that the right of appeal conferred by sections 96 (1) and (2) and 100 is only withheld by section 95 (3) when the decree is passed with the consent of the parties, ecmpromise, recording of compromise, and decree being three separate proceedings. He has quoted a decision of the Madras High Court, reported as Appogari Veerasalingam v. Korvuri Basivireddi (2), as one exactly in point. That care dealt with a situation similar to the present situation except that there was no previous appeal under Order XLIII, rule (1) (m), A written compromise was presented to a Subordinate Judge who recorded it and passed a decree which the High Court held was in accordance with it, in the face of objection by the defendant that he agreed only to execute a cale deed to the plaintiff onteide the Ocurt on the plaintiff withdrawing the suit and not to a deeree being passed (as it appears from the report was dore) compelling him to execute the saledeed. The defendant aprealed uneuccess.

fully against the decree to the District Judge, and then preferred a second appeal to the High Court.

The High Court overraled two preliminary objections (1) that the second appeal was in effect against an order by the District Judge, in appeal, confirming an order by the first Court recording a compromise and was barred by Order XLIII, rule (1) (m) and section 101 (2) and (2) that section \$6 (3) probibited an appeal from a decree passed with the consent of parties. On the first point the High Court ruled that the first and sesond appeals were respectively from the decree of the Sabordinate Judge passed in accordance with the compromise, after recording it, and from the decree of the District Jadge on appeal against the Sabordinate Judge's desree, and that there bad been no appeal to the District Court against the order recording the compromise. answer to the second objection was held to be that the decree itself was not passed with the consent of the parties, but the Court held that there was a consent of parties to the terms of a compromise agreement which was recorded and it passed a desree in accordance therewith notwithstanding the objection of one of the parties.

The appeal was then dismissed on the merits, the defendants' objection being dealt with in the following terms:

"The appellant's learned Counsel coutended that under the compromise agreement the first defendant agreed only to execute a sale deed to plaintiff outside the Court in consideration of the plaintiffs' withdrawing the suit and that he did not agree to a decree being passed compelling him (the second defendant (sic)) to execute such a sale deed. Whether he agreed to the Courts' passing a decree, or not, compelling him to execute a sale-deed is not relevant. The real question is whether the suit was adjusted by a compromise one of the terms of which was that the first defendant should execute such a sale. deed and whether a decree can be passed in accordance with such a term. We think that it could be done."

^{(1) 6} Iud. Car. 775.

^{(2) 25} Jnd. Cas. 58; 27 M. L. J. 178; 1 L. W. 541; 16 A. L. T. 126.

LALIT KUMAR MURREJEE D. DASIRITHI SINGHA.

Our view of the law as applied to the fasts of the sases before us is this. Under Order XXIII, rule 3, the first Court had to see whether the suits were proved to its satisfaction to have been adjusted by a lawful compromise. There is no question of the lawfulness of this particular compromise but the first Court held that adjustment was not so proved because two of the parties had not agreed to the compromise, and it refused to record the compromisc. Appeal was made under Order XLIII, rule 1 (m), and the District Judge beld that all the parties bad agreed to the compromise, and reversed the order refusing to record it. This order of the District Judge was final under section 104 (2). There was thus a final decision that all the parties had consented to the compromise. Again, under Order XXIII, rule 3, a deeree in assordance with a recorded compromise must follow it. There is no doubt that the present decrees are in acsordance with the recorded compromise, which has been held finally to have been made with the someont of the parties. Those parties at the time of that consent must have contemplated the issue of the decrees, which are mere formal expressions of the compromise, in that view these decrees are decrees passed with the consent of the parties within the meaning of section 96 (3). No appeal lies against them.

Mr. Dalip Singh for the appellants relies strongly upon the decision on the second preliminary objection in Appegari Veerasalingam v. Koveuri Basiviredai(2), and we suppose that we must be taken to dissent from it. Nevertheless, the ultimate result of that case seems to uphold our view. The appeal failed and the learned Judges, although asked specifically to go behind the finding of the Court which recorded the compremise that it was agreed to by the appellant, did not do so (we have quoted the actual words of the judgment purposely) and indeed appear to have ignored the request altogether.

It will be seen also that we differ from the learned Additional Judicial Commisaloner who decided Renuka v. Onkar (1), in his interpretation of the law and we do so

with all respect for what he has written.

Mr. Dalip Singh's further contention that ander section 105, Civil Procedure Codes if appeals lie, the correctness of the order on which the decrees are based can be attacked, even if that order is not appealable, need not be dealt with since we hold that appeals do not lie.

We, therefore, dismiss both appeals with

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Appeal dismissed.

CALCUTTA HIGH COURT.

APPELL PROM ORIGINAL CIVIL No. 89 OF 1920

IN SUIT No. 248. OF 1919.

November 19, 1920.

Prisent: -Sir Lauselot Sanderson, Kr., Chief Justice, and Justice Sir Asutosa Mookerjee, Kr.

PLAINTIFF—APPECLANT

DASARATHI SINGHA DEPENDANT-RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 9 (2),

-Minor heir-Guardian of property, appointment of

-Estate of deceased under Administration

The appointment of the mother of a minor as administratrix to his father's estate, does not deprive the minor of his interest in the estate of his father, and an order of the Court within whose jurisdiction such property exists appointing a guardian of the property of the minor is not without jurisdiction and cannot be treated as a nullity. [p. 268, col. 1]

LALIT KUMAR MUKERJEE U. DASARATHI SINGHA.

Appeal from an order of Mr. Justice Rankin. Mr. S K. Chakravarti, (with him Mr. B. O. Ghose), for the Appellant.

Mr. E. L. Mitter, (with him Mr. H. O. Maiumdar), for the Respondents.

JUDGMENT.

SANDERSON, C. J .- This is an appeal from the judgment of my learned brother, Mr. Justice Rankin.

On the 27th of November 1919, a suit was brought by the plaintiff against Dasarathi Singha, based upon promissory-notes alleged to have been executed by the defendant, the dates of which extended from the 28th of July to the 3rd of September 1919. defendant was sued as a person who was sui juris. On the 17th of December 1919, an ex parte decree was made. Thereafter, there was an attachment of certain properties, and, in consequence thereof, on the 16th of February 1920, an application was made by Subashini Dasi, who was alleged to be the certificated guardian of the defendant, that the decree should be set aside. It was alleged that at the time of the above mentioned snit and deeree the defendant, Dasarathi Singhe, was a minor. On the 15th of June 1920, the learned Judge delivered judgment after an issue or issues had been tried, and the following order was made : "This Court doth deelare that the defendant is a minor under the age of twenty-one years and it is ordered that all proceedings in this suit except the said plaint be, and the same are hereby, set aside. And it is further ordered that the defendant be at liberty to appear in and defend this suit upon a proper guardian being appointed in this suit. And it is further ordered that the said plaint and the register of this suit be amended by describing the defendant in the cause title thereof an a under the age of twenty-one years."

The main ground on which this appeal was argued by the learned Connsel for the appellant was that the order appointing the guardian, who was the sister of the defendant, was a nullity, and that the defendant had in fact attained his majority in May

1919.

The material dates are as follows. In December 1900, the father of the defendant died; on the 31st of May 901 the defendant was born; on the 30th of Auguts 1901

Letters of Administration were granted to the defendant's mother in respect of the father's estate. It was on the : Oth of July 1917 that Subashini Dasi, the applicant in this matter, was appointed guardian of the person and the property of the defendant, Dasarathi Singha. At that time the defendant was under the age of seventeen years. By reason of the provisions of the Indian Majority Act, the effect of that order, if valid, was to extend the mirority of the defendant until he attained the age of twentyone. Therefore, if the order was valid, the defendant was still a minor in 1919, when the promissory-notes were executed by him and when the decree in the suit was made.

Learned Counsel has argued that the order of guardianship made by the District Judge was without jurisdiction and that, consequent. ly, it should be treated as a pullity, and that if it were so treated the defendant was not a minor in November or D-sember 1919, when the suit was instituted and the decree made, inasmuch as he attained the age of eighteen in 1919.

The District Judge of the Hughli Court by his order appointed the sister guardian of both the person and the property of the defendant. My learned brother, Mr. Justice Rankin, found that the residence of the defendant was not within the jurisdiction of the Hughli Court and that, consequently, the appointment of the guardian, so far as it concerned the person of the defendant, was not valid. But the learned Judge further found that cartain of the properties left by the minor's father were within t-e jurisdiction of the Hughli Court and that, consequently, the order was not invalid so far as the property was corcerned.

It was, however, urged that the mother of the defendant had been appointed administratrix of the father's estate and of the abovementioned properties and that, consequently, the said properties vested in her and, therefore, they were not the properties of the defendant. It was urged, therefore, that the Hughli Court had no jurisdiction to make the order appointing the sister guardian of the property, and, therefore, it must be treated as a pullity. By section 4 of the Probats and Administration Act (V of 1881) it is provided as follows:-

LALIT KUMAR MUKERJEN U. DABARATHI SINGHA,

"The executor or administrator, as the ease may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such. [But nothing herein sontained shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other porson]."

Therefore, the property of the defendant's father would vest in the defendant's mother as administratrix on her appointment as such administratrix, and for the purposes of administration. The defendant, however, was admittedly his father's heir, and he had a beneficial interest in the property, and I am not prepared to hold that the mere fact of the appointment of the mother as administratrix would have the effect that the defendant had no property within the jurisdiction of the Court within the meaning of section 9 (2) of the Guardians and Wards Act (VIII of 1890).

In my judgment, therefore, the Hughli Court had jurisdiction to make the order as to the guardianship of the property, and, although there, may not have been any necessity to appoint the guardian in respect of the property-as to which I express no the order opinion-I cannot hold that The order the was a pullity. Hughli Court, therefore, extended the minority of the defendant until he Was twenty-one years old. Consequently, he was a minor at the date of the suit and the desree, and he should not have been sued as if he were a person in sui juris.

The result, in my judgment, therefore, is that I agree with my learned brother, Mr. Justice Rankin, in the order which he has made, and, in my judgment, this appeal should be dismissed with easts.

Mooresten, J.—I agree that the order made by Mr. Justice Rankin must be affirmed and this appeal dismissed with costs.

The facts material for the determination of the question in controversy are not in dispute at this stage, and may be briefly outlined. On the 27th November 1919, the appellant instituted a suit against the respondent on several negotiable instruments under Order XXXVII of the Civil Procedure Code. The claim was not contested, and was decreed ex parts on the 17th

Desember 1919, On the 12th February 1920, the sister of the respondent initiated the proceedings which have culminated in this appeal. She made an application under rule 4 of Order XXXVII of the Code of Civil Procedure, to set aside the ex parte decree on the allegations that the respondent was, at the date of the institution of the suit, an infant, that she had been appointed guardian of his person and property, that the suit instituted against him, described as sui juris, was not properly constituted, and that, consequently, the ex parte desree should be vacated and the suit restored to be re-tried in accordance with law. It was asserted that the respondent was the posthumous son of his father and was born on the 31st May 1901. Her sister was appointed guardian of his person and property by the District Judge of Hughli on the 30th July 1917 with the result that the period of minority, which would otherwise have terminated on the 31st May 1919 was extended up to the 31st May 1922. Consequently, on the 27th November 1919, when the suit against the respondent was instituted he was still an infant. The appellant contended that the order for the appointment of the sister as gnardian was inoperative, first, because it had been made without jurisdietion; and secondly, because it had been irregularly made without service of the raquisite notices. Justice Mr. overraled these contentions and granted the application,

On the present appeal, the grounds urged before Mr. Justice Rankin have been reiterated and it has been urged by Mr. Chakravarti that the order was made without jurisdiction and that, in any event, it was irregularly made.

It may be stated at once that the second ground assigned cannot be entertained in the present proceedings. If the order was irregularly made, the proper course to follow was to have it vacated by the Court which passed it, as pointed out by Mr. Justice Davar in the case of Nagardas Vachra; v. Anandrao Bhai (1). We are, consequently, called upon to consider only one question, namely, whether the order for appointment of guardian was made without

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^{(1) 81} B. 590; 9 Bom. L. R. 495.

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jurisdiction. Section 9 of the Guardians and Wards Act (1890) provides that if the application is with respect to the guardianship of the person of the minor, it may be made to the District Court having jurisdiction in the place where the minor ordinarily resides, or to a District Court baving perisdiction in a place where he has property. In so far as the order appointed the sister to be guardian of the person of the minor, it has been found that, at the date of the application, the minor did not ordinarily reside within the jurisdiction of the District Court at Hughli. Consequently, we may take it that the order in that respect was made without juriediction. But this is not sufficient for the purposes of the appellant, because, under section 3 of the Indian Majority Act (1875), the period of minority is extended from eighteen years to twentyone years, if a guardian has appointed either of the person or of the property of the infant. Consequently, the appeliant bas to establish that the order for the appointment of the sister as guardian of the property of the minor was also made without jurisdiction.

On this part of the ease, the contention is that the minor had no property within the jurisdiction of the District Court at Hughli. It is conceded, however, that the father of the minor left property within the jurisdietion of that Court. The respondent on his birth took this property by right of inheritande, because it is well established that an unborn shild is treated as in actual existence whenever it is to his benefit so to treat him. As was pointed out in Beroja v. Nucokissen and Keshab v. Eishnu Prosad (3), this is a principle recognised by Hindu Law. The rule was subsequently affirmed by a Fall Beach of this Court in Kali Das v. Krishan Chandra Das (4) and was recognised by the Judicial Committee in the case of Garendromohun Tagore v. Jotendromohun Tagore (5). We then start with the position that

the estate left by his father, subject no doubt to the liability to discharge such debte, if any, as were legitimately payable out of the assets left by him. It is then contended, that as, on the 20th August 1901, the mother of the infant was appointed administratrix to the estate left by ber deceased bushand, the properties ceased to be the properties of the infant within the meaning of section 3 of the Indian Majority Act. In support of this proposition reliance is placed upon section 4 of the Probate and Administration Act, which is in these terms: "The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." This section corresponds to section 179 of the Indian Succession Act (1865), which was considered by this Court in the ease of B. aja Nath Dey Sirkar v. Anandamoyi Dasi (6). Mr. Justice Phear pointed out in that case that the executor or administrator holds the estate of the deceased only in a representative character, and takes ro beneficial interest therein. This view was affirmed in Ragnaroin v. Universal Life Assurance Co. (7) and was subsequently adopted by the Bombay High Court in Lullubhai v. Mankutarbai (8) and by the Madras High Court in Adusupatti Venkata Rao v. Saumi I illai (9). The case last mentioned pointed out that the decisions in Bhaifi Bhim i v. Administrator-General of Bombay (10) and Srivangammal v. Sandammal (11) were in reality not opposed to this principle. In these cases, the question substantially in controversy was as to the right of possessich of the administrator as against the person entitled to succeed to the estate either under a testamentary instrument, or in the crdinary source of inheritance when the original owner died intestate.

the respondent took by right of inheritance

^{(2) 2} Sevestre 238. (3) 2 Sevestre 240.

^{(4) 2} B. L. R. 103 at p. 121 (F. B.); 11 W. R. A. O.

J. 11; 4 Mad Jur. 296; 1 Ind. Dec (N. s. 679.

⁽⁵⁾ I A. Sup. Vol. 47 at p. 67; 18 W. R. 359; 9 B. L. R. 377; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

^{(6, 8} B. L. R 208.

^{(7) 7} C. 594; 6 Ind. Jur. 85; 10 C. L. R. &61; 8 Ind. Dec. (N. 8.) 931.

^{(8) 2} B 388; 1 Ind. Dec. (N. s.) 682 (F. B.).

^{(9) 13} Ind, Cas. 795; 22 M. L. J. 228; 11 M. L. T. 27; (1912) M. W. N. 56.

^{(10) 23} B. 428; Chitty's S. C. C. R. 550; 12 Ind. Dec. (N. 8 1 281.

^{(11) 28} M. 216; 9 M. L. J. 838; 8 Ind. Dec. (N. s.)

ABULANANCA MUTRU U, PONNUSANI.

I am, therefore, unable to hold that the result of the appointment of the mother of the respondent as administratrix on the 30th Angust 1901 was to deprive him of his interest in the estate of his father, which he had acquired on his birth on the 31st May 1901. Consequently, the order for appointment of his sister as guardian was made with jurisdiction and had the effect of extending the period of his minority up to the 31st May 1922. The suit instituted against him as sui juris on the 27th November 1919 was thus improperly constituted and the ex parte decree made therein has been rightly vacated.

J. P.

Appeal dismissed.

MADRAS HIGH COURT.

OIVIL APPEAL No. 270 of 1918.

November 5, 1921.

Present: - Mr. Justice Spenser and

Mr. Justice Ramesam.

ARULANANDA MUTHU and Anchere—

PLAINTIFF'S LEGAL REPRESENTATIVES—

APPELLANTS

DET BUS

PONNUSAMI alias THAMBAYASAMI MANIAGAR AND OTHERS— RESPONDENTS.

Adoption—Disqualified proprietor adopting without consent of Court of Wards, validity of—Madras Regulation (V of .1804), s. 25—Majority Act (IX of 1875), sr. 2 (a), 3—"Competent," meaning of—"Capacity," meaning of.

An adoption by a disqualified proprietor whose estate is under the Court of Wards and who is above 18 years of age but under 21 years without the consent of the Court of Wards is not invalid under section 25 of the Madras Begulation V of 1804 read with section 2 (a) of the Majority Act. [p. 266, col. 1.]

The word "competent" in section 25 of the Madras Regulation V of 1804 implies legal competency while the word 'capacity" in section 25 of Act IX of 1875 is wider in meaning and includes legal competency as well as other ability. [p. 268, col. 1.]

Appeal against an order of the Court of the Subordinate Judge, Ramnad at Madura, in Original Suit No. 129 of 1913 dated the 25th March 1918.

Mesers, S. Srinivasa Lyengar and N. Srinivasacharya, for the Appellants.

Messrs. B. Sitarama Bow, A. Krishnaswami Aiyar and S. Muthiah Mudaliar, for the Respondents.

JUDGMENT.

Spences, J.—The plaintiff brought this suit for a declaration of his title to succeed to the properties of Ponnusami Maniagar by virtue of his having been adopted by that individual and for recovering his share in the estate. The Subordinate Judge dismissed the suit holding that, as Ponnusami Maniagar was a ward under the Court of Werds at the time of the adoption and as the Court of Wards had not sanctioned the alleged adoption, the adoption, even if true, would be invalid for want of the previous consent of the Court of Wards in writing as required by section 25 of Regulation V of 1804.

Section 25 of Regulation V of 1804 deelares: "It shall not be competent for disqualified land-holders to adopt shildern without the consent of the Court of Wards previously had in writing," and section 4 of that Regulation declares: "where minors may succeed to inheritable property, they shall not in any case be competent to take charge of or to administer their own affairs during the period of their minority and for the better understanding thereof, the duration of minority shall, without exception, continue until the completion of the eighteenth year of age." In 1875, the Indian Majority Act was passed, and it provided under section 3 that "every minor of whose property the superintendence has been or shall be asenmed by any Court of Wards shall be deemed to have attained his majority when he shall have completed his age of twenty one years and not before." Then, the section goes on to provide that every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. If this stood alone, the conclusion of the Subordinate Judge would be perfectly correct and we shold have to support it. But sestion 2 (a) of this Ast states, "nothing herein contained shall affect the capacity of any person to set in the following matters (namely) marriage, dower, divorce and adoption."

Now, we see that 18 is the age of majority for Wards of Court under the Regulation before Act IX of 1875 was passed and it is the ARULAMANDA MUTEU v. PONNUSAMI.

age of majority for other persons under Act IX of 18:5, but when the Indian Majority Act was passed at a time while Regulation V of 1804 was still in force, its effect was to raise the age of majority from 18 to 21 for minors whose estates were under the adminis. tration of the Court of Wards for all purposes except for those matters referred to in section 2. The result is that, as regards questions of marriage, adoption, etc., the eapacity of minors is left untouched by the Indian Majority Act, and it is as if the Act had never been passed. . In such matters the law stands exactly as it stood before that piece of legislation was put on the Statute Book. It is argued that the restriction upon adop tion contained in section 25 of the Regulation was introduced not by reason of the age of the minor, but by reason of the fact that he is a disqualified owner; but when the Act of Majority does not extend the disqualification of persons under the age of 21 to matters of marriage, adoption, etc., the effect is that an adoption made by a person over 18 but under 21 without the consent of the Court of Wards is not invalid by reason of the Regulation. The word 'competent' in the Regulation implies legal competency. The word 'sapacity' in the Act is wider in meaning and includes legal competency as well as other ability.

Mr. B. Sitarama Row wished us to take the view that the saving clause appearing as section 2 of Act IX of 1875 governs only the general provision in section 3 as to .8 years being the age of majority for ordinary persons, but not the special provision as to minors whose property is under the superintendence of the Court of Wards. I find it impossible to make this distinction when the words in section 2 are nothing herein contained shall affect. herein contained must mean contained in any part of this Act. There are no apt words which may serve to restrict the application of section 2 to one part of the Act while applying it to other portions.

Some additional points were raised before ne by the learned Vakil for the appellant as to the effect of the Majority Act being only applicable to Regulations passed after 1897, when the General Clauses Act defined "enactment" and as to the application of the Court of Wards Regulation being only as governing the relations between the Court of Wards and its wards. But it is not

necessary to deal with these points, as on the first point the appellant is entitled to succeed.

The result must be that the suit which was dismissed, must be remanded for desision upon the other points arising in the case. We deside nothing on the question of the plaintiff's age in this issue, or as to other issues which have not been argued before us. These questions will be determined by the lower Court.

Costs of the appellant and respondents Nos. 1 and 7 will abide the result and be provided for in the final decree. The appellant is entitled to a refund of Courtfees paid by him on his appeal.

RAMBOAM, J.-I agree.

Assuming that the word "capacity" should be construed in the Majority Act its general sense i.e. inherent or intrinsis capacity [Cf. Orden v. Ogden (1). Ohetti (Venugopal) v. Ohetti (Venugopal) (2)] and that restraints on eapacity may not be properly described as want of eapacity, still the extension of the restraint on the capacity to adopt in section 25 of the Court of Wards Regulation V of 1804 which is terminable at the age of 18, to the age of 21, by the use of the Majority Act in reading section 4 of the Court of Wards Regulation and applying it first to the word 'minor' and then to "disqualified landholder" amounts to affecting the eapacity of the minor. Section 2 of the Act therefore, applies.

Other points argued by the learned Vakil for the appellant, viz., (1) that the word 'enactment' in section 3 of the Indian Majority Act does not include a Regulation

of the Madras Code;

(2) that a general law such as the Majority Act does not affect a special law like

Regulation V of 1804, and

(3) that the effect of section 25 of the Regulation is to make the adoption voidable only at the instance of the Court of Wards and not to make it void, need not, therefore, be considered.

M. C. P.

J. P. Appeal allowed.

(1) (1903) P. 48; 77 L. J. P. 34; 97 L. T. 827; 24 T. L. R. 94.

12. (1909) P. 67; 78 L. J. P. 23; 99 L. T. 885; 53 S. J. 163; 25 T. L. B. 146.

FIRM OF SANTDAS DEVEISHENDAS U. FIRM OF NICHARSING JAVAHIRSING,

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SOIT No. 261 or 1918. April 18, 1921.

Freient :- Mr. Kamp, A. J. O. FIRM OF SANTDAS DEVKISHENDAS-PLAINTIFFS

rersus

FIRM OF NIDHANSING JAVAHARSING AND OTHERS- DEPENDANTS.

Contract Act (IR of 187'), s. 73-Non-delivery of goods contracted - Damages, assessment of.

In an action for non-delivery or non-acceptance of goods under a contract of sale, the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. [p. 267, col. 2.]

Mr. Srikrishindas Lula, for the Plaintiff.

Mr. Tahilram Maniram, for Defendants Nos. I and 3.

Mr. Dipchand Chandumal, for Defendant No. 2.

JUDGMENT.—The only question in this suit is as to the rate to be adopted for the measure of damages for failure of delivery of 50 bales July 1917 cotton. The practice of taking delivery is a matter of common knowledge. The seller makes "Mati Khari" on his buyer and the latter sends a delivery shit, i. e, a request to the seller to deliver to

the person named in the chit.

In the present case defendants sold to plaintiffs who sold to Charatsing Attarsing who sold to one Jaswantrai. Jaswantrai issued the delivery shit No. 300 to his seller Charateing Attareing, who passed it on to the plaintiffs who gave it to the defendants. Defendants failed to deliver any cotton. Ordinarily, therefore, the damages to the plaintiffs is the difference between the market rate and the contract rate on the due date and not the damages as between the market-rate on due date and the rate of plaintiff's contract with Charateing Attarsing. Plaintiffs have claimed at a marketrate of Rs. 40 per maund. But the defendants claim that plaintiffs have settled their contract with Charatsing at Rs. 37.4 0 per maund and the defendants say they should not be compelled to pay plaintiffs more loss than they (plaintiffe) have actually sustained, i, e, the rate for the measure of damages should be Rs. 37.7.0 per maund.

It is not suggested, nor is there anything to show, that defendants knew that plaintiffs had sold these bales of cotton to Charatsing Attarsing. Indeed, plaintiffe may have had another contract of purchase for 50 bales which they could, if they had chosen, have appropriated to their contract of sale to Charatsing Attarsing for all we know.

Section 73 of the Contract Act lays down the rule for damages for breach of contract. The application of that rule shows that the boyer sould not sharge the seller with the less sustained by breach of a contract between the buyer and a third party, consequent on the sellers' breach of his contract with the buyer, unless, at the time of contract between buyer and seller, the former's contract with the third party was expressly brought to the knowledge of the seller. Similarly, the defaulting seller cannot claim to take advantage of a reduction of his liability procured by the buyer who has committed default in his contract with a third party.

The defendants' contention on this point has been the subject of judicial pronouncements so far, such as the leading case of Rodocanachi v. Milburn (1) which was applied by the House of Lords in the recent case of Williams v. Agius (2). Lord Esber in the former case answered the argument in the following terse and unmistakeable language:-"It is well settled that in an action for non-delivery or non-asseptance of goods under a contract of sale the law does not take into account in estimating the demages anything that is assidental as between the plaintiff and the defendant, as for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods," This view of the law has been quoted with approval in a subsequent ease in Eugland, slater and Co. v. Houle & Smith (3) and has tather received the same. tion of the Judicial Committee in appeal from the Indian Courts; Muhammad Habib Ullah v. Bird & Co. (4), Jamal v. Moella Dawood

^{(1) (1887) 18} Q. B. D. 67, 56 L, J. Q. B. 202, 56 L. T. 694; 85 W. R. 241; 6 Asp. M. C. 100.

^{(2) (1914)} A. C. 510, 83 L. J. K. B. 715; 110 L. T. 865; 19 Com. Cas. 200; 58 S. J. 877; 30 T. L. R. 351.

^{(8) (1920) 2} K. B. 11; 99 L. J. K. B. 401; 122 L. T. 6 1; 25 Com. Cas. 140; 86 T. L. R. 132.

^{.4. (1921, 37} T L. R. 405; 63 Ind, Cas, 589; 43 A. 257; 14 L. W. 850 (P. O.).

SAILENDRA NATH MITRA U. RAM CHARAN PAL.

Sons and Co. (5). In this respect therefore. the principle to be applied is the same in

India as in England.

If, therefore, the defaulting seller cannot take advantage of a contract reducing his liability between his buyer and a third party. it is a fair deduction that he cannot equally take advantage of a settlement effected between his buyer and the third party which has the effect of reducing the damages which the buyer has sustained through breach by the seller of his contrast with him. So in this case, the fact that plaintiffs settled their contract with Charateing Attar. sing at Rs. 37-4 0 affords the defendants no ground for contending that the measure of the damages due by them to the plaintiffs should also be calculated at that rate and not at the market-rate of the due date.

Nor was this the care of the sale of a specific article which was the subject-matter of both the sale and the sub-sale. I am, therefore, of opinion the defendants are not entitled to the rate of Rs. 37-4-0 for the measure of the damages payable by them to the plaintiffs.

Mr. Fatehehand admits the rate for July 17 was Rs. 40 I, therefore, allow damages at

that rate.

(The learned Additional Judicial Commissioner then decreed the elaim.)

J. P.

Claim decreed.

(5) 31 Ind. Cas. 949; 18 Bor. L. R. 315; 20 C. W. N. 105; 30 M. L. J. 73; 14 A. L. J. 89; 19 M. L. T. 85; 8 L. W. 181; 23 C. L. J. 137; (1918) 1 M. W. N. 70; 41 C. 493; 9 Bur. L. T. 8; 43 I. A. 6 (P. C.).

CALCUTTA HIGH COURT. REFERENCE UNDER COURT FEES ACT IN APPEAL FROM APPELLATE DECREE No. 174 or 1921.

May 16, 1921.

Present:-Justice Sir Asutosh Mookerjee, Kr. SAILENDRA NATH MITRA-APPELLINT-RESPONDENT

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RAM CHARAN PAL AND OTHERS.

Court Fees Act (VII of 1870) s. 7, (x', cl. (c)-Suits Valuation Act (VII of 1887), s. 8-Court-lee; payable in suit for specific performance of contract to grant lease-Principle. .

In order to determine the jurisdiction and the Court-fee payable in a suit for specific performance of a contract to grant a lease the suit must be first valued for payment of Court-fees in accordance with the rule embodied in section 7, sub-section (x), clause (c) of the Court Fees Act; then the value so determined for computation of Court-fees should be adopted as the value for purposes of jurisdiction. [p. 269, col. 2]

The right construction of section 8 of the Suits Valuation Act is, that the valuation for the purposes of jurisdiction should, in the cases mentioned there, follow and be the same as the valuation for Court-

fees. (p. 264, col. 2]

The valuation for assessment of Court-fees controls the valuation for purposes of jurisdiction.

[p 269, col. 2.]

Reference under the Court Fees Act in appeal from appellate decree against the decree of the District Judge, Midnapur, dated the 4th October 1920, affirming that of the Subordinate Judge, Midnapur, dated the 23rd September 1916,

Babu Baranasibasi Mooker ee, for

Appellant.

Baba Ram Charan Mitra, for the Govern.

ment. JUDGMENT .- This is a Reference under section 5 of the Court Fees Act, in an appeal from an appellate desree which arises out of a suit for specifi; performance of a contract to grant a lease. The suit, which was instituted on the 27th August 1915 in the Court of the Subordinate Judge of Midna. pur, was valued at Rs. 1,200 for the purpose of determining the jurisdiction and at R. 32 for the purpose of payment of Court fee. elaim was decreed in the Court of first instance and the first defendant was directed to execute in favour of the plaintiffs a lease for the disputed land on a fixed rental of Rs. 32. On appeal to the District Judge, the decision of the primary Court was reversed on the 17th January 1915 and the SAILENDRA NATH MITRA U. BAM CHARAN PAL.

suit was dismissed. On second appeal to this Court, the decree of the District Judge was set aside and the case was remanded for re-trial. After remand, the District Judge re heard the appeal and affirmed the decree of the Court of first instance. Against this decree a second appeal has been preferred to this Court. The appeal has been valced at Rs. 32, which is the amount of rent annually payable for the contract of tenancy sought to be specifically enforced. This valuation was based on section 7, sub-section (x), clause (c) of the Court Face Act. Objection was taken by the Stamp Reporter to the valuation on the ground that, under section 8 of the Saits Valuation Act, the Court-fee was payable on the value of the appeal as stated for purposes of jurisdiction. As this view was controverted on behalf of the appellant, the matter was placed before the Taxing Officer, who referred the question to the Ohief Justice, as it was, in his opinion, one of general importance. The determination of the point in controversy depends upon the true construction of section 7, sub-section (x), clause (c) of the Court Fees Ast and section 8 of the Suits Valuation Act.

Section 7, sub section (x), clause (c) of the Court Fees Act provides that the amount of fee payable in a suit for specific performance of a contract of lease shall be computed assording to the aggregate amount of the fine or premium, if any, and of the rent agreed to be paid during the first year of the term. Section 8 of the Suits Valuation Act provides that where, in suits other than those referred to in the Court Fees Act, 1870, sestion 7, paragraphs V, VI, IX and paragraph X, clause (d), Court-fees are payable ad valorem under the Court Fees Ast. 1870, the value as determinable for the computation of Court fees and the value for purposes of jarisdiction shall be the same. The view taken by the Stamp Reporter is. that, as the suit has been valued for purposes of jurisdiction at R : 1,200, the value as determinable Vbe. for computation of Court fees must also be deemed to be Rs. 1,200. I am of opinion that this position sannot be supported, as it ignores the provision in sestion 7 of the Court Pass Act which is brought into conflict with the provision in sestion 8 of the Suits Valuation Act. If the construction put upon section

8 of the Suits Valuation Act, namely, that the valuation for purposes of jurisdiction is. to be determined by the market value of the property and that valuation is to be taken for the purposes of payment of Court fees. were correct, the effect would be to nullify the provisions of section 7 of the Court Fees Act. The right construction of section 8 of the Suits Valuation Act is that the valuation for the purposes of jurisdiction should, in the cases mentioned there, follow and be the same as the valuation Court-fees. This view is supported by the desision in Hari Sanker Dutt v. Kali Kumar Patra (1), which approved the earlier eases of Bai Vurunda Lakshmi v. Bai Manegavri (2) and Velu Goundan v. Kumaravelu Goundan (3). The procedure to be adopted in eases of this character is obvious; first value the suit for payment of Court-fees in accordance with the rule embodied in section 7, sub-section (x), clause (c) of the Court Fees Act; then adopt the value so determined for the somputation of Court-fees, as the value for purposes of jurisdiction. There is a manifest danger of conflict between the provisions of the two Statutes if the process is reversed; in other words, the substance of the matter is that the valuation for assessment of Court-fees controls the valuation for purposes of jurisdiction. I hold ascordingly that, in the present case, the value for the purpose of payment of Court-fees was correctly assessed at Rs. 32 under sestion 7 of the Court Fees Act and that the value for the purpose of jurisdiction is, consequently, only Rs. 32 under sestion 8 of the Suits Valuation Act. This no doubt leads to the conclusion that the suit was not instituted in the Court of the lowest grade competent to try it, in contravention of sestion 15 of the Civil Prosedure Code : but sestion 11 of the Suite Valuation Ast affords the plaintiffs' adequate: protection : see also Nidhi Lal v. Mashar Husain (4) and Matra Mondal v. Hari Mohun Mullick (5). In my opinion, the mamorandum of appeal bears the requisite amount of

^{(1) 32} C. 734, 9 C. W. N. 690.

^{(2) 18} B. 207; 9 Ind. Dec. (N. s.) 646.

^{(3) 20} M. 289; 7 M. L. J. 30; 7 Ind. Dec. (N. s.)

^{(4) 7} A, 230; A. W. N. (1885) 1; 4 Ind. Dec. (N. 1.)

^{(5) 17} C. 155, 8 Ind. Dec. (N. s.) 642,

KHAIRATI C. UMAR DIN.

Court fees and must, if otherwise in order, be registered.

B. N.

Appeal ordered to be registered.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 363 OF 1921,

November 18, 1921.

Present:—Mr. Justice Chevis.

KHAIRATI—PLINTIFF—

PETITIONER

versus

UMAR DIN-DEFENDANT-

Limitation Act (IX of 1908), ss. 3, 5, Sch. I, Art. 164
—Civil Procedure Code (Act V of 1908), s. 151—
Application to set aside ex parte-decree—Extension of time—Inherent power.

Section 5 of the Limitation Act is not applicable to an application to set aside an ex parte decree.

Section 151 of the Civil Procedure Code must not be used to defeat the imperative provisions of section 3 of the Limitation Act

Sonubai Baburao v Shivajirao Krishnarao, 60 Ind. Cas. 919; 45 B. 646; 23 Bom. L. R. 110, dissented from.

Petition, under section 44 of Act IX of 1919, for revision of the order of the District Judge, Hoshiarpur, dated the 1st Fabruary 1921, reversing that of the Munsif, Second Class, Hoshiarpur, dated the 23rd November 1923.

Sheikh Niae Muhammad, for the Petitioner. Mr. Ghulam Rasul, for the Respondent.

JUDGMENT.—This is an application by Khairati for revision of the order of the District Judge of Hoshiarpur. The fasts are as follows:—The petitioner lodged a suit escipet the respondent and the latter was

served in jail. The suit was decreed ez parte on the 15th of November 1919. The respondent was released from jail on the 14th of May 1920 and he filed an application for setting aside the ex parte decree on the 15th of June 1920. The first Court rightly held that no extension of the period of 30 days allowed by Article 164 of the Schedule to the Limitation Ast sould be granted, and dismissed the application as time-barrad. The learned. District Judge, quoting Maharaj Narain v. Bane i (1), held that the provisions of section 5 of the Limitation Act could be applied and that the application for setting aside the ex parts decree having been lodged within 30 days of the respondent's release from jail should be regarded as within time. The District Judge, therefore, set aside the ex parte deeree and remanded the case for redesision.

The ruling quoted by the learned District Judge is no authority for the view adopted by him. This ruling merely lays down that section 5 of the Limitation Act may be applied in cases where an appeal has been lcdged after the period of limitation for appeal has expired. This, of course, is correct, for section 5 applies to appeals. It also applies to applications for a review of judgment or for leave to appeal or any other application to which the section may be made applicable by an enactment or role for the time being in force. But, in the Punjab at least, this section has not been made applicable to applications under Article 164 of the Schedule to the Limitation Act, and the Mansif was quite right in refusing to allow any extension of time. Connsel for the respondent refers me to Sonutai Baburao V. Shivajirao Krishnarao (2), which lays down that the Court has inherent power to re-open cases under section 151 of the Civil Procedure Code. With all respect to this ruling, I prefer to follow the rulings of this Court which clearly lay down that section 151 must not be used to defeat the imperative provisions of section 3 of the Limitation Act This section lays down that suits, appeals and applications preferred after the prescribed period of limitation shall be dismissed.

(1) 145 P. L. R. 1904; 21 P. R. 1904.

(2) 60 Ind, Cas. 919, 45 B. 618; 28 Bom. L. B. 110,

GONTU APPIREDDI C. GONTU CHINNA APPIREDDI.

In the present ease the period of limitation prescribed expired before the application was made and the application is time-barred and must, therefore, be dismissed, no extension of time being allowable, as section 5 is not applicable.

Finally, Counsel for the respondent urges that this Court should not interfere in revision in cases where the time-barred application has wrongly been held to be within time; but the present case is one in which the District Judge has wrongly upset a correct decision of the First Court dismissing the application as time barred. It is not a case in which a mistake as to limitation has been made by the Court of first instance. Farther, I note that the petitioner, according to the statements in his own application, was released from jail on the 14th of May 1920 and that the application for setting saide the ez parte deeree was not presented till the 15th of June 1920, so that it cannot be said that the application was presented even within 30 days from his release from jail,

I accept this application for revision and, setting aside the order of the District Judge, I restore the order of the first Court dismissing the application as barred by time. The respondent will pay costs both in this Court and in the Court of the District Judge.

Z. K.

Application accepted.

MADRAS HIGH COURT.

APPEAL LGAINST ONDER NO. 177 OF 1920.

September 14, 1921.

Present: - Sir William Ayling, Kr., Offg. Chief Justice, and Mr. Justice Odgers. GONTU APPIREDDI - APPELLANT

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GONTU CHINNA APPIREDDI AND OTHERS
- RESPONIENTS.

Provincial Insolvency Act (V of 1920), ss. 7, 27 (1) and 3—Petition by creditor for adjudication and cancellation of transfers—Order cancelling sales by insolvent, legality of.

On a petition under section 7 of the Provincial Insolvency Act, 1920, for adjudication in insolvency, it is not competent to the court by the same order adjudicating the debtor an insolvent to order cancellation of sales made by the insolvent immediately prior to the application. It is for the receiver to take action for the cancellation of the alienations under section 63 of the Act and not for the Court to do so on a petition for adjudication. [p 272, col. 1.]

Hemraj Champa Lall v. Ramkishen Ram, 38 Ind. Cas. 369; 2 P. L J 101 at p. 107; 1 P. L. W. 732; (1917) Pat 3 ?, followed.

Khushhaliram v. Bholar Mal, 28 Ind. Cas. 578; -37 A. 252; 13 A. L. J. 270, distinguished.

Appeal against the order of the District Court, Guntur, dated 13th March 1920, in Insolvency Petition No. 1 of 1919.

Mr. V. Ramadess, for the Appellant.

Mr. N. Rama Rao, for the Respondents.

JUDGMENT,-In this case two creditors of one Chindayaram Ramaya and of his three undivided sons (respondents Nos. 1 to 4) petitioned (i) that they might be declared insolvents, (ii) that certain alienations made by respondents Nos. 1 to 4 in favour of the 5th respondent might be declared invalid and cancelled. The alienations took place about a month before the presentation of the petition which is dated December 19.8. The learned Judge heard the petition on 19th 1920 and, in the same order, not only adjudicated respondents Nos. 1 to 4 insolvents but deelared the sale deeds which witnessed the alienations cancelled. The act insolvency alleged and proved against the respondents Nos. I to 4 was these alienations under section 6 (b) of the Provincial Insolveney Act (V. of 192) i.e., they were held to be transfers with intent to defraud or delay ereditors. The petition

GONTU APPIREDDI U. GONTE CHINNA APPIREDDI.

was presented under section 7 and the debtors were adjudicated under section 27 (1) which runs thus: "If the Court does not dismiss the petition it shall make an order for adjudication." There is, of course, no doubt that the learned District Judge was justified in making the order of adjudication but the question is, was he right in going further and ordering the sancellation of the sale-deeds in the same order. He apparently held a detailed enquiry to which the vendor was a party; one would ordinarily whereas that a much more summary procedure would, in the first instance, meet the case. The question is governed by section 53 of the Act which provides that "such transfers as are therein specified shall be voidable as against the Receiver and may be annulled by the Court." The scetion certainly contemplates action by Receiver. It is true that at the time the order for eancellation was made Receiver had not been appointed, but he was appointed later on the same day. In Hemraj Ohampa Lall v. Ramkishen Ram (1) it was held that until the Reseiver refuses or declines to act no one else can do so, because he is the person to set, the proceeding under section 36 (now section 53) in motion.

We are inclined to respectfully adopt this decision. The other cases cited can be shortly dealt with. In Kauleshar Ram v. Bhawan Prasad (2) the Allahabad High Court held that a proceeding to set aside a transfer should be taken in the name of the Receiver, and that no proceeding should have been sommensed (by ereditors) until after the appointment of a Receiver. It may well be that, when the Reseiver fails to move in the matter, a ereditor may do so, Nikka Mal v. Marwar Bank Limited (3). Even there the Court held that, in a case of fraudulent preference, the Receiver should sither apply or be a party to the application. The decision in Khushhaliram v. Bholar Mal (4), does

not deal with the question at all but simply with the jurisdiction of an Insolvency Court. There the Judge had referred a creditor alleging a fictitious mortgage to a suit instead of enquiring into the question himself as the Court held he was bound to do. It does not appear whether or not a Receiver had been appointed in that case. Section 4 of the Act which was quoted for the respondents is inserted for the purpose of putting an end to the conflict of decisions as to whether proceedings in the Insolvency Court constitute rescudicate or not.

It appears to us that what authority there is all points one way, viz., that it is for the Receiver to take action under section 53 and not for the Court to do so on a petition for adjudication. We, ascordingly, set aside that part of the District Judge's order which relates to the cancellation of the sale deeds to the 5th respondent.

No costs in this Court.

M. C. P.

Appeal partly allowed.

^{(1) 38} Ind. Cas. 369; 2 P. L. J. 101 at p. 107; 1 P. L. W. 732; (1917) Pat. 303.

^{(2) 42} Ind. Cas. 845.

^{(3) 52} Ind. Cas. 188; 151 P. R. 1919.

^{(4) 28} Ind, Cas. 57%, 37 A. 252; 18 A. L. J. 270.

ILABI BAZA BHAN C. TAIBA BEGAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 32 OF 1921. October 19, 1921.

Present: - Mr. Daniels, J. C. ILAHI BAZA KHAN-DEFENDANT-APPALLANT

versus

Musammat TAIBA BEGAM-PLAINTIFF -RESPONDENT.

Compromise decree-Time fixed for compliance-Extension of time-Decree and compromise bearing different dates-Time, when begins to run.

Where a compromise-decree fixes a period of time for the payment of a sum of money under it that period cannot be extended on the ground of the Courts being closed on the day fixed for payment when it was not necessary under the compromise that the money should be paid into Court.

A compromise becomes operative when it is embodied in a decree, and if it fixes any time for the doing of any act, the time begins to run not from the date of the compromise, but from the date

of the decree.

Appeal against an order of the District Judge, Fyzabad, dated the 12th May 1921, confirming an order of the Muneif, Frzabad, dated the 12th March 1921.

Mr. Wasi Rasan, for the Appellant. Mr. Niamatullah, for the Respondent.

JUDGMENT,-The sole question in this appeal is, whether the appellant complied with the terms of a compromise-decree. compromise in question was filed on 19th August 1920 but was not signed by the last of the parties till just before the end of August and was not embodied in the decree in the suit until 31st August. By the compromise it was agreed that the appellant should pay a sum of Rs. 25 compensation to the plaintiff within four months from to-day". The sum was not actually paid until 4th January 1921. The Courts. were closed on January 1st and 2nd but opened on the 3rd. Two points were argued in the Court below :-

(1) Whether the four months should be counted from 19th August or from 31st

August.

(2) Whether, if the latter contention is correct, the appellant sufficiently complied with the desree by tendering the money on 3rd January though he did not actually pay. it till next day.

The learned District Judge has found

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this Court a further point has been argued on behalf of the respondent, namely, that even if the four months be counted from August the 31st the appellant was not entitl. ed to any extension of time on assount of the Courts being slosed on that day. It appears to me that this contention must prevail. It is ecneeded that, neither section 5 of the Limitation Act, nor section 10 of the General Clauses Act, applies and no law. has been shown or suggested (apart from a. general suggestion that it would be equitable) by which such an extension can be claimed. It was not even necessary. under the compromise that the money should be paid into Court. The appellant might have paid it to the opposite party direct and certified it to the Court afterwards. On the question of the date from which the four months should be counted I am disposed to agree with the appellant, It seems to me that the compromise only became operative when it was embodied in the decree, and that the word "to-day " must be construed as referring to the day on which it became actually effective. But on the ground already discussed, I consider that the decision of the learned Judge was correct and I accordingly dismiss the appeal. As the point now pressed was not urged in the Court below, I make no order as to costs of this appeal.

N. B.

Appeal dismissed.

CALCUTTA HIGH COURT. APPEAL FROM ORIGINAL DECREE No. 414 OF 1915.

April 14, 1921.

Fresent:-Justice Sir Asutosh Mookerjee, Kr., and Mr. Justice Buckland. BHARAT RAMANUJA DAS MOHANT-

PLAINTIFF - APPALLANT .

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SARAT KAMINI DASI 'AND OTHERS-DEFENDANTS-RESPONDENTS.

Transfer of Property Act (IV of 1832), s. 52-Lis against, the appellant on both points. In pendens-Consent decree, if falls within scope of rule

BHARAT RAMANUJA DAS U. SARAT KAMINI DASI.

-"Contentious suit," meaning of -Suit originally contentious, if ceases to be contentious, because it is compromised.

A consent-decree falls within the scope of the rule of lis pendens enunciated in section 52 of the Transfer of Property Act. [p. 277, col. 1.]

One acquiring interest pendente lite in a proceeding which is lis pendens is bound by the decree
without regard to its form, or whether it is erroneous,
and it is immaterial that the relief granted in the
suit is the result of agreement or compromise,
except where it is the result of fraud or collusion
between the parties. [p. 277, col. 2.]

In order to determine whether a suit is contentious within the meaning of section 52 of the Transfer of Property Act, the Court has to consider whether it is contentious in its origin and nature. The expression "contentious suit" must be held to be used in contradistinction to a collusive suit in which there is no contest. [p. >76, col. 1.]

If a suit is not collusive, it cannot be maintained that, though originally contentious, it ceases to be contentious because it is compromised by the act of the parties [p. 276, col. 1.]

A decree is none-the-less a decree as defined by the Code of Civil Procedure, because it is based on a compromise and the legal effects of the decree contemplated by Order XXIII, rule 3, Civil Procedure Code, do not differ from the legal effects of a decree where the suit has been fought to the end. [p. 277, col. 1.]

Appeal against a decree of the Subordinate Judge, Bankura, dated the 30th April, 1915.

Mr. N. Surkar, Dr. Jadu Nath Kanjilal, Babus Gopendra Nath Das and Rama Prosad Mooker ee, for the Appellant.

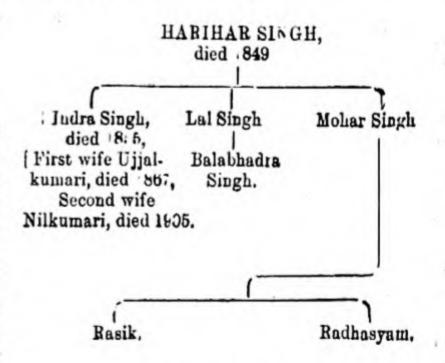
Babus Bepin Behary Ghose, Sib Chandra Palit, Ban-im Chandra Mukheries and tan-thanan Ghose, for the Respondents.

JUDGMENT.

MOOKERJES, J.—This is an appeal by the plaintiff in a suit to enforce a mortgagesecurity, executed in his favour on the 14th September 1906, by the first defendant, Raja Balabhadra Singh Deb, in respect of what is known as the Raipur Zemindary. Besides the mortgagor, 85 other persons were made parties to the suit in the Court below, on the allegation that they were subsequent ensumbraneers. They filed twelve separate and raised numerous written statements questions which were embodied in fourteen issues. We are now concerned with only one set of defendants, namely, defendants Nos. 8 to 19, who have been described in these procaedings as the Rathis and the Datts. They set up a mortgage for Rs. 75,000 executed by the first defendant in their favour on the

28th January 1908. They contended that the security held by them, though subsequent in point of time, bad priority over the mortgage in suit, by the application of the dostrines of subrogation and lis pendens. The Subordinate Judge held that these defend. ants were entitled to the benefit of the rule of lis pendens, but that the principle of subrogation was of no avail. In this view, the Subordinate Judge has granted the plaintiff a mortgage-decree, subject to the mortgage in favour of the Rathi and the Dutt defendants to the extent of Rs. 71,000 only. On the present appeal the plaintiff has contend. ed that the rule of lis pendens is of no assistance to the defendants, who have not only controverted this argument but have also assailed the opinion expressed by the Subordinate Judge as to the inapplicability of the principle of subrogation. To elucidate the questions in controversy, it is necessary to explain the eireumstances which led up to the mortgage set up by the Rathi and the Dutt defendants.

The Raipur Zemindari, which is the subjectmatter of both the mortgages, originally belonged to one Haribar Singh whose name appears in the following genealogical table; it is alleged to have been an impartible Raj governed by the rule of primogeniture according to the custom of the country and the neage of the family:



Harihar Singh died in 1849, leaving three sons, Indra Singh, Lal Singh and Mohar Singh. Indra Singh, as the eldest, succeeded to the Raj, while his two brothers received maintenance. Indra Singh died in 1855, leaving him surviving his two widows and two brothers. The first widow, Ujjalkumari,

BHARAT BAMANUJA DAS U. SARAT KAMINI DASI.

died in 1867 and the second widow in 1905 after the death of both Lal Singh and Mobar Singh, On the 12th January 1906, shortly after the death of Nilkamari, Balabhadra Singh instituted a suit (Suit No. 10 of 1906) for declaration of his title to the Raipur Zamindari and for recovery of possession thereof from various persons including the Rathis and the Datts, who, he alleged, were wrongfully in occupation under titles ereated by Nilkumari. The Rathis and the Datts resisted the claim on the allegation that they had acquired an indefeasible title, first by purebase at a sale held on the 20th January 1891 in execution of a decree, on a mortgage granted on the 22od April 1885 to one Tarashand Pal by Nilkamari and Mohar Singh, and then again by a purchase on the 20th January 1832 in execution of a prior mort. gage taken by one Kahetranath Mahapatra from the same mortgagors. The order-sheet in that suit, which has been received in evidence in this litigation, makes abundantly clear that the suit was contentious and was astively prosecuted by both sides during many months. When the issues had been framed, the suit was, after the usual adjournments, set down for trial on the 13th January 1908; on that date, on the applieation of both parties, time was allowed to them till the 17th January to compromise. On the date so fixed, it was recorded that the case had not been compromised, and the trial commenced. The bearing proceed. ed from day to day till the 23rd January when the ease was adjourned in view of a "talk of sompromise." Ultimately, on the 28th January 1903, a sulenama (petition of compromise) was filed on behalf of the plaintiff Balabhadra Singh and the Rathi and the Dutt defendants as also an added defendant Brajalal Datt. The Court accepted the petition of compromise, but could not forthwith make a decree on the basis thereof, as there were other defendants who had not compromised The case was assordingly directed to proceed against the remaining defendants. On the 30th January, a sulenama was filed on behalf of the plaintiff and another defendant and was accepted. The trial proceeded as against the other defendants who utilised, as appears from the order of the 14th Fabruary 1908, the documents previously filed by the Bathi and the Datt defendants. The pro-

ecedings were much prolonged and the hearing did not conclude till the 6th March 1908, when judgment was reserved. On the 31st March 1908 judgment was delivered. and the suit was decreed, "partly in terms of sulenama and partly on contest." The desree thus made gave effect to the eompromise beibcdme tn the presented on behalf of the plaintiff and the Rathi and the Datt defendants on the 28th January 1908. The decree recites the terms of the compromise which now require examination.

The purport of the compromise was that and the the Rathi Dutt defendants relinquished in favour of the plaintiff whatever interest they had asquired in the Raipur Zamindari, for a consideration of Rs. 71,000 which was secured by a mortgage of the Zamindari, as the plaintiff was unable to pay the amount in eash. The petition of compromise resites that this mortgagebond had been executed on the same date to secure a sum of Rs. 75,000, made up of the aforesaid sum of Rs. 71,000 and an additional each payment of Rs. 4,000. There is no room for controversy that the compromise and the mortgage constituted one entire and indivisible transaction and that when the desree of the Court, made on the 31st March 1908, give effect to the compromise, it validated the whole contract between the parties inclusive of the mortgage. To take any other view would be to sacrifies substance to form and to disintegrate vital elements of the transaction which could not, in the contemplation of the parties, have ever been regarded as other than inseparable in character. The question thus emerges for consideration, whether the mortgage in suit, executed on the 14th September 1906 after the institution on the 12th January 1906 of Suit No. 10 of 1906 for determination of the title to the hypotheested property, is affected, by virtue of the rule of lis pendens, by the sonsent-decree in the title suit dated the 31st March 1908, which incorporated and gave effect to the mortgage of the 28th January 1908. The Subordinate Judge has answered this question against the plaintiff and we have now to consider whether his conclusion is well founded on principle,

The rule of his pendens is enunciated in section 52 of the Transfer of Property Act in the following terms:—

BHABAT BAMANUJA DAS C. SABAT KAMINI DASI.

"During the active presention in any Court baving authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or preceding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

The desicion of the Judicial Committee in Faiyat Husain v. Manshi Frag Narain (1) shows that, in order to determine whether a suit is contentious within the meaning of this section, we have to consider whether it is contentious in its origin and nature. The expression "contentious suit" must then be held to be used in contradictination to a collusive suit in which there is no contest, a suit of the nature described by Lord Brougham in Bondon v. Becher (2).

"A centence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence there must be a real interest, a real argument, a real proseantion, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into questiop."

maintained that, though originally contentious, it ceases to be contentious because it is compromised by the act of the parties. This view is supported by the decision of a Fall Bench of the Madras High Court in Annamalai Chettiar v. Malayandi Appoya Naik (3), where it was

(1) 34 I. A. 102; 9 Bom. L. R. 656; 11 C. W. N. 561; 4 A. L. J. 344; 5 C. L. J. 562; 17 M. L. J. 263; 29 A. 3)9 (P. C.).

(2) (18°5) 3 Cl. & F. 479; 9 Bligh (N. s.) 532; 6 E.

(3) 29 M. 416; 1 M. L. T. 145; 16 M. L. J. 372 (F. B.).

roled that the dostrine of lis rondens as embedied in section 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit cr proceeding, even when such suit or proceeding is subsequently compromised, and a decree is passed in pursuance of such compromise not tainted by fraud or collusion. The view was followed in the ease of Mati Lal Fal v. Freo Nath Mitra (4) where Dose, J, quoted with approval the following observation of Chancellor Searis of the Supreme Court of California in Partridge v. Shephard (5): "We know of no good reason why a judgment entered by consent of parties, in a cause in which the Court has jurisdiction of the subject-matter and of the parties, is less efficacions than if entered after a trial of the suit. It may be impeashed like any other judicial record by evidence of a want of jurisdiction in the Court rendering it, by showing collusion between the parties or by proof of fraud on the part of the party offering the record." The same position was: affirmed in the case of Tinoodhan Chatterice v. Trilokya Saran Sanyal (6) and had been recognised in the earlier decisions in Nadurconissa Febre v. Aghur Ali Chowdhry (7), Rai Rishen Mooker; ee v. Radha Madbub Holdar (8) and Monohur v. Hurryhur (9). A similar opinion was expressed by Jenkins, C. J., in Krishnappa v. Shirappa (10). As was pointed out by Subrahmania Ayyar, J., in Annamalas Ohettiar v. Malayandi Appoya Naik (3), the generality of the words "under any desree" cr order made therein in section 52 of the Transfer of Property Ast, upon their face, lend no support to the argument that a consent desree does not fall scope. It is well known that a judgment by consent or default is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case; see South American & Mexican

^{(4) 3} Ind. Cas. 696; 9 C. L. J. 96; 13 C. W. N.,

^{(5) (1886) 71} Cal. 470: 12 Pacific 480.

^{(6) 18} Ind. Cas. 177; 17 C. W. N. 413.

^{(7) 7} W. R. 103.

^{(8) 21} W. R. 349. (9) 3 Shoms Report 23.

^{(10) 31} B. 393; 9 Bom. L. R. 130.

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Oo., In re (11), Bellcairn (The) (12), Nicholas v. Asphar (13), Rajlakshmi Dasse v. Katyayani Dases (14) and this is so, even though, as pointed out in Wentworth v. Bullen (15) and in Huddersfield Banking Co. v. Lister (16), the consent order is in essence only the order of the Court sarrying out an agreement between the parties. The essence of the matter is that a desree is none-the. less a desree as defined by the Code of Civil Procedure, because it is based on a compromise, and the legal effects of the decree contemplated by Order XXIII, rule 3, Civil Procedure Code, do not differ from the legal effects of a decree where the suit has been fought to the end. When the Court makes a decree by consent it performs not a ministerial but a judicial function; the Court must be satisfied that the agreement or compromise is lawful, and although the Court must record the entire agreement or compromise, it can pass a decree in accordance therewith only in so far as it relates to the suit. Concemently, the fast that a deeree is given in accordance with terms which have been come to between the parties ddes not provent the decree from being the formal expression by the Court of an adjudication on a right claimed or a defence set up conclusively determining the rights of the parties with regard to all or any of the matters in controversy in the suit, within the meaning of the definition contained in section 2 (2), Civil Procedure Code. Section 96 (3), on the other hand, makes it elear that a decree passed with the consent of parties is a dcoree within the meaning of the Code. It may also be maintained that, unless a compomise is collusive, the very fact that there is a empromise shows that the suit was in its origin and nature contentions, otherwise there would be nothing to compromise. In our opinion, a songent decree falls within the scope of the rule of lis pendens snuneiated in section 52 of the Transfer of Property

(11) (:895) 1 Ch 37; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 591; 43 W. R. 131.

(12) (1835) 10 P. D. 16'; 35 L. J. P. 3; 5 L. T. 635; 34 W. R. 55.

(13) 24 O. 2:6; 12 Ind. Dec. (N. s.) 810.

(14) 12 Ind. Cas. 464 38 C. 639.

(15) (1829) 9 B. & C. 810; 9 L. J. (o. s.) K. B. 33; 109 E. R. 813; 33 R. R. 3;8.

(18) (1895) 2 Oh. 273; 61 L, J, Ch. 523; 12 R. 831; 72 L, T. 703; 43 W. R. 567.

A similar view was adopted in the Morris (17) where of London v. Shadwell, V. O., held that a decree taken pro confesso was binding on a purchaser who had entered into a contract after the filing of the bill, and this was subsequently approved by Lord Brougham, L. C. See also Windham v. Windham (18). A similar rule has been recognised and frequently applied in the Courts of the United States, not as based on psculiarities of statutory provisions, but as founded on well-established principles of public policy, namely, that the plaintiff would be liable to be defeated by the defendant's alienation before the consent judgment or decree and would be driven to commence his precedings de noto, subject again to be defeated by the same sourse of proceeding. On this ground it has been repeatedly ruled that one acquiring interest pendents lite in a proceeding which is lis rendens is bound by the decree without regard to its form, or whether it is erroneous, and it is immaterial that the relief granted in the suit is the result of agreement or compromise, except where it is the result of fraud or collusion between the parties, Norris v. Ile (19), McIlwrath v. Hollander (20), Partridge v. Shephard (5), Turner v. B. bb (21).

Reliance has finally been placed on behalf of the appellant upon the rule enunciated in the following terms by Sir Richard Coach, C. J., in Kailas Ohandra Ghose v. Fulchand Jahuri (22), as to the liability of a purchaser pendents lite : "With regard to the question of lis pendens the dostrine appears to be this, that the aliense is bound by the proceedings in the suit after the alienation and before he becomes a party. Then the question is by what proceedings in the suit is he bound? Is he bound by the proceedings which arise from the nature of the suit, and from the case set up, and the relief prayed in the bill, or is he to be bound by any order which the Court may be induced by the parties to make in the course of the suit? I can find no authority which goes to the

(20) (1850) 73 Missouri 105; 39 Am. Rep. 484

(21) (1875) 60 Missouri 342.

(22) 8 B. L. R. 474; 2 W. R. Sap. 523,

^{(17) (1832; 2} L. J. Ch. 35; 5 Sim 247; 58 E. R. 329, (8) (1667) 2 Freeman 127; 2 Eq. Cas. Abr. 290; 22 E. R. 1103.

^{(19) (1894) 152} Ill. 190; 43 Am. St. Rep. 233.

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extent of saying that, because he does not thirk fit to become a party to the suit, he is to be bound by any order whatever that may be made. It seems to me that he ought only to be bound by proceedings which, from the nature of the suit, and the relief prayed, he might expect would take place and if there had been no notice in this case, it might have been necessary for us to determine what is the precise effect of lis pendens. But this need not now be determined. Practically, there is no substantial difference between lis pendens, and having notice of the suit. He would be equally bound by them, and not more by one than by the other."

These observations were quoted with approval by Pontifex, J., in Kasumunnissa Bibee v. Nilratna (23), and by Banerjee, J., in Kishory Mohun v. Mahomed Muzaffar Hossein (24) which, it may be noted, was decided on another ground on appeal to the Judicial Committee: Mahomed Mozuffer Hossein v. Kishori Mohun Roy (25). With regard to the role enunciat. ed by Coneb, C. J., in Kailas Chandra Ghose v. Fulchand Jahuri (22), two points must not be overlooked. In the first place, the case was decided long before the Transfer of Property Act was placed on the Statute Book, and it would be opposed to well recognised principles of construction Statutes to attempt to engraft on section qualifications or restrictions justified by its language but discoverable from pre-existing judicial pronouncements. Such an attempt would be open to emphatic condemnation; see the judgment of Lord Herschell in Bank of England v. Vagliano (26) and the judgment of the Fall Bench of this Court in Uttam Chandra v. Haj Krishna (27), in the second place, as las been frequently pointed out, for example, Annamalai Ohettiar v. Malayandi Appaya Naik (3) and Tinoodhan Chatterjee v. Trilohya Saran Sanyal (6), the rule laid down by Couch, C, J., is not in accord with the earlier

decision of this Court in Naduromissa Bebee v. Aghur Ali Ohowahry (7), and indeed a different rule was subsequently laid down by Couch, C. J., himself in the case of Raikishen Mooker ee v. Radha Madhub Holdar (8) where the doctrine of his pendens was applied to a purchase pending a suit which terminated in a sonsent decree.

But if, notwitetanding the comprehensive terms of section 52 of the Transfer of Property Act, we adopt the restricted rule enunciated by Sir Richard Couch in Raslas Chandra Ghose v. Fulchand Jahuri (22) and embark upon an enquiry as to whether the decree made by consent was such as the plaintiff might, from the nature of the suit and the relief prayed for therein, expect would take place, the result is of no avail to him. The deeree which was actually made on compromise was in essence a decree which might, even after contest, have been made in favour of the plaintiff in that suit (now the first defendant in this livigation). He sought to recover the Raipur Zemindari on the allegation that the Rathis and the Dutta were in occupation under a title inoperative against him because ereated by a limited owner, as Nilkumari was, with or without the concurrence of a future possible elaimant, in the position of Mohar Singh. A suit of this description may well be regarded as a case of excessive alienation by a limited owner, and may terminate in a decree for possession in favour of the ultimate owner, subject to recoupment, partial or entire, of the advances made by the creditor. Instances of such decrees may be found in the decisions Moulvie Committee in of the Judicial Mohamed Shumsool Hooda V. Showukram of (28),Commissioner Deptuy v. Khan an Singh (29) and Bhagwat Dayal v. Debi Dayal (30). & Thei substance of the matter is that the compromise decree was of the same type as the conditional decree, such as may be and is often made in suits by reversioners, where the alienation by a limited owner is set aside on equitable terms. We are of opinion, consequently, that even accord-

^{(23) 8} C. 79 at p. 85; 9 C. L. R. 173; 10 C L. R. 113; 4 Ind. Dec. (N s.) 51.

^{(24) 18} C. 188; 9 Ind. Dec. (N. s.) 126

^{(25) 22} I. A. 129 (P. C.); 22 C. 909; 5 M. L. J. 101; 6 Ear. P. C. J. 583; 11 Ind. Dec. N. S.) 602.

^(26) 1891) App. Cas. 107 at p. 145; 64 L. T. 353; 60 L. J. Q. B. 145; 39 W. R. 657; 55 J. P. 676.

^{(27) 55} Ind. Cas. 157; 47 C. 277; 31 C. L. J. 98; 24 C. W. N. 229.

^{(25) 2} I. A. 7; 14 B. L. R. 226 (P. C.); 22 W. R. 409; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43.

^{409; 3} Sar. P. C. J. 405; 8 Suth. P. C. J. 434; (29) 34 I. A. 72; 9 Bom. L. R. 591; 5 C. L. J. 344; 11 O. W. N. 474; 4 A. L. J. 232; 2 M. L. T. 145; 17

M. L. J. 233; 29 A. 331; 10 O, C. 117.

(10) 85 I. A. 48; 35 C. 420; 7 O. L. J. 335; 12 C. W. N. 393; 18 M. L. J. 100; 5 A. L. J. 184; 14 Bur. L. R. 49; 3 M. L. T. 344; 10 Bom. L. R. 280 (P. C.).

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ing to the test formulated by Sir Richard Couch, the plaintiff must be held bound by the dostrine of lie pendens.

If, then, there is no essape from the conclusion that the plaintiff is bound by the rule of lis pendens enunciated in section 52 of the Transfer of Property Ast, the mortgage ereated in his favour by the first d-fendant on the 14th September 1906, after the latter had instituted the suit for establishment of title on the 12th January 1906, must be deemed to have been affected by the consent decree made therein. That deeree gave effect to the mortgage of the 28th January 1908 which was a component part of the decree even though not made enforceable thereby. This is elear from decisions of the Judicial Committee in Pranal Anni v. Lakshmi Anni (31) and Hemasta Kumari Debi v. Midnapore Zemindari Oo. (32). Indeed, to validate the mortgage in favour of the plaintiff, quite as much as the mortgage in favour of the Rathie and the Datts, it was essential that the title of the mortgagor should be established, and that result was accomplished only by the consent decree of the 31st March 1908, which affirmed the agreement of the 28th January 1908, inclusive of the mortgage comprised therein as an integral component element. As between the plaintiff and his mortgagor (the first defendant) the principle of estoppal may apply and the after asquired title of the mortgagor may be made to inure to the mortgages, but the case is otherwise as between the first defendant and the Rathis and the Dutts mortgagees. The case of a mortgage given back by the purchaser to the vendor of an estate stands upon a footing of its own. While it is true that, where money is loaned or something equivalent done, upon the security of a mortgage in fee with general warranty, the mortgagor cannot set up an after acquired estate against the unsatisfied mortgagee; it is equally true that, where the transaction is simply a purchase, with such mortgage back to secure payment of the purchase money, the rule does not We are, consequently, of opinion that

(81) 26 I. A. 101; 22 M. 508; 1 Bom. L. R. 894; 8 C. W. N. 485; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. s.) 863 (P. C.).

(82) 53 Ind. Cas. 534; 46 I. A. 240; 47 C. 485; 31 C. L. J. 298; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; 1920; M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 22 Bom, L. B. 488 (P. C.).

the Subordinate Judge has correctly held that the mortgage in suit must be postponed to the mortgage in favour of the Bathis and the Datts. The plaintiff, it is satisfactory to find, eannot make a real grievance of this conclusion; for, as the Sabordinate Judge has observed, there is overwhelming evidence that the compromise was brought about by the plaintiff himself: it was he who was the virtual plaintiff in the other sait in the cloak of Balabhadra and employed his own men and money actively to prosecute the suit, The compromise which he thus brought about iceluded the mortgage with its express recital that the charge thereunder would priority over all other charges. The plaintiff eannot now very well complain when it transpires that this is precisely the result of the application of the rule of lis pendens.

In view of our decision upon the question of lis pendens, it is unnecessary to express an opinion upon the question of the applicability of the principle of subrogation, which has not received adequate consideration from the Sabordinate Jadge. We may add that if it were necessary to determine the question of subrogation, a fuller investigation of the relevant facts than what is contained in the judgment of the lower Court would be essential.

The result is, that the decree of the Sabardinate Judge is affirmed and this appeal dismissed with costs. The cross-objections cannot be seriously maintained and are dismissed without costs.

BUCKLAND, J. - l agree.

B, N.

Appeal and Oross-objections dismissed.

TRIPUBANA BEETHAPATI RAO DORA U. ROKKAM VENKANNA DORA.

MADRAS HIGH COURT, FULL BENCH.

SECOND CIVIL APPEALS NOS. 383 AND 384 OF 1920.

January 5. 1921.

Present: -Sir Walter Salis Schwahe, Kr., Ohief Justice, Mr. Justice Coutts-Trotter and Mr. Justice Kumaraswami Sastri.

IN S. A. Nos. 383 of 1920
TRIPURANA SEETHAPATI RAO
DORA—PLAINTIFF—APPELLANT

tersus

ROKKAM VENKANNA DORA
AND OTHERS—DEFENDANTS Nos. 7 to 14 and 16

TO 18-RESPONDENTS.

IN S. A. NO. 384 OF 1920

TRIPURANA SEETHAPATI RAO

DORA-PLAINTIFF-APPELLANT

tersus

DABBIRU SURYA NARAYANA
PATNA DU AND OTHERS — DEFENDANTS
NOS. 4 TO 15 — RESPONDENTS.

Evidence Act (I of 1872), ss. 35, 40 to 43-Judg. ments not inter partes, recitals in, admissibility of.

A recital in a jugment not inter partes of a relevant fact is not admissible in evidence under section 35 of the Evidence Act. [p. 232, col. 1; p. 285, col. 1.]

Kasi Nath Pal v. Jagat Kisore Acharjee, 35 Ind. Cas. 298; 20 C. W. N. 643; 23 C. L. J. 583 at p. 585 followed.

Case-law considered.

Second appeals against the decrees of the District Court, Ganjam, at Berhampore, in Appeal Suits Nos. 82 and 55 of 1918, respectively, preferred against the decree of the Court of the Temporary Subordinate Judge, Ganjam, at Berhampore, in Original Suit No. 56 of 1916.

These second appeals soming on for hear. ing on the 29th of April 1921, and on the 3rd and 4th of May 1921, upon perusing the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the case, and upon hearing the arguments of Mesers. K. P. M. Menon and C. Sambasiva Roo, for the Appellant in both eases and of Mr. C. S. Venkatachariar. the 9th Respondent Second in for Appeal No. 3:3 of 1920 and of Mr. H. Suryanarayana, for the Respondents Nos. 1 to 9 and 11 in Second Appeal No. 383 of 1920 and for Respondents Nos. 1 and 3 to

12 in Second Appeal No. 334 of 1920 and the 10th Respondent in Second Appeal No. 383 of 1920 having died and his legal representative not having been brought on record within the time allowed by law and the 2nd Respondent in Second Appeal No. 384 of 1920 not appearing in person or by Pleader, and the cases having stood over for consideration till the 9th day of May 1921 the Court (Ayling and Olgers, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The only question argued before us in these second appeals is, whether the lower Appellate Court was right in treat. ing as inadmissible in evidence a judgment in certain summary suits (Exhibit B). These suits were not between the present parties or their predesessors in title and the only importance of the judgment consists in a recital therein that a certain R. Chendramma died on 3rd May 1904. There is nothing in the judgment to show on what this recital is based. The fact of Chendram. ma's death was undisputed and it may be that both sides agreed as to the date. But the date itself was immaterial for the suits turned on the simple question of whether Ohendramma had, while alive, alienated her property to third parties so as to deprive the plaintiff in that suit of the right of succession. The date of R. Chendramma's death is relevant to the question of limitation raised in the present second appeals : and Mr. K. P. M. Menon for appellant contends that the resital in the judgment is admissible in evidence under section 35, Indian Evidence Act, as an entry in an official resord made by a public servant in the discharge of his official duty.

The general rule as to the relevancy of judgments is contained in section 43, Indian Evidence Act; Respondents Vakil arguer, relying on this section as well as on the ruling of the Calcutta High Court in Kosi Nath Pal v. Jagat Kisore Actaries 1), that recitals in a judgment not inter parter are not relevant. He has also drawn our attention

^{(1) 35} Ind. Cas 248; 20 C. W. N. 643; 23 C. L. J. 583 at p. 585.

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to a recent case, Ram Parkash Das v. Anand Das (2) in which their Lordships of the Privy Conneil appear to take the same view. The passage referred is at page 726 of the report and there has been some discussion before us of its meaning: but we understand their Lordships to say that a resital in the Magistrate's judgment of a relevant admission is not relevant evidence of the fact of that admission. If that be ac, the same principle would cover the present case.

This is the view to which we incline, but Mr. Menon has pressed us with the decisions in Parbutty Dassi v. Purno Chunder Singh (3) and in three cases of this Court Eyathamma v. Atulia (4), Thama v. Kondan (5) and Krishnasami Ayyangar v. Rajagopala Ayyangar (6).

If the Calentia case stood alone, should feel no great difficulty. It is not binding on us; and its correctness has been doubted in subsequent desisions of the same Court [Vide Ram Sunder Gope v. Haribala Dhubi (7)]. It is, moreover, possible to distinguish it on the ground that the entry of an abstract of the pleadings in the deeres in that ease (which it was sought to put in evidence) was enjoined by specific Circular Orders binding on the Court which passed the decree. In our case, the only provision as to the contents of the judgment is that of section 68 of the Rent Recovery Act, which simply says that the judgment shall contain the reasons for the same. It would be difficult to bring this resital of date under the head of reasons for the judgment.

The decisions of our own Court, however, stand on a different footing; and even if it were possible to distinguish them we think the point is of such general importance that its decision by a Full Bench is desirable.

We find some difficulty in understanding the first case, Byathamma v. Avulla (4). The learned Judges say that the decision in Parbutty Dassi v. Purno Chunder Singh (3) applies, and name section 35 as the section under which the entry is applicable but the reasoning at the top of page 24 applies rather to section 13 and this is the section dealt with in the Madras case which they rely on [Ramasami v. Appavu (8)].

The judgment in the second case [Thama v. kondan (5)] does not discuss the point but follows the earlier decision and states the recital of an admission in a judgment is relevant under section 35, i. e., to prove the admission.

The judgment in the third ease [Krishna-sami Ayyangar v. Rojagopala Ayyangar (6)] is to the same effect.

It has been suggested that the ease of admission may be different from that of other relevant facts; but we can find no basis for such a distinction in section 35.

We, therefore, refer the following question

for the decision of a Full Bench:-

Is a recital in a judgment not inter partes of a relevant fast admissible in evidence under section 35, Indian Evidence Act?

These second appeals came on before a Full Bench on the 16th and 18th December 1921.

Messre. K. P. M. Menon and O. Sambassva Rao, for the Appellant.—Under section 35 of the Evidence Act the recital as to date of a person's death, though not interpartes is admissible. A judgment is a public record prepared by the Judge. Statements in the judgment are akin to entries made by public servants in public records. The admissibility of recitals in judgments do turn on whether they are interpartes. Parbutty Dassi v. Furno Chunder Singh (3), Byathamma v. Avulla (4), Thama v. Kondan (5), Krishnasami Ayyangar v. Rajagopala Ayyangar (C).

Mesers. C. S. Venkatachariar and H. Suryanarayana, for the Respondents.—
We have to look to sections 40 to 43 of the Indian Evidence Act to determine the relevancy of statements contained in judgments. Judgments not inter parter are not evidence. Section 35 has no application.

^{(2) 88} Ind. Cas. 583; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 450; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 78 (P. C.).

^{(3) 9} C. 586; 4 Ind Dec (N. s.) 1038, (4) 15 M. 19; 5 Ind Dec. (N s.) 363, (5) 15 M. 378; 5 Ind. Dec. (N. s.) 616.

^{(6) 18} M. 73; 4 M. L. J. 212; 6 Ind. Dec. (N. s.)

^{(7) 37} Ind. Cas. 911.

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^{(5) 12} M. 9; 13 Ind Jur. 16; 4 Ind Dec. (N. s.) 35.

TRIPURANA SERTAPATHI BAO DORA U. ROKKAM VEKKANNA DORA.

Kasi Nath Pal v. Jagat Kisore Acharies (1) and Ram tarkash Das v. Anand Das (2).

OPINION,

Scaware, C. J.— In this case I had the opportunity of reading the judgment of Mr. Kumaraswami Sastri, J., and I agree with him entirely.

COUTTS TROTTES, J .- I agree.

KUMARASWAMI SASTRI, J .- The question referred to us for determination is, whether a recital in a judgment not inter partes of a relevant fact is admissible in evidence under section 35 of the Evidence Act, The suit was filed by the plaintiff appellant to resover the immoveable properties specified in the plaint on the ground that he purshased them from the reversionary beirs of one Adinarayana on whose death his mother Chandramma succeeded to a limited estate conferred on her by Hindu Law as mother of the last male owner. Chandramma alienated the properties and the suit to recover the properties from the aliences had to be filed within twelve years from the date of Chandram ma's death under Article 141 of the Limitation Act, IX of 1908 As the defendant pleaded that the suit was barred by limitation, the date of Chandramma's death became material and the plaintiff alleged that she died on the 3rd of May 1904, while the ease for defendants was that she died in February 1904, and not in May 1904, and that the suit was barred as it was filed more than 12 years from February 1904. On Chandramma's death the father of the second defendant in this suit filed a suit in the Revenue Court against sertain tenants for the purpose of acceptance of pattas and muchilikas under the Rent Recovery Act, VIII of 1:65. The suit was dismissed, but in the judgment there is a statement made by the Judge that Chandramma died on the 3rd of May 1904. The only evidence let in by the plaintiff as to the date of death of Chandramma was the statement in the judgment, which is filed as Exhibit B in the case. The Subordinate Judge was of opinion that this statement was relevant to prove the issue as to the date of death of Chandramma and, acting upon it, he held that Chandramma died within twelve years before the date of the suit and that, there. fore, it was not barred by limitation. On appeal, the District Judge was of opinion

that the statement in a judgment not inter partes was not evidence. He believed the evidence of the defendants' witnesses and dismissed the plaintiff's suit as barred by limitation. In second appeal the point raised is that the recital of the date of death in the judgment was evidence under section 35 of the Evidence Act and that the District Judge was wrong in rejecting it as irrelevant. The contention of Mr. K. P. M. Menon, for the appellant is that a judgment is a public record within the meaning of section 74 of the Evidence Act, that a Judge is a public servant and when he writes a judgment, he makes a public record, and that a statement in a judgment is, therefore, an entry made by a public servant in a public record, which, if it relates to a relevant fact, would be evidence under section 35, irrespective of whether the judgment in which the statement occurs, is or is not between the same parties. In support of his argument be refers to the decisions in Parbutty Dassi v. Purno Chunder Singh (3), Byathamma v. Avulla (4), Thama v. Kondan (5) and Krishnasami Ayyangar v. Rungopala Ayyangar (6). For the respond. ents if is contended that the relevancy of judgments is governed by sections 40 to 43 of the Evidence Act and that a judgment not inter partes is not evidence. Reference has been made to Kasi Nath Pal v. Jagot Kisore Acharges (1) and the observations of the Privy Council in Ram Parkask Das v. Anand Das (2). I am of opinion that section 35 has no application to judgments and that a judgment which would not be admissible under sections 40 to 43 of the Evidence Act would not become relevant merely because it contains a statement as to a fact which is in issue or relevant in a suit between persons who are not parties or privies. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments in Courts of justice. Section 40 enacts that the existence of any judgment, order or deeree which by law prevents any Court from taking cognizance of a suit or holding a trial is a relevant fact when the question such Court ought to take whether eognizance of such suit or to bold such trial. Section 41 deals with final judgments, orders and decrees in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction, or what is known

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as judgments in rem and states that such judgments, orders or decrees are conclusive proof of the matters specified in the section, and, by virtue of that section of the Act, evidence would not be allowed to disprove those matters. Section 42 refers to judgments relating to matters of a public nature relevant to the enquiry and states that such judgments, though evidence, are not conclusive proof of what they state, thus allowing evidence to be given to disprove facts found in the judgments. Section 43 states that "judgments, orders or decrees other than these mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or deeree is a fact in issue or is relevant under some other provision of this Act," e. q., section 13. Section 44 enables a party to show that any judgment, order or decree which is relevant under see tions 40, 41 or 42 was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. It appears to me that these sections sodify the law to the admissibility of judgments ID evidence. It is not suggested that, under the provisions of these sections, a judg. ment, unless it be a judgment in rem, would bind third parties who are not parties to the judgment or elaim under those who are parties. Other judgments would be res inter alios acta and would not be admissible in evidence. The same is the law in England, and I need only refer to Natal Land and Colonization Company v. Good (9). Section 35 of the Evidence Ast, which enacts that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duties or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact, deals with a distinctly separate class of easer, namely, entries made by public officials acting in the exercise of a statutory duty or power conferred by special enastments which regulate matters of public or quasi public interest It would be straining the language of section 35 to hold that a Judge, when he writes a judgment, is making entries in a public or official book, register or reserd, and that every statement made in (9) (1868) 2 P C. 121; 5 Moo. P. C. (N. s.) 132; 16 W. R. 1086; 16 E. R. 465.

a judgment is an entry in such book, register or resord. If section 35 is applicable to judgments and if the contention of Mr. Menon is assepted, the result will be that every judgment would be admissible in evidence to prove a relevant fact if it contains any etatement as to a fast in issue or relevant fact, even though that judgment may be between persons who are total strangers to the litigation in which it is sought to be filed as evidence. I find it difficult to bold that the Legislature, which in sections 40 to 44 has earefully defined the limits within which judgments are admissible in evidence, would have, in a previous section, practically nullified the provisions as to the relevancy of jadgments by including judgments in the eategory of public or other official books, registers or resords. I am unable to agree with the desisions relied on by Mr. Menon. In Parbutty Dassi v. Purno Chunder Singh (3) the suit was for the possession of a fishery and the plaintiff wanted to let in evidence of an admission alleged to have been made by a predecessor in title of the defendants in the written statement in a former suit. This would be evidence under section 21 of the Evidence Act. The written statement was not forthcoming as it was destroyed and the only evidence of the admission was that contained in a deeree in the former suit which began by giving a short statement of the pleadings in the suit. The rules of Court required every decree to contain an abstract of the pleadings. Prinsep and O'Kinealy, JJ., held that the statement in the decree was evidence of the admission made under section a5 of the Evidence Act. The learned Judges begin by stating that the original containing the admission of the defendant's predecessor in title could not be produced as it was destroyed and that, under a Circular issued by the Sudder Court, it was the duty of the Court to enter in the decree an abstract of the pleadings, and they relied on section 35 as authority for the view that the admission sought to be proved can be proved by the abstract prefixed to the decree. At the end of the judgment, however, they go on to state that the admission in the decree would be binding only if the person who is alleged to have made the admission was the predecessor intitle of the defendents and observe : "Whether the defendants are bound by the state. ments of Rashmoni depends on the question TRIPURANA SEETHAPATI ROO DOBA U. ROKKAM VENKANNA DOBA.

whether Rashmoni was their predecessor-intitle; and this point has not been decided by the Subordinate Judge. If he holds that defendants do not represent Rashmoni, neither the decrees nor the admission can be admissible against them. On the other hand if he holds that the defendants do represent Rashmoni ther, in our opinion, so much of the decrees as purports to give the statement of Rashmoni is admissible in the present case. The amount of weight to be given to such statement is a matter to be desided by the Court below." Lekraj Kuar v. Mahipal Singh (10), to which the learned Judges refer. was a case not of a judgment but of a statement made in a Settlement register, and their Lordships of the Privy Council were of opinion that being an entry in a register kept by a public servant under statutory authority it was admissible under section 35 of the Evidence Act. It seems to me that if the learned Judges were of opinion that any statement made in a judgment would be a statement made by a public officer in a public resord and would bring it under section 35, all the discussion as to the duty of the Judge to make an abstract of the pleadings in the decree, the destruction of the original plead. ings containing the admission and as to its relevancy depending upon whether Rashmoni, the person who is alleged to have made the statement abstracted in the decree, was the predecessor in title of the defendants would be immaterial as a statement recorded under the circumstances mentioned in section 35, would depend for its relevancy on the mere fact that it was made by a public servant in the discharge of his duty apart from the sources of his information or the relationship of the persons giving the information to the persons who were interested subsequently in the matter. The correctness of this decision was doubted in Sunder Das v. Fatimul ul nissa Begam (11) and Romsunder Gope v. Haribala Dhubi (7). In Baythamma v. Atulla (4) the question was whether the parties were governed by Makkattayam or Marumakkatta. yam Law and it was sought to prove that in a previous claim petition to which a preceding Karnavan was a party, he acted in the capa-

('1) 1 C, W, E, 518,

city of a Karnavan, thus showing that the parties were governed by the Marumakkat. The order of the District tayam Law. Munsif resiting the petition of the previous Karnavan was sought to be put in to prove the allegation made by the previous Karnavan and it was held, on the authority of the 9 Calcutta case [Parbutty Dassi v. Purno Chunter Singh (3) , eited above, that it was admissible under sestion 35 of the Evidence Act. As printed out by the learned Referring Judges, the reasoning in this case would apply to section 13 rather than section 35. Rama Swami v. Appasu (8), which is referred to by the learned Judges, related to the relevaney of judgments under sections 13 and 42 of the Evidence Act and had nothing to do with section 35. The 15 Madras case cited above, Thama v. Eondan (5), was a suit to redeem a Kanom. The Kanom document was lost and the judgment in a previous suit brought by a previous Jenmi to redeem the same Kanom in which it is stated that defendants admitted their position as Kanomdars was sought to be put in evidence. learned Judges, following Learni Kuar v. Mahipal Singh (10), Farbutty Dassi v. Purno Ohunder Singh (3) and Byathamma v. Avulla (4), eited above, held that the judgment was admissible and that the resital in a judgment of the admission of the relevant fast would be evidence of the Jenmi's title under section 35 of the Evidence Act. As the second suit to redeem was between the same parties as those to the first suit, it is difficult to see why recourse should be had to section 35 for the purpose of rendering the previous judgment admissible in evidence, as the matter could well have been brought under sections 40 to 43 of the Evidence Act. Neither in this case nor in the case reported at page 19 of the same volume is there any discussion of the authorities and the Judges simply follow the decision in the 9 Calcutta case [Parbutty Dassi v. Purno Chunder Sing's (3)] eited above. I think the correct poinciple has been laid down by Mookerji, J., in Kasi Nath Pal v. Jagat Kishe Actaries (1), where the learned Judge held that, "although a judgment not inter partes may be used in evidence in certain cirumstances as a fact in issue or as a relevant fast or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties."

^{(10) 5} C. 744: 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jacksion's P. C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. N. 8., 1081 (P. C.'. - 4 - 1+

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The judgment of the Privy Council in the 43 Calcutta case [Ram Parkath Das v. Anand Dos (2) eited above also makes it clear, The question there was whether a person was disqualified from being a Mahant by reason of his having been married. Evidence was sought to be let in of a recital in the judgment of a Magistrate of an admission of the marriage made in the course of proceedings before him. Their Lordships of the Privy Council held that the judgment was rightly rejected as not by itself cyidenes of the facts recorded therein. It is argued by Mr. Menon that what their Lordships rejected was not the judgment but a statement by one Hanuman Lal, made on oath, that the Mahant was married; but a reference to the passage in which the observation of their Lordships occurs makes it clear that they were referring to the judgment. It is unnecessary in this reference to consider whether, if admissions made by parties to a suit or their predecessors in title are relevant and the originals containing the admissions are not forthcoming, secondary evidence of such admissions can be given by reference to extracts from judgments. The answer to the question will turn not on section 35 but with reference to the provisions of the Act relating to the relevancy of admissions and the sections relating to recondary evidence. On a consideration of the authorities and the provisions of the Evidence Act, I am clearly of opinion that section 35 would not render a judgment not inter partes evidence. I would answer the question referred to us in the negative. M. C. P.

Answered in the negative.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 605 OF 1921.

October 20, 1921.

Fresent:—Mr. Justice Scott Smith.

PARDUMAN CHAND AND OTHERS—

PLAINTIPPS—APPELLANTS

tersus:

GANGA RAM-DEFENDANT-RESPONDENT,

Provincial Small Cause Courts Act (IX of 1867), Sch. II, Art 8—Suit for interest on mortgage-money, cognisance of—Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXIII, r. 1—Withdrawal of suit—Sufficient cause.

A shop was mortgaged to the plaintiffs with possession and the mortgagee agreed to pay a certain sum yearly as the munaja profits) of the mortgage money, and in case of default this sum was to carry interest Plaintiffs sued to recover a sum less than Rs. 500 as the munaja for three years and interest thereon in the Court of a Munsif with 2nd Class powers:

Held, that the suit was one for interest on the mortgage-money and was one triable by a Court of Small Causes and that, therefore, no second appeal

lay in the case. [p. 286, col. 1.]

It is not a sufficient cause for allowing a suit for interest on a mortgage to be withdrawn under Order XXIII, rule 1 of the Civil Procedure Code, that a subsequent suit for principal, if brought, would be barred under the provisions of Order II, rule 2 of the Code. [p. 282, col. 1.]

Second appeal from a decree of the Senior Subordinate Judge, First Class, Kangra at Dharmsala, dated the 17th January 1921, reversing that of the Honorary Munsif, Second Class, Bijapur, District Kangra, dated the 17th June 1920.

Bakhshi Tek Chand and Lala Jogan Nath; for the Appellants.

Mr. Jai Gopal Sethi, for the Respondent.

JUDGMENT,—Plaintiffs' suit, which was for munofa due under the terms of a mortgage deed and for interest thereon, has been dismissed by the lower Appellate Court on the ground that it was not proved that there is any subsisting mortgage in plaintiffs' favour. The plaintiffs have filed a second appeal in this Court and have asked that, if no second appeal lies, the case may be heard as an application for revision.

The suit was for a sum of money less than Rs. 500 and was heard by a Munsif with 2nd Class powers, and the first appeal was heard by the Subordinate The first ground of appeal to this Court is that no appeal lay to the Subordinate Judge's Court and that he had acted without jurisdiction in hearing it. The original mortgage deed has not been produced but a copy of it is on the record and it shows that a shop standing on a certain specified spot of land was mortgaged with possession to the plaintiffs by one Lachbi Ram who agreed to pay Rs. 144 yearly as munafa of the mortgage-money, and on failure to pay this amount it was to sarry interest. The present suit is for three years munofat and for interest. Now, on bahalf of the appellants it is contended that what was PARDUMAN CHAND E. GANGA BAM.

mortgaged was a vacant site and a shop and that the suit is for the profits of immoveable property, and, therefore, excluded from the augnizance of a Court of Small Causes, No doubt a vacant site is des. eribed in the beginning of the mortgage. deed, and it is clear from the dimensions of the shop that it does not cover the whole plot. The only thing specifically mortgaged by the deed was the shop and if the suit be considered as one for the rent of the shop it was not excluded from the cognizance of a Court of Small Causes. But the suit is clearly one the profits of the mortgage-money; in other words, it was one for interest on the mortgage-money, and, therefore, it was one triable by a Court of Small Causes and the appeal was properly heard by the Subordi. nate Judge and no second appeal lies.

An application was made to me that the appellants should be allowed to withdraw the suit under Order XXIII, rule 1 of the Civil Procedure Code It is not stated that the suit must fail by reason of some formal defect or that there is any other sufficient ground of a like nature for allowing the plaintiffs to institute a fresh suit in regard to the subject matter. The reason urged before me in arguments is that contained in ground 4 of the application. The present suit was merely for interest and the plaintiffs were afraid that a second suit for principal, if brought bereafter, may be beld to be barred by Order 11, rule 2 of the Civil Procedure Code. This, however, is not a sufficient cause for allowing the present suit to be withdrawn. The plaintiffs having brought the present suit for interest only the defendants have a very good defence to a subsequent suit for principal, namely, that it would be barred by Order II, rule 2 of the Civil Procedure Code, and to allow the plaintiffs at this stage to withdraw the suit would be to deprive the defendant of that ground of defence.

The other ground urged, namely, that there are important questions of law and that, whatever the desision of this Court may be, there would probably be an appeal under the Letters Patent, is no sufficient ground for allowing the withdrawal and I have, therefore, rejected the application.

In support of the prayer that this Court may interfere on the revision side, it is nrged that no issue was framed as to whether the original deed of mortgage had been lost and that the plaintiffs were thereby prejudiced. A perusal of the record shows that at the very first hearing the defendant pleaded that the original mortgage deed should be produced and the Court also recorded an order to the same effect. It was not till many months later that the plaintiff's Mukhtar told the story about the deed having been handed over to Lachbi Ram, the mortgagor. No issue was framed as to whether this was correct or not, but the plaintiffs apparently knew that they had to prove it because they produced Nebal Chand, Dittu and Khana as witnesses to the fact. In my opinion, therefore, they were not prejudiced in any way by the omission of the Trial Court to frame an issue on the point. These witnesses have been disbelieved by the lower Appellate Court, which finds that the plaintiffs have not proved that the deed was last.

In the fifth ground of appeal it is stated that the lower Appellate Court has erroneously supposed that the deed was with the mortgagor and, therefore, it should be presumed to have been discharged. This ground is based upon the following sentence from the lower Appellate Court's judgment: "The story seems to be very improbable. It was a very valuable security worth Rs. 1,500. It is extremely unlikely that the mortgagees should part with it to the mortgagor, the very person who even (sic) denying it, without a receipt asknowledgment. and without an presence of the deed with the mort gagor is a very strong proof of its discharge. Therefore, as a rule, the deed is the last thing which a mortgagee would part,"

I do not think that from this the lower Appellate Court meant that the deed in this case was with the mortgagor. What it meant was that mortgagees, as a rule, would not part with their deed, especially to the mortgagor, until it is paid because the presence of the deed with the mortgagor is a strong proof of discharge. It made these remarks in order to support its view that it was extremely unlikely

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with the deed to the mortgagor without receiving payment from him. I agree with the lower Appellate Court that the appellants have not proved that the deed was lost and I do not consider they are entitled to have the case remanded so that they may produce further evidence.

I, therefore, dismiss the appeal with costs on the ground that no second appeal lies and I decline to interfere on the revision side.

z, K.

Appeal dismissed and interference in revision declined.

OALOUTTA HIGH COURT,
APPEAL FROM ORIGINAL DECAME No. 37 OF
1919.

June 17, 1921.

Present: —Justice Sir John Woodroffe, Kr.,
and Mr. Justice Cuming.

SECRETARY OF STATE FOR INDIA IN
COUNCIL-DEFENDANT-APPELLANT

versus

PLAINTING RESPONDENTS.

Bengal Tenancy Act (VIII of 188'), ss. 95 (a), 97 — Court of Wards' power to sue—"Estate," meaning of — Accretion—Re-formation—Limitation, special law of — Civil Procedure Code (Act V of 908, s. 8 — General rule as to plea of limitation—Rennell's map, evidentiary value of Presumption of continuity—Accuracy—Evidence Act (I of 1074), s. 83.

Section 97 of the Bengal Tenancy Act gives the Court of Wards power to sue in the case of an estate which comes to it under the provisions of section 95 a; of the Act. [p. 292, col. 1.]

The word "estate" in section 95 (a) of the Bengal.

Tenancy Act means all that the holder is entitled
to by way of re-formation or accretion. [p. 298, col. 1.]

The Court of Wards has the same power to sue when the estate comes to it indirectly through the mechanism of the Bengal Tenancy Act as it has in a case which comes directly under the provisions of the Court of Wards Act [p 292, col. 1.]

In the case of a suit alleged to be barred under a special law of limitation, the party setting up the plea is not entitled to deduct the period of two months for service of notice under section 80 of the Civil Procedure Code. [p. 297, col. 1.]

It is necessary that limitation should be pleaded in all cases in which the suit is alleged to be barred. But particularly this is so where the bar is alleged under some special law. [p 297, col 1]

The general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon

questions of fact [p 29i, col. .]

Points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on the evidence. [p 297, col. 1]

here limitation has not been pleaded and where no issue has been raised, the ourt cannot make any assumptions with regard to it. If limitation is urged as a bar the facts on which it is barred must be proved after an issue has been framed. [p 297, col. 2.]

The mere fact that a book was not referred to in the lower Court, may not of itself be a good objection in appeal. If, however, the book was used to establish the existence of facts which the appellant had no opportunity of meeting and which he desired to rebut, the admission of the book in the appellate stage might involve a remand. [p 298, col. 1.]

Whatever else may have been the purpose of the preparation of Rennell's map, that purpose included the delineation of roads and waterways and so it may be used to ascertain the position of a river shown

therein [p 295, col. v.]

Although Rennell's map was not contemporaneous with the Permanent Settlement, it having been made some 22 years or so before the Decennial Settlement on which the Permanent Settlement proceeded, it may be used, on the presumption of continuity, as evidence of a state of things at the time of the Permanent Settlement [p. 298, col 2.]

The presumption of continuity is one which varies with the circumstances of each case and is applicable to things which are continuous in their nature. If they are that, then the Court may presume that they continue in the state in which they were last known, in the absence of evidence

to the contrary. [p. 298, col. 2.]

Where Rennell's map is referred to as evidence there is a presumption of its accuracy under section 8s of the Evidence Act in respect of such matters as to which it is admissible in evidence. [p. 300, col. 1.]

Appeal from the original decree against that of the Additional Subordinate Judge, Backerganj, dated the 18th November 1918.

Mr. Gibbons, Advocate-General, Babu Ram Charan Mitro, Dr. Dwarka Nath Mitter and Babu Monindra Nath Baner, ee, for the Appellant.

Mr. S. R. Das, Babus Surendra Chandra Sen and Surendra Nath Guha, for the Respondents.

JUDGMENT,—The plaintiffs Nos. 1 to 34 and the plaintiff No. 35 are proprietors of the permanently settled revenue paying.

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estates Nos. 1763 and 1764 respectively on the revenue roll of the Bakargani Collectorate. The plaintiffs Nos 1 to 34 are also lessees of the estate No. 1764 under a patta from the thirty-fifth plaintiff. The two estates together constitute the Zemindari of Pargana Dakhin Sahabazpur, No. 1763 and the lease-hold are in the management of a Manager under the Coart of Wards and this suit is brought by him on behalf of the plaintiffs Nos. 1 to 34 and by the plaintiff No. 35. The subject. matter of this suit are two island churs at present known by the names of Chur Botham and Chur Harikishore and certain lands described in schedule A to the plaint. The question is, are these lands re-formations of the plaintiff's permanently settled estates as the plaintiffs allege, or are the two churs new formations in a navigable river and the other lands assertions to the permanently estate assessable to additional settled revenue. The land settled was, as we have said, Pargana Dakhin Sahabazpur. regards the northern and the southern boundaries of the Pargana there is no dispute. As regards the west, the plaintiffs say that the Pargana was bordered by the Betus River. The respondent says that it was bounded by other settled estates.

The question in dispute is, where is the eastern boundary of this permanently settled estate. It is undisputed that the eastern boundary of the settled Pargana was the western bank of the river Sahabazpur. The question is, whether the western bank of Sahabazpur river as it was at the time of Permanent Settlement and as depicted in Rennell's map forms the eastern boundary of the Pargana. It is both parties' case that the western bank of the Sahabazpur river is the eastern boundary and the point to be decided ie, where was that western bank at the time of the Permanent Sattlement. We have to deside whether the lands in suit fall within the boundaries of the estate in respect of which the plaintiffs have been paying revenue to Government.

It is necessary, particularly with reference to the issue of res judicata, to give a short resume of the previous history on th subject, and with reference to the objection that there has been an abatement or remission of the original revenue consequent on the reduction

of the area, to give a short previous history; of the Pargana.

In the year 1847, two churs, named Bhasan Tezamaddi and Dampier, formed in the Sahabazpur river. In the year 1880-81, there was a Deara Survey and the Deara Superintendent of Surveys took possession of these two islands on behalf of Government. He disallowed the respondents' contention that these churs were re-formations on the sites of their diluviated permanently settled lands and that the sites were dry lands, according to Rennell's map of 1764-73 at the time of the Pormanent Settlement. He relied on Kelso's map which was prepared in 1847 48 and held that the churs were new formations on the bed of a navigable river and belonged to Government. The respondents who objected to the decision claimed them as being within their easterm boundary. The decision of the Deara Superintendent was in 1883 and was, as we have said, based upon Kelso's map which he held showed that the lands in question lay outside the boundary of the permanently settled estate. An appeal was made to the Commissioner by the respondents and the Commissioner in his order of the 26th March 1884, after stating that Rennell's map showed that shortly before the Permanent Settlement where the lands had re-formed was part of Sahabazpur and that subsequent to the Permanent Settlement the Pargana suffered severely from diluvion all along its eastern face as was shown by a comparison of Kelso's and Tasin's map with that of Rennell, expressed his opinion that the lands were elearly re-formations of the appellant's permanently settled estate and reversed the order of the Dears Superintendent assessing them with revenue and ordered the islands to be released. From that decision of the Commissioner, the Government appealed to the Board of Ravenue and, in their grounds of appeal, amongst other matters, they alleged that Rennell's map was incorrect and . contended that a comparison of Kelso's map with the locality showed that the chur was thrown up in a big navigable river and was' not included within the Pargana, The Board of Revenue rejected the appeal of the Government and referred them to their remedies by a civil suit. On the 6th of October 1893, a: Civil Suit (No. 76 of 1893) was filed by Government for declaration of title and

U. W.

Vol. LXVI] SECRETARY OF STATE FOR INDIA C. ANNADA MOHAN BOY. possession of Chur Dampier. It is to be observed that no sivil proceedings were taken with respect to the other chur, namely, Bhasan Tazumaddi, and assordingly the plaintiffs in this suit allege that the Government acquiess. ed in the decision of the Commissioner of Revenue and the Board of Revenue in respect of that chur. That suit was subsequently transferred to another Court and re-numbered as No. 90 of 1895. The Secretary of State in his plaint in that suit alleged that estates Nos. 1763 and 1764 were owned by the defendants in the first paragraph of the plaint mentioned and that together they constituted the Pargana Dakhin Sahabazpur and that a wide channel, an arm of the sea locally known as Dakhin Sahabazpur river, lay to the east of the Pargana Dakbin Sahabazpur and formed the eastern boundary of that Pargana. Then the plaint set forth the

proceedings to which we have referred and alleged that the chur was formed in a wide navigable river and was not a re-formation on the original site of any lands of Pargana Dakhin Sahabazpur, that the map of Major Rennell did not represent the state of things existing at the time of the Permanent Sattlement, that it was drawn on too small a scale to admit of any satisfactory comparison and that there were reasons for holding that it was not accurate. The plaintiff accordingly prayed for a desree deslaring that the lands in dispute being an island formation in the bed of a big navigable river belonged to him and that the elaim of the defendants that they were re formations in situ was without foundation. The respondents filed a written statement in which they alleged that the disputed chur having formed on the original site of diluviated lands permanently settled with the proprietors of Pargana Dakhin Sahabszpur, the plaintiff had no right, title or interest in such newly formed lands. They contended that, though the map of

Major Rennell was prepared some years

before the Permanent Settlement, yet in the

absence of evidence of change the position of

the land and water ought to have been

presumed to continue. They alleged that

this map had been acted upon by the Govern.

ment in several instances and, on the basis of

that map, the Revenue Authorities had released

newly formed lands to private parties and

private parties had also in several instances

obtained decrees against Government for

newly formed lands in Stie Civil Court on the basis of this map. They denied that it was inaccurate. Then, in paragraph 11, a statement was made which is important upon the issue of abatement of revenue now sought to be raised. Paragraph 11 of the written statement alleged that after the Permanent Settlement the river lying to the east of Pargana Dakhin Sahabazpur gradually encroached upon it and diluviated its land to the extent of nearly eight miles in breadth for which the present Zamindars or their predecessors-in-interest obtained no reduction of revenue and, as the present chur was a re-formation on the site of the diluviated lands, the plaintiff had no right thereto. This statement that there had been no reduction of revenue was not, we may here observe, contested in the suit, and no issue was raised with reference thereto. The suit was heard by the Subordinate Judge of Barisal who gave his judgment on the 12th of December 1895. A number of issues were raised of which the most important were the 4th and the 5th, namely, (4) "Has the land in dispute been formed in a large and navigable river or an arm of the sea existing at the time of the Permanent Settlement?" and (5) "Whether the land in dispute is a re-formation on the original site of the defendants' Pargana Dakhin Sababazpur and

whether it is an ascretion to the same?" We shall refer later when dealing with the issue of res judicata to the findings of the Subordinate Judge in that suit. The conelusion, however, to which he came was that Rennell's map should be followed and that the eastern boundary of the Pargana as it existed at the time of the Permanent Settle. ment was shown by that map. He found that the map could be re-laid and that the correct starting point was the south west angle of Fort William. He, however, also found that a portion of Chur Dampier fell beyond that line and was an ascretion to the Pargana for which the defendants were liable to pay additional revenue. That portion is marked by the letters A, B, C on the map. He assordingly dismissed the suit except as regards the small triangular portion to which we have referred which was declared to lie outside the boundary line of the Pargane and was, therefore, liable to assessment. In the present suit, the same question has some up again with respect to the property now in dispute and the two issues which have been

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framed are (5) "Are the plaintiffs entitled to all lands and churs to the west of the eastern boundary of Pargana Dakhin Sahabazpur as shown in the map annexed to the decree in Suit No. 90 of 1895?" and (6) "Is the defendant entitled to dispute the said eastern boundary?"

Touching the issue of abatement, the following facts must be noted. From an early date the Salt Department occupied lands belonging to the Zemindari. At first the Salt Department appear to have paid Rs. 12,208 (Siesa) for their use and occupation and the Zemindars paid the full revenue of Rs. 57,435.13.4. After that, the sum was not paid but was called "suspended." That is, it was deducted from the total revenue. Zamindars paid Rs. 44,413 15 5 only. In other words a book transfer was made of the amount due to the Zeminder as rent by the Salt Department. In 1833 the manufacture of salt was discontinued. The Government offered to give back the lands held by the Salt Department on the Zemindars agreeing to pay in future the sam previously deducted from the revenue payable, in other words, the revenue originally fixed. The respondents did not agree to go back to the old state of affairs alleging that the "suspension" of jama was allowed not only on account of rent but also in consideration of sundry cesses of which the Zemindars had been deprived. They pointed out what appears to be the fact, viz., that a large portion of the lands relinquished by the Salt Department had been resumed by Government and separately assessed. In Exhibit KK Mr. H. Ricketts' (the Commissioner of Chittagong) letter, it is stated that some Salt Mokams had been wholly washed away. A survey of the lands was made in 1848 by Mr. Kelso to ascertain the extent and locality of the resumed lands. whether lands held by the Salt Department were in possession of the Zemindars and, to quote Mr. Ricketts' letter, "to ascertain the extent of the Zemindari which pays the reduced 'ama of Rs. 44,413 15 5."

Mr. Ricketts points out that the Government had resumed lands of the area there stated—the aggregate area of resumptions actually exceeding the area of the estate held by the Zemindars. He states that the assessment of the resumed lands was already Rs. 33,513 and would in a few years equal the sadar jama of the original estate. The

jama then paid by the estate was stated to be R. 44,4 3 cn 102,095 aeres culturable. This, he observes, was a high jama for an estate settled in perpetuity, especially when it was considered that much of the land was held by Talukdar under the Zemindars at a very The Collector had proposed that low rate. the question of re-imposition of the suspended Rs. 13,021 should be adjusted by composition on the terms mentioned in the letter which it is not necessary to recapitulate. Mr. Ricketts, however, states that these terms were not acceptable to the Zamindars who represented that the jama then paid (Rs. 44,413) was a heavy burden on the lands remaining to them and that to re-impose the suspended jama without restoring all the privileges they possessed previous to the introduction of the salt manufacture would be unjust. He points out that the Zamindars could show that the Government had by means of 35 resumption suits reparately resumed 151,862 agree assessed at Rr. 33,513, that portion of the land resumed was certainly the land held by the Salt Department, that some Salt Mokams had been destroyed by diluvion, and that the land which then comprised their Zemindari was not in extent and produce disproportionate to the jama already paid, namely, Rs. 44,413. Oa the whole, he concludes as follows: "Assuredly, the long array of resumptions would induce a bias in favour of the Zemindars and I by no means feel so assured of our equitable right to re-impose the suspended jama as to recommend that the extreme measures of re-imposition and sale by Court of the estate for arrears should be resorted He recomended, therefore, as an alternative, that all intentions of re-imposing the suspended Rs. 13,021-13 11 should be abandoned. After this, on the 11th September 1850, the Revenue Secretary to the Government of Bengal wrote to the Sadar Board of Revenue stating that the plea of the Zemindars against re imposition of the sum deducted on assount of the salt manufacture had been proved to a great extent to the satisfaction of Mr. Ricketts and that, "taking into consideration the great extent of the resumptions that have been made in this estate and the vast increase of actual jama derived therefrom, His Honour is pleased, in accordance with the recommendation of SECRETARY OF STATE FOR INDIA U. ANNADA MOHAN BOY.

Mr. Ricketts, to authorize the abandonment of the suspended amount and the proposed reduction in the sadar jama of the estate." We may here observe that it would seem that from the year 1802, if not from 1793, the actual amount of revenue which had been paid by the Zemindars was the sum of Rs. 44,413.15 5 pier, which represents the sadar jama as originally fixed less the deduction made on account of occupation of land by the Salt Department. From this letter it would seem clear that the reason for a reduction of the revenue paid by the estate was that a portion of the estate had been resumed by Gavernment.

the estate had been resumed by Government. A preliminary objection was taken in the written statement on the ground that the Manager of the Court of Wards had no power to bring a suit for khas possession in an attached estate. This objection, we may obsarve at the outset, is relevant only so far as the plaintiffs Nos, 1 to 31 are concerned who are described as 'Wards of Court by the General Manager, Court of Warde." It does not apply to the 35th plaintiff, Bat it is contended that if the objection is good against the Court of Wards representing the plaintiffs Nos. 1 to 34 the suit fails as regards the plaintiff No. 35 also on the ground that the plaintiffs Nos. 1 to 34 are subordinate holders under him and that he has no present right to sue. The facts as regards this are that the District Judge exercised the jurisdiction vested in him under the Bengal Tenancy Act and acted under the provisions of section 95A of that Act which provides in section 97 that "in any case in which the Court of Wards undertakes under section 95 the management of an estate or tenure, so much of the provisions of the Court of Wards Ast as relates to the management of immoveable property shall apply to the management" In the ease of the appointment of a Manager by the District Judge under section 95, section 98 contains the provisions applicable to the Manager and, amongst other such provisions, the Manager has "the same powers as the co-owners jointly might but for his appointment have exercised." The contention on behalf of the appellant is that the word "management" in section 97 relates to Part VI of the Court of Wards Ast which is so entitled, and that that

part of the Act does not give powers for the institution of a suit. There is no reference in section 97 to Part VI of the Court of Wards Act, but the argument is based on the fact that l'art VI of the Court of Wards Act deals with management and on the contention that that part contains the whole of the powers of management which are conferred in the case of the Court of Wards taking over a property under the provisions of section 95 (a) of the Bengal Tenancy Act. It is argued on behalf of the respondents that, though it cannot be said that the plaintiffs are disqualified proprietors, the case must be treated in the same way as if they were such and that, under the provisions of section 97 of the Beugal Tenancy Act, it is not merely Chapter Vi of the Court of Wards Act which is made applicable but all sections of the said Act which have any reference to management and there are provisions relating to management which are not included in that part; that the effect of taking over a property by the Court of Wards is to prevent the proprietor from managing it; that it is not the intention of the Legislature that the Court of Wards managing a property which has been made over, to it under the provisions of section 95 (a) of the Bengal Tenancy Act should have any less powers than a Manager appointed by the Judge under the provisions of section 98 of the Bengal Tenancy Act, and that, as in a case which comes directly under the provisions of the Court of Wards Act, Manager has the the power suit, it must reasonably be held that the same power of suit exists as a part of the general management in the case where the management of an estate has been made over to it under the provisions of section 95A of the Bengal Tenancy Act.

It must, we think, be taken to be a reasonable interpretation that when the Bengal Tenancy Act gives the District Judge the power to direct that an estate be managed by the Court of Wards in such case that body has the same powers as it has in regard to other estates directly coming within the provisions of the Court of Wards Act. In the latter case, there would be a power of suit in the Court of Wards. Should we say then that, because an estate comes to the

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Court of Wards not directly but through the meshanism of the Bengal Tenancy Act, the manager has no such power? As regards the manager appointed under section 95 (b), it has been held that he is competent to sae to recover possession of land: Sibo Suntari v. Ra Mohun (1). In our opinion there is no ground or reason for holding this and at the same time holding that there is no power of suit in the case of an estate taken under esetion 95 (a). We are of opinion that section 97 gives the Court of Wards power to sue in the oase of an estate which esmes to it under the provisions of sestion 95 (a) of the Bengal Tenancy Act. It is argued that under section 95 (a) the estate to be managed is that which is handed over and was handed over before the churs in suit formed. But the word "estate" there means we think all that the holder is entitled to by way of reformation or appration. The lands which were handed over to the Manager were the whole estate in which subsequently the lands in sait are said to have re-formed. If there had been no dispute between the parties as to the title to these lands, it sould not, we think, be sontended that the Court of Wards had no power to take steps to manage these lands as churs which had formed within the ambits of the estate made over to their management. It is not contested that where an estate directly comes to the Court of Wards, it has power to sue, and this appears to us to be part of its powers of management. our opinion, it has the same power when the estate comes to it indirectly through the mechanism of the Bangal Tenancy Act. Possibly, the Legislature in enacting section 97 of the Bengal Tenancy Ant intended to draw a distinction between the management of the property of the co-owners and the care of their persons. It is admitted that there is no decision to the contrary effect and we hold, therefore, that this objection fails.

Passing from this preliminary objection we will deal, first, with the contention that there has been an abatement or reduction of revenue in respect of the estate and that, therefore, the plaintiffs must show not merely what were their lands at the time of the Permanent Settlement but that the lands in suit

are re-formations of lands of which they have been paying revenue since such alleged abatement. No such case was made in the written statement, though the materials upon which it is based were in the possession of the Government. It was put forward for the first time after the evidence had been olosed on both sides. The learned Judge refused at that stage and under the circumstanses of the case to allow this issue to be raised. He, however, permitted the defendant to argue the point on the plaintiff's evidence and held that there had been in fast no abatement. It is objected that the Court should have allowed the issue. For the purpose of this judgment we may assume (without so deciding) that the Court should have allowed the issue to be raised. It is, however, a different question whether the appellant is entitled to a remand to obtain evidence on this point. Dr. Dwarks Nath Mitter who appeared for the Government in the lower Ocurt and before us admitted that he did not ask to give evidence on this issue in the lower Court and that he was then willing to have the point determined on the record as it then stood. Bafore us, however, the learned Advocate General asks for a remand. But it is quite clear that he has not in mind any definite evidence, which is known and can be produced. He stated that he wished to have an opportunity to examine the resumption records in order to see how matters stood as regards the lands resumed and whether they or any other lands had diluviated. He spike of "being in the dark" es regards these matters. It is obvious that, whilst it might have been a matter of doubt whether when a particular piece of evidence was put forward as available, the Court should allow a remand seeing that no evidence was offered in the lower Court, it is also elear that such a remand should not be allowed at the present time after so long a trial merely for the purpose of making an ecquiry whether there is any evidence to be produced. The judgment was given in November 1918, and, if there were any evidence, steps should have been taken meanwhile to ascertain what it was. Had the appellant then some to Co rt and said: "Here is the evidence I want to provo. I ask for a remand in order that I may prove it," there would at least have been a matter for consideration. But here all the evidence that

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there may be is in the Government's possession and has been so all along. Not withstanding that the point was not taken in the pleadings till after the close of the evidence and since then nothing has been apparently done to ascertain the facts. It is, to our minds, quite clear that no remand should be allowed and we refuse the same. will, for the purpose of this judgment, (and without so deciding), assume that the objection may be raised notwithstanding that it was not taken until after all the eviderse had been given and the case closed, and will consider the question on the evidence as it is now before us. The facts of this question of abatement have been already fully stated. If an abatement were established, then undoubtedly the plaintiffs would have to show that the land in suit was not merely a re-formation of the lands settled with them in 1793 but of lands other than those in respect of which abatement was made and of lands for which they have been and are now paying revenue. It has been contended by the appellant that there had been an abatement of some Rs. 13,000, that is, that the revenue is paid at the rate of Rs. 44,413 15 5 instead of Rs. 57,435...3 4 and that this abatement was allowed not only as regards the lands resumed but in respect of diluviated lands also. For the respondents it is argued that they never asked for an abatement and that all that happened was that they refused to assent to the arrange. ment proposed by the Government as set out in Mr. Ricketts' letter which we have mentioned and that it must in consequence be assumed that the state of things as it existed prior thereto continued up till the present date, namely, that the revenue was Rs. 57,435 13.4, a deduction being made in respect of lands taken possession of by Government and which the respondents refused to take back on the terms offered to them by Mr. Ricketts, It is further contended that abatement is only evidence of relinquishment of lands and that there has been none. There was, it is said, no request to deduct or agreement to deduct. For the Crown it is argued that, after this length of time, it must be taken that, though the respondents may have refused to accept Mr. Ricketts' offer, there has been an asquiessence in the Government

resolution allowing a deduction of revenue.

It is not necessary to decide whether there has been an abatement of revenue or not because in this case we assume (without deciding it) that there has been such an abatement without such conclusion affecting the decree which the plaintiffs have got, for, we are of opinion that, as is clearly shown by the letter from the Secretary to the Bengal Government to the Board of Revenue, the alleged abatement was giver, as was expressly stated, not in respect of any diluviation but in respect of resumption of lands, though it is a fact that the diluviation was mentioned in Mr. Risketts' letter. The lands so resumed in respect of which the alleged abatement was given are shown to the west of Keles's line. It is suggested that there may have been some diluviated land to the east of Kelso's line which had been lost previous to the making of his map. This hypothesis seems to be unfounded on the facts, for, if abatement had been given for diluvion as well as resump. tion that would have been stated in the final order of the Government of Bangal. Tas letter to the Board doss not so state but explicitly says that the abatement was given for the resumed lands. If this so, as we find it to be, it is immaterial whether there were any diluviations. What is important and relevant is to accertain the position of the resumed lands in respect of which, according to the letter we have mentioned, a reduction of revenue is alleged to have been given. These lands are shown to the west of Keleo's line and as the lands in suit are to the east of that line and to the west of the line of Rennell's map which (as later held) shows the eastern boundary of the Pargans, it follows that the lands in suit cannot be the lands in respect of which abatement, if there was any, was allowed, but are, if Rennell's line be the true eastern boundary, re. formations of land for which the plaintiffs have paid and are paying revenue. The question then whether there was or was not an abatement is in this view of the case immaterial. Whether Rennell's ligs is the eastern boundary of the Pargana depends on our finding as to whether the preceding desision of 1895 on this point is see ulionta, and, if not, whether the

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line of Rennell should be accepted as established on the evidence given in this suit.

Passing to the issue as to res judicata it is the case that the subject-matter of the suits is different but the identity of the property in the two suits is not necessary. What is contended is that the eastern boundary in 1793 of the Pargana in which the lands formerly and now in suit were and are is the eastern boundary as shown in Rennell's map. It is not contended that there is a res judicata upon the question whether Rennell's map was correctly laid in the map in the former suit all along the eastern boundary, that is, beyond Chur Dampier. A distinction must be drawn between the question whether the eastern boundary is that depicted in Rennell's map and whether that map was correctly laid in the previous suit beyond the astual boundary then in question. The eastern boundary had to be assertained before it could be found whether Chur Dampier was in the Pargana or not. It was necessary to decide the eastern boundary of the Pargana in the previous suit and the same has been found, it is said, to be necessary in the present case on the issue dealing with the merite, the bulk of the evidence dealing with the question whether Rennell's or Kelso's map should be taken to depict the eastern boundary. We think this contention is sound as also the argument that even if it were not necessary (which we think it was) the question of the eastern boundary was submitted for decision and decided. We have in the statement of facts fully set out those which bear on this point. It is the ease that there was no formal issue as to the eastern boundary of the Pargana but the whole history of the proceedings prior to the suit of 1895, the pleadings in that suit, the judgment and deerse show that the question which was agitated between the parties was whether the eastern boundary of the Pargana was the line of Rennell or of Kelso. This was the groundwork of the judgment. the latter it was stated that it was necessary for the purpose of the issues to find out what was the state of things at the time of the Permanent Settlement, that is, whether the spot on which Chur Dampier formed wa land or water at the time of the Permanent Settlement. How was the Judge

(we refer to the particular circumstances of this ease) to arrive at this conclusion but by assertaining the eastern boundary of the Pargana? The judgment further stated as follows : - "Both parties ask the Court to presume that the eastern boundary of Pargana Dakhin Sahabazpur as found in the maps upon which they respectively rely (that is Rennell and Kelso) existed at the time of the Permanent Settlement. It was also stated that at the request of the plaintiff and with the consent of the defendant the Amin was directed not to go to the spot but to draw the lines of the several maps on the cadastral survey map so that the limits of Pargana Dakhin Sahabazpur may be easily ascertained." His report refers to the line of the Sahabazpur river according to the maps prepared by Rennell and Kelso and the testing of the correctness of Rennell's map. The Judge then fully examined the question whether Rennell's or Kelso's map should be accepted and the conclusion was "Rennell's map should be but guide in deciding the dispute." The decree, of course, is given directly only as regards the lands then in dispute but reference is there made to the boundary of Pargana Sababazpur. As regards this decision there was no appeal. From the order sheet it appears that in the petition of the defendant a map of the disputed land was directed to be kept with the record as part of the decree. In our opinion the only way whereby either in the past or present suit it was or is possible to decide whether the property in suit belongs to one party or the other is by settling the eastern boundary.

And, clearly, the eastern boundary could not be settled until the Judge had determined which boundary line he should accept that of Rennell's or that of Kelso's. Until this point had been determined not an inch of the boundary line could be ascertained.

The Subordinate Judge has held that from the extracts of the former judgment the finding of what was the eastern boundary of the Pargana—whether according to Rennell or Kelso—was the very first necessary step: then that line had to be relaid; and the third step was to ascertain the position of the land then in dispute in order to find out what portion of it, if any, was the Pargana land and

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what portion was navigable river at the time of the Permanant Settlement. He holds that the determination of whether Rennell's map shows the eastern boundary of the Pargana at the Permanent Settlement was really the foundation or the groundwork of the former judgment. In his opinion, it was impossible to find out the boundary line of Char Dampier without, first of all, determining whether Rennell's or Kelso's was the eastern boundary of the Pargana at the Permanent Settlement: that was the only means of finding this out; the eastern boundary had long been washed away and there was no landmark either in Ohor Dampier or elsewhere from which it could be ascertained and that in short, finding that Rennell's western the boundary was the eastern boundary of the Pargana at the time of the Permanent Settlement is eliminated from the judgment, there is nothing to sustain it. He assord. ingly finds that the decision of the former suit as regards the eastern boundary is res judicata and that that boundary was shown by Rennell's map. With this conelusion we agree.

It is further sontended and denied that the question of abatement is res judicata; that is, the Government cannot raise the question that there has been an abatement of revenue, seeing that in the Suit of 1895 it was expressly alleged by the respondents and not denied by the Secretary of State that the lands had been held without dedustion of revenue. The question, therefore, it is said, is constructive res judicata. This raises several questions of difficulty. It is not, however, necessary to deside them because, even if this question of abatement is not res sudicata as the appellant contends and even if there had been an abatement of rent in fact as he also contends, the question is not of practical importance seeing that the lands in respect of which abatement is alleged to have been given are, in our opinion, resumed lands shown in Kelso's map and these lie to the west of his line with the result that the lands in suit cannot be reformations of lands in respect of which the plaintiffs have been allowed the alleged abatement.

Assuming, ther, that the eastern boundary of the Pargana is shown by Rennell's line, a question is raised whether Rennell's map

was correctly plotted in the former suit. In the Suit of 1895, the Amin prepared a map. In that suit, the Court deputed the Amin to compare Rennell's map, Kelso's map and others on the spot; but, at the request of the plaintiff, namely, the Government, and with the concent of the defendant's Vakil, the Amin was directed not to go to the spot but to draw the lines of the several maps (one of which was Rennell's) on the Cadastral Survey map so that the limits of the Pargana Sababazpur might be easily ascertained. The Amin accordingly prepared a map show. ing the limits, amongst others, according to Rennell. The learned Subordinate Judge has pointed out that this map was prepared in the presence of the representatives of the parties and was signed by the Kanungo deputed by the Government for the purpose. When this map was filed in Court, neither party objected that it was incorrect in any respect. The suit was disposed of accepting the map as correct and the whole line of Rennell war, without objection on the part of the Government, demareated upon the map annexed to the decree. In the plaint in the present suit reference is made in para. graph 13 to Rennell's map as being correctly drawn and in paragraph 22 it is alleged not only that the map was accurate, that is, represented the eastern line of the Pargana but that it had been correctly plotted in the previous Sait of 1895. Now, the Government in their written statement, whilst denying that Rennell's map was accurate, did not deny the allegation that, whether accurate or not, it had been correctly plotted in the suit of 1895. Then, the 5th issue raised in this suit is: "Are the plaintiffs entitled to all lands and churs to the west of the eastern boundary of Pargana Dakhin Sababasour as shown in the map annexed to the decree in Sait No. 10 of 1895 ?" The form of this issue, as the learned Subordinate Judge has pointed out, also indicates that up to the time when the issues were framed the defence did not dispute the correct plotting of the eastern boundary. No objection, he says, was taken to the form of this issue when the issues were reconsidered and a new issue was framed at the beginning of the trial. The question of the plotting of the map is further discussed in Order No. 104 of the order-sheet dated the 9th September 1918 where the arguments of both parties have PECRETARY OF STATE FOR INDIA U. ANNADA MOHAN ROY.

been given. We agree with the learned Subordinate Judge who has held that this is not a mere matter of evidence but is an essential and material fact touching the title. He has held that the correctness of the plotting must be taken to be admitted by the defence, though at the trial an attempt was made to dispute it. It is true, as we have eaid, that the accuracy of Rennell's map was contested but not the question whether it was correctly plotted and we think that the argument raised in the suit on behalf of the Crown and also repeated before us that Rennell's map was incorrect implies also that it was incorrectly plotted is not sound. for, the two matters are entirely different. We are of opinion that there is no ground for reversing the judgment of the Subordinate Judge upon this point. We would add further that if there were any substance in this contention, one would have expected that the Government would have, during the two years which have clapsed since the date of the deeree, had a map prepared which would have shown whether or not Rennell's map had been correctly plotted or been prepared to show by expert evidence that it could not be re-laid. This could have been produced or stated and the Court might have been asked to allow evidence to be given to prove what the map to prepared showed or the evidence would prove. We do not say that such an application would necessarily have successful but, at any rate, it would have made the position of the appellant stronger than it now is; for, he is asking for a remand upon a fast which the learned Judge bas held must be taken to have been admitted and he is not even now in a position to show to us by a map prepared by an expert in what respect the previous plotting was erroneous. As it is thus established that the line of Rennell is the eastern boundary of the Pargana by virtue of the previous decision in the Suit of 1895 and as it must be taken that that boundary was correctly plotted in the map in the Suit of 1895, and as it is an admitted fact that the lands in suit lie to the west of that eastern boundary and to the east of Kelso's line, it follows that the lands in suit must be taken to be re-formations of land in respect of which the plaintiffs have been and are now paying Government revenue.

These findings dispose of the arreal but having regard to the fact that possibly our

propose to deal also with the issue of the eastern boundary as a question of fact independent of the findings in the previous suit which we have held to be res judicita.

The preceding portion of the judgment was delivered on the 23rd May 1921, to which date the case was adjourned in order that we might determine whether we should go into the facts of the case in the event of its being found that the issue as to the eastern boundary was res judicata. On that day and about a month after, the appeal was first opened, a new objection was taken to the suit by the learned Advocate. General on the ground that as regards a portion of its subject matter it was barred by a special law of limitation, namely, section 24 of Regulation II of 1819. The portion of the suit said to be barred is that for land other than the two island churs taken possession of by Government to which a period of twelve years is applicable and as regards which, therefore, no question of limitation arises. In paragraph No. 18 of the plaint it is stated that the proprietors appealed to the Board of Revenue and the Board by its order dated the 9th March 1915 confirmed the proceedings of the Collector and rejected the appeal. Paragraph No. 3-A of the written statement runs as follows:-

"The suit is barred by limitation." In the issues framed on the let November 1916, the fourth issue is: "Is the suit barred by limitation?" New issues were framed on the 9th January 1917 and those issues did not ecutain any issue raising the ground of limitation. It is suggested on behalf of the appellant that this was due to the absence of the Government Pleader, a suggestion which it is said is supported by Order No. 13, in the order cheet, dated the 10th January 1917. However this may be, new issues were settled in lieu of those framed on the 1st November 1916; and amongst those issues there is no issue raising the when the Now. ground of limitation. bearing of the appeal is well through it is argued that the suit is barred as regards the land, other than the two island chure, because it was not brought within one year of the date of the ecommunication of the Board's order. The order of the Board is

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dated the 9th March 1915. It is alleged to bave been communicated to the respondents on the 12th April 1915 and the suit was brought more than a year after that date, that ie, on the 17th May 1916. For it has been held that in the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct, as the plaintiffs have attempted to do in this case, the period of two months for service of notice under section 80 of the Civil Procedure Code. This ground, as we have stated, is raised for the first time almost at the conclusion of the litigation. It is necessary that limitation should be pleaded in all sases. But particularly this is so where the bar is alleged under some special law. The general rule, we think, is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a desision upon questions of fast. In this case a question of fact is involved, namely, whether or not the Board's order was communicated, if so, on what date and whether the persons who are alleged by Government to have received notice were authorized agents of the respondents for that purpose. In our opinion this objection which is not contained in the grounds of appeal should not be allowed to be taken at this stage. It is said that the fact that the case is barred sufficiently appears without necessity for remand on the evidence, though that evidence was not given on this issue. We do not think that points of limitation should be desided against the parties unless attention been drawn to the question of limitation and an opportunity given them to meet it on the evidence. Even if the objection could be taken, the evidence is not enflicient to support it. The evidence upon which the appellant relies is to be found in the record of the Daara Settlement proceedings from which it appears that notices were served on one Nabin Chandra Guha an am mukhtear on behalf of Ananda Chandra Roy on the 11th April 1915 and on Shyama Charge Chakravarty, Manager the of Court of Wards estate the 12th April 1915. Beyond these facts no others are given bearing upon this question of limitation. They are obviously insufficient. There was, for instance, no proof of the signatures of Nabin Chandra Guba

or S. C. Chakravarty and it is not shown that the receipts which these persons are said to have signed are for a letter communicating notice of the Board's decision. Possibly this may be the fact, but we eannot, where limitation has not been rleaded and where no issue has been raised, make any assumptions. If limitation is orged as bar, the facts on which it is parred must be proved after an issue has been framed. As stated, there is no question as regards the two island churs to which admittedly limitation for the period of twelve years applies. The objection fails. Under the eirenmetances, it is not necessary to consider whether, if the point could be taken, section 24 of the Regulation has applicability to the present case.

We proceed now to determine on the facts and irrespective of the decision in the suit of 1895 what was the line of the eastern boundary of the plaintiffs' property at the time of the Permanent Settlement which includes the question whether Rennell's map may be taken as showing this. The question before us in its most simple form is this. The plaintiffs bave a permanently settled estate. There is no dispute as to the northern and southern boundaries and only in a secondary way as to the For, according to the plaintiffe, West. Western the boundary at the time of the Permanent Settlement was water: according to the appellant it was dry land, The primary question is as to eastern boundary. It is admitted that the western bank of river Sahabszpur was the eastern boundary of the respondents' estate. The question then is, what was the position of the river in 1789, the date of the Deeannial Settlement for the Permanent Settlement of 1793 is based upon the prior one. If the lands in suit are on the west of the river, they fall within the plaintiff's estate. The plaintiff contends that this is shown by Rennell's map, if it is to be accepted as admissible and accurate.

The onus is, of course, on the plaintiffs though once they have started their case so as to sufficiently raise an inference in their favour they may (as in fact they do) rely on the fact that evidence which if it is in the possession of any one is in the possession of the Government, is not produced.

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The onus is sought to be discharged by means of Rennell's map and some Settlement reports and books of reference The ease in the main rests on the map. But we will first deal with objections taken to the reports.

The Settlement Reports are, it is argued, not evidence, and reliance is placed upon the decision in Garuradhwoja Prasad v. Superundhwaja Prasad (2), As regards Mr. Beveridge's history of the District of Bakargani, it was not referred to in the lower Court, and its use here is objected to on this ground. The mere fast that the book was not referred to, might not be, of itself, a good objection. If, however, the book was used to establish the existence of facts which the appellant had no opportunity of meeting and which he desired to rebut, the admission of the book now might involve a remand. cordingly, the claim to refer to this history was not pressed. As regards the Settlement Reports, it is to be observed that the appel lants' map (AA) was prepared (according to the evidence) on reference to Mr. Jack's Calendar. The case to which ference has been made does not support the exclusion of the reports here referred to and we think that they are evidence. If evidence, the appellant desires to make nie of them. As stated, the respondent does slaim the support of other evidence. but even if he did not the question whether the map is sufficient must depend on the facts of the particular case. Here they are pesuliar in that the whole case is bound up in the decision of the eastern boundary of the estate and that eastern boundary is a river the position of which was one of the purposes of Rennell's map to locate. So that when we know that the eastern boundary of the permanently settled estate was the western bank of the river and when we know what the position of that river was at the date of the Permanent Settlement we are in a position to decide the issue before us.

For the appellant it is next contended that the onus cannot be discharged by conclusions drawn from, practically, the map alone.

Major Rennell, the Director of Survey. made his celebrated maps between the years 1764 and 1773. It is stated that the map which is used in this case was made sometime after 1767. There is no need to disense the value of Rennell's map in respect of boundaries, location of villages and the like. Here Rennell's map is used for the purpose of ascertaining the position of a river. Whatever else may have been the purpose of their preparation that purpose undoubtedly included the delineation of roads and waterways, and, so their Lordships of the Privy Conneil in Haradas Achariya v. Secretary of State (3) adopted the position of the river therein question as shown in Rennell's mar.

Rennell's map, however, was not contemporaneous with the Permanent Settlement, It was made some 22 years or so before the Decennial Settlement on which the Permanent Settlement proceeded. On this ground, therefore, the appellants object that it cannot be evidence of a state of things a considerable number of years after its date. If they are right on this then the suit on the facts must fail for the only evidence is Rennell's map. There is no sontemporaneous map and subsequent maps are no evidence of the previously existing state of things. The respondents in reply invoke the presumption of continuity. This is a presumption which varies with the circumstances of the case and is applicable to things which are continuous in their nature. If they are that, then the Court may presume that they continue in the state in which they were last known in the absence of evidence to the contrary. It may be said (as it is in fact argued here) that a river such as the Meghna is not continuous in its nature but continually variable. Reliance is placed in this connection on the observations in the order of Mr. Strong, the Collector, in a proceeding under section 76 of Act IX of 1847 that the Island Dakhin Sahabazpur is notoriously subject to diluvion and alluvion and that in the period which elapsed between Rennell's Survey and the

^{(2) 23} A. 87 at pp. 48, 49; 10 M. L. J. 267; 5 C. W. N. 33; 27 I. A. 238; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724 (P. C.).

^{(3) 43} Ind. Cas. 361; 26 C. L. J. 590; 22 M. L. T. 438; (1918) M. W. N. 28; 20 Boin, L. R. 49 (P. C.).

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Permanent Settlement half the Island might bave been diluviated and have re-formed in the shape of new island churs. And in the order of the Board of Revenue it is stated that: "Rennell's survey was made more than 20 years before the Decennial Settlement and in a tract such as this, which is situated on the Bakarganj littoral and is subject to violent fluvial and tidal action it furnishes no safe indication of the actual position of Morzahe at the time of the Decennial Settle. ment." In the judgment in the 1895 suit, the learned Judge stated, "that from time immemorial the Meghna has been continually diluviating its right bank along the eastern boundary of Dakhin Sahabazpur Pargana and that a considerable portion of it is now under water."

In a petition filed by the manager of the Court of Wards to the Deputy Collector it is stated that the petitioner was surprised and alarmed that the Revenue Authorities were making attempts to assess all the lands ontside the Revenue Survey lines although up till then it had been admitted by the Government that a considerable portion of the Zamindaris Nos. 1763 and 1764 permavently settled in 1793 had been washed away by the Dakhin Sahabazpur river before the Revenue Survey was made. With the exception of the last-mentioned petition the other statements are strictly not evidence in the case on this point. As regards the jadgment in the 1.95 suit it is either res judicata as we have held, in which case the present question need not any longer be disenseed, or if it was not res judicata the observations of the learned Judge are not evidence. No attempt was made in the lower Court to call evidence on the subject of the variability of this river. We have, however, the fact that resumption proceedings did take place in the years 1840 to 1847, with reference to diluvious referred to in Mr. Rickett's letter dated the 30th November 1848. Further, there are the proceedings as regards Hassan Tajuddin and Dampier Churs.

The respondents admitted that there was diluviation on the east of the Pargana after the date of the Permanent Settlement and some changes on the western side of the Paragana prior to that date. On the other hand, it is submitted that, so far as the evidence before us shows, no claim was made or proceedings taken as a consequence of

changes in the river prior to the resumptions sommensed in 1840 and continued until 1847 after which in the year 1248, survey of such resumptions was ordered. Part of the land was in possession of the Salt Department, and if there had been loss of land by flavial action the Salt Department might have claimed an abatement of rent; but they did not do so. Moreover, it is said that if there he any evidence of what occurred between the date of Rennell's map and the Permanent Settlement, such evidence must be in the possession of Government but it has not been produced. and that, therefore, we are entitled to assume that Rennell's map in a sufficient and substantial way indicate the position of things at the date of the Permanent Settlement.

The question is one which is not without difficulty. The facts establish that between tha date of Rennell's map and the Permanent Settlement there were considerable changes on the western side of the Pargana in the form of silting up. In fact, such silting up is relied on by the respondents to explain certain facts which the appellants put forward to show the inaccuracy of Rennell's map. It is also sommon ground that there has been extensive diluvion on the east after the date of the Permanent Settlement. If we are to consider both these facts it may be argued that they dispose of any presumption of continuity. But the question here is a narrower one, namely, the position of the eastern bonndary line. Are we to presume that that remained unchanged from the date of Rennell's map until that of the Permanent Settlement ? The only evidence on this point is as to a period subsequent to the Permanent Settlement. In the absence of any evidence to the contrary as to the state of affairs between the date of Rennell's map and the Permanent Settlement, we think we should assume that on the eastern side Rennell's map may be taken to represent the state of things there at the time of the Permanent Settlement In fast it seems established that it is since that time that a strong drift of the river towards the west with diluvion of the eastern boundary has been observed. Whether Rennell's map is otherwise good evidence and accurate is of course another question with which we deal later. All that we now hold on this point is that the map is not exeluded on the ground that it is not contemporaneous with the Permanent Settlement

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because, as regards the eastern side of the Pargana, with which we are almost directly encerned, the state of things appearing in Rennell's map may be deemed to have continued until the Permanent Settlement. Whilst it appears to be the fact that changes did meanwhile take place on the western side this is not inconsistent with the eastern boundary having remained during the same period substantially unchanged. There is perhaps the less chance of error in this case that is of giving the plaintiff; more land than that to which they are entitled because it is admitted that the river has been diluviating his estate on the east since the Permanent Settlement, and as to the anterior period ap to the date of Rennell's map either we must assame that things remained as they were, or if not it is natural to empose that the admitted and constant nature of the dilavion after the Permanent Sattlement is an index of the nature of the dilavion in the anterior period mentioned. If, then, we may refer to Rennell's map as evidense, there is a presumption of its assarasy under section 83 of the Evidence Act in respect of such matters as to which it is admissible evidence. Under that section the Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate." It is thus not necessary to refer to or to rely upon statements made in this suit or in the Suit of 1895 as to the value, and, therefore, assuracy of Rennell's maps for the purposes for which they were prepared; namely, amongst othere, the delineation of rivers and other water. ways. It is for the appellant in this ease to rebut the presumption of accuracy of the map in relation to the fasts of this particular case, and this be bas, in fact, attempted to do.

Rennell's map is admissible in evidence of the state of things at the Permanent Settlement. But if this is done, it will be assumed to be accurate unless the contrary is shown by the respondents. Before dealing with his criticism on the assuracy of Rennell's map we will first refer to another matter.

An objection was taken that the may on which the Amin worked in the previous

case as Rennell's map has not been produced and that it is not shown to be Rennell's map. There does not appear to be any ground of appeal on this head. Paragraph 60 of the memorandum of appeal to which we have been referred, deals with another matter, namely, "that no decree should have been granted to the plaintiffs on the basis of Rennell's map alone seeing that Rennell's map was never compared with local conditions and never checked by measurement in the locality by any surveyor whether of experience or otherwise." That is not the point raised by this objection. The point here is that the map (Exhibit No. 23) is inadmissible, and indeed irrelevant, because it has not been shown that it was made with reference to Ronnell's map. It is true that objection was taken to the admission of this map in the lower Court but not on the ground which is here urged. No sush ground ear, in our opinion, be urged now; for if such objection had been taken in the lower Court, the plaintiffs might have met it by re-platting the borndaries with reference to a cory of Repnell's map as to which there could be no dispute. It is true that the plaintiffs contended that the correstness of the plotting in the previous suit was admitted and should not be gone into again. But if the objection had been taken then, which is taken before us now, to the admission of the map (Exhibit 23) and such objection had been decided against the plaintiffs, then the plaintiffs might have asked to re plot the boundaries with reference to some admitted copy of Rennell's map. Moreover, the admission that the plotting in the previous suit was correct, assumes that Exhibit No. 23 which shows such plotting, was made with refereree to Rennell's map. Otherwise, the plotting would not be correct. In fact, this objection is only another form of that with which we have already dealt, vis., the correstness of the plotting of Renneli's line in the map of the previous suit. The Amin also says that he was given a copy of There does not appear, Rennell's map. therefore, to be any substance in the contention that the Amin in the previous suit proceeded upon the basis of some map other than Rennell's or that, at any rate, it had not been shown that the map on which he did proceed was Rennell's map.

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We hold that the Amin did work with reference to Rannell's map.

We next deal with the grounds which have been put forward to rebut the presumption of accuracy of Rennell's map assuming it to be admissible.

The appellant contends, in the first place, that Rennell made a mistake of some 5 feet 45 inches in the longitude of Fort William Semaphore Station, Calcutta, the starting roint of his survey, and hence argues that the map as re-laid by the Amin in 1895 must be some 6 miles too far to the east. It ie, however, quite immaterial in the present ease whether Rennell did or did not know the correct longitude of the Samaphore Station for Rennell has taken the Semaphore Station as zero and has calculated his longitudes from the Semaphore Station treating the station as zero. If we want to discover the longitude of any point on Repnell's map when referred to Greenwich all we have to do is to add the correst longitude of the Semaphore Station, to the longitude given by Rennell's.

What the Amin did was to enlarge Rennell's map to the same scale as the

survey map.

He then superimposed the map on the Survey Map. This is quite easy as he knew what was the correct longitude of Rennell's starting point.

The main difficulty in re laying Rennell's map has been the determination of the starting point. This has been determined by the Survey Department to be Sama-phore Station.

It is quite easy to find the corresponding longitude of any place given in Rennell's map on the survey map by adding to the longitude of the place on Rennell's map the correct longitude of the Semaphore Station. The Amin who re-laid the map knew the correst longitude of the Semaphore Station as given in the survey map. What was important and absolutely necessary was to know the point from which Rennell started and the longitude of the point. It is immaterial once the point has been discovered that Rennell gave it an incorrect longitude for Rennell treated it as his asro. Rennell's error in the longitude of his starting point (the Semaphore Station) would only be of importance in determining what the starting point was,

Secondly, the appellants contend that Rennell himself never surveyed the island of Dakhin Sahabezpur but that it was surveyed by Richie. His contention is based on the fact that no mention is made of the survey of Dakhin Sahabezpur in Rennell's diary and also on the opinion of Major Hirst. But we have only got Rennell's diary up to 1767. It is possible that either be discontinued writing his diary or it has been lost, for his survey was continued up to 1773.

Moreover, it is really immaterial whether Rennell or Richie made the survey, for the presumption of accuracy under section &3 arises from the fact that the maps are made under the orders of Government and not that they were made by Rennell. Further, Rennell apparently supervised and corrected Richie's work.

We pass to Dr. Mitter's third argument to show that Rennell's map is inaccurate.

Rennell's map shows the western boundary of Dakhin Sahabezpur to be water. we re-lay Rennell's map on the present survey map we shall find that the western boundary is dry land and that there are permanently settled estates to the west of Dakbin Sahabazpur and immediately contiguous to it. These permanently settled estates must have been, therefore, part of the original island of Dakhin Sahabazpur at the time of the Permanent Settlement. Therefore, the island of Sahabazpur must he placed further to the west so that the western boundary coincides with what is the western boundary of the island of Sababaspur. Rennell had placed the island too far to the east.

The respondent contende, on the other hand, that the island was correctly placed by Rennell. That there are a number of islands shown by Rennell on west of Dakbin Sababazpur and that by accretion these islands have been joined together and now form solid land contiguous to Dakhin Sahabazpur island and the river Betua which is the western boundary of Dakhin Sahabezpur bas been growing smaller and smaller through silting up. He shows from Kelso's maps that even in 1840 the Betua was a big river perhaps two or three miles broad while now it is a narrow stream. That all the lands immediately to the west of the Betus as it

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of Rennell and that they were not permanently settled estate at the time of the Permanent Settlement. Even if at the time of the Permanent Settlement the western boundary of Pargana Sahabazpur was dry land that would not prove it was dry land when Rennell made his survey. The appellant, to show that the western boundary of the Pargana at the time of the Permanent Settlement was land and not water contends that two permanently settled estates were then actually contiguous to Dakhin Sahabazpur, viz., North Sahabazpur and Kristodaspur.

To prove that these two estates North Sahabazpur and Kristodaspur were contiguous to South Sahabazpur at the time of the Permanent Settlement he has relied on certain quinquennial returns filed by the Zemindar in 1802 which give, according to him, the list of the Kismats, etc., which formed the permanently settled estate in 1793 and more specially on the entries of Kismats Deguti, Gormani and Kathali to show that North Sahabazpur was contiguous in 1793.

The eastern boundary of one of these, viz., of Chur Gurmani, alone is given as Dakhin Sahabazpur. The importance of the others is to show the position of Chur Gurmani. This Gurmani is shown as a Chur and no revenue is assessed on it.

But this evidence does not put the case very high. At the highest, it would show that the Zemindar of North Sahabazpur claimed in 1802 as part of their permanently settled estate this Chur Gurmani. It would not prove necessarily that Chur Gurmani was in existence in 1793. That would only be proved by the papers of 1793. In 9 years many churs may have formed or disappeared.

Moreover, even assuming that Chur Gurmani was in existence iin 1793 and so that there was dry land contiguous to South Sahabazpur on its western boundary, that would not prove that Rennell in 1767 had not depicted correctly the then state of affairs. It is quite possible that subsequent to Rennell's Survey the islands shown by him on the west of Dakhin Sahabazpur became joined up together and joined up with Dakhin Sahabzpur. Thus it is quite possible that at the time of

the Permanent Settlement the Western boundary of Dakhin Sahabazour Was no longer water but land. Bat there is nothing to show how much was water and how much land. Ohur Gurmani might be merely a small chur which temporarily connected Dakhin Sahabazpur with other estates That obviously would not of itself show that Rennell had incorrectly placed the island of Sahabazpur in 1767 or that the east. ern boundary of the island had changed between the time that Rennell depicted it and the Permanent Sattlement. We are not entitled to assume that because land had formed on the western boundary between Rennell's survey and the Permanent Settlement that land had diluvated from the eastern boundary, The same arguments apply to Churs Pata. Bedaralla, Subbi and Khalifa which plaintiffs included in their estate of Dakhin Sahabazpur at the time of the Permanent Settlement and which the appellant alleges are west of Rennell's line. They are possibly accretion to the island and may well have formed bet ween Rainell's Survey and the Permanent Settlement.

A glance at the map would show that most of the land west of Rannell's western line is chur. Some lands which appear to be of a more or less permanent nature correspond roughly with some of Rennell's islands which fact would go to show the correctness of his survey.

The appellant then argues that eartain four Churs Sibpur, Bedar, Medaphar and Sibsankar were resumed by Government in 1840, that these churs lie well to the west of the present line which the plaintiff claims as his boundary and so the appellant argues that the plaintiff by that admitted that the boundary line was Kelso's line. He would seem to contend that the plaintiff knew then where the boundary line really was as witnesses who had been alive at the time of the Permanent Settlement were then available.

It appears that in two cases Madaphar and Sibsankar the plaintiff did appeal to the Commissioner unsuccessfully. In the other two cases he did not contest them. No suit was brought to set aside the desision.

But the condust of the plaintiff proves little or nothing. It may well be that he had no material at his command then to prove where the boundary was. As far as can be seen

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Rennell's map, were not discovered till many years later. Moreover, these lands apparently formed part of the land that had been in the occupation of the Salt Department. It is quite possible that the Zemindar did not think it worth while to spend any money fighting the point with Government. Then it is to be remembered that, with regard to these resumed lands as they were called and revenue payable, the Zemindar was in communication with the Revenue Authorities and withheld payment of the sum of Rs. 13,000 formerly debited to the Salt Department with the result that the Government took action as stated in the letter of Mr. Rickett by subsequent correpondence to which we have referred. At this distance of time it is not possible to determine exactly what were the facts. We do not think that those above stated can be construed into an admission by the Zemindar that he knew quite well that the boundary line lay to the west of these churs. Farthermore, it must be remembered that until the decision of the Privy Council in the case of Lopes v. Muddun Mohun Thakocr (4) it had always been held that land reformed in situ belongs not to the Zemindar but the Government. It was Lopet's case (4) which set the point at rest.

Fifthly, the appellant has contended that certain villages, for instance, Colya, Govin dapur, Mendigange, are shown in Rennell's map and are now found to be at some miles distance. This we do not think is of much importance. In the first place, the object of Rennell's Survey was not the villages but the rivers and waterways, and he would not be very particular as to the exact site of the villages. Secondly, the villages from the nature of the country often shift. Thirdly, these villages are often long straggling villages and it is not possible to say what part of the village Rennell took for the dot which represents the village.

To sum up, we do not think that the appellant has succeeded in proving that Rennell's map incorrectly depicted the position of the island of Dakhin Sahabazpur in 1767 or that in 17.3 there was any change in the eastern boundary of the island from what it was in 1767.

(4) 18 M. I. A. 497; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth, P. C. J. 336; 2 Sar. P. C. J. 594; 20 E R. \$25.

We are of opinion that the appellant has not established sufficient grounds for a reversal of the decision now under appeal and we accordingly dismiss his appeal with costs.

B. N. Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 237 OF 1919.

September 11, 1920.

Present:—Mr. Hallifax, A. J. O.

KOLHU AND OTHERS—DEFENDANTS—

APPELLANTS

versus

BELSINGH-PLAINTIFF- RESPONDENT.

Custom-tionds of Bhagi in Bhandra District-Guardianship of minor's property-Step-brother or mother-Rule of decision in absence of custom,

As regards guardianship, the Raj Gond family of Zemindars of the Shikmi Zemindari of Bhagi in the Bhandra District is not governed by the Hindu Law, and, in the absence of proof of any custom, a question of guardianship in that family must be decided according to justice, equity and good conscience. [p. *O*, col 1.]

Where certain minors of a Gond family with their mother are living jointly with their step-brother, who manages the whole estate, and is regarded by the family and all the world as the natural and rightful guardian of the minor's property, he must, according to equity and justice, be treated to be, as against the mother, a guardian both defacto and dejure, more so if the personal law of practically the whole population amidst which the family resides recognises a step-brother as the natural and rightful guardian in presence of the mother. [p. 309, col. 1.]

Appeal from appellate decree against a decree of the District Judge, Bhandara, dated the 15th April 1919, modifying that of the Subordinate Judge, Bhandara, dated the 10th October 1918.

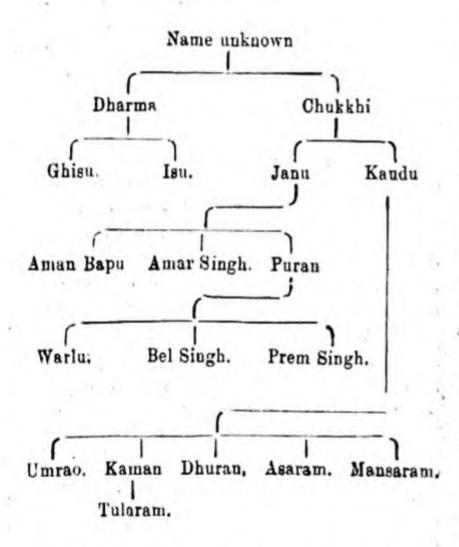
Dr. H. S. Gour, for the Appellants,

JUDGMENT.-It seems advisable to clear the ground by mentioning first inassurasy with which the extent of the various shares is described in this case. The system of annas and pies is convenient up to a certain limit, but the uneducated Indian mind is incapable of grasping the idea of anything less than a quarter of a pie, and in many cases cannot get beyond the idea of a pie. That, however, is no reason why the Court should be guilty of inassu. racies which might result in substantial

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injustice on further sub division of the shares so improperly described. Here we are at times dealing with a share of one-twentieth which in the anna pie notation should be represented by 9.3/5 pies, but almost invariably this is called 9\frac{1}{4} pies. So also the share that is really 2 annas and 1.3/5 pies in that system of notation is always called 2 annas and 1\frac{1}{4} pies. In this case it will be more convenient to refer to shares in terms of vulgar fractions.

2. This appeal arises out of one of a number of suits filed by the three junior members of the Raj Gond family of Zemindars of the Shikmi Zemindari of Bhagi in the Bhandara District. The following genealogical table of the family will assist comprehension of the facts:—



3. The Zemindari consisted originally of 12 villages. Ghisu and Isu alienated their half share in the two villages of Nakti and Megardhokra many years ago, and the half share in those two villages is no longer a part of the Zemindari. In 1895 they mortgaged their half share in the remaining ten villages to one Ramdayal Mawari of Dongargarb. He eventually sued them on the mortgage and obtained possession of their whole estate, the half share in the ten villages, in 1901. In 1905 the Zemindari, therefore, consisted of a half share in each of the 12 villages originally comprised in it. Aman,

Paran and Umrao being dead, a quarter of this property belonged to Aman Bapu, another quarter to the three sons of Paran and the remaining half to the four surviving sons of Kaudu. It is admitted that, according to the personal law governing Raj Gonde, a son has no vested interest in the family property during his father's life, so that Tularam was excluded by his father Kaman. He tried to get over this difficulty by the statement that he was the son of Umrao who was then dead, but the entire falsity of this has been established and is now admitted.

In December 1904 some of the members of the family applied for assistance to R. B. Anantlal, Extra-Assistant Commissioner, who was in charge of the Debt Conciliation Board, certain arbitrators deputed by the Government who were formally appointed by the parties in each case and acted as a sort of informal Bankruptey Court to deal with argicultural indebtedness after the famine. Exhaustive enquiries were made, and no effort seems to have been spared to get good terms from the ereditors of the family and to resens it from the slough of insolvency into which it had fallen and set it on its feet. Ramdayal Marwari was indused to reconvey his half share in the ten villages in consideration of getting the whole of the village of Sirpur and Rs. 6,380. The amount of the desree under which he had forcelosed the half share in the ten villages was Rs. 6,313 and he also gave up his slaims under a decree for Rs. 1,155 and various bonds for Rs. 2,050 against Ghisu, together with established claims for Rs. 2,422 against Aman Bapu and the sons of Puran and for Rs. 488 against the sons of Kaudu.

5. Apart from these debts, the total amount due from the family was found to be Rs. 7,944 together with a sum of about Rs. 3,000 due for land revenue to the superior proprietor. In lieu of this the ereditors were induced to accept reduced sums aggregating only Rs. 3,465. Of this total debt of close on Rs. 11,000, the amount due by Aman Bapu and the three sons of Puran seems to have been not less than Rs. 7,000. In addition there was the Rs. 2,422, their share of debt wiped off under the Sirpur arrangement. We are now concerned in this appeal.

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only with Bel Singh and Prem Singh, the two younger sens of Puran, and the share of the total debt falling on their shoulders would be Rs. 3,140,

6. The money required for the payment of all these debts was proposed to be raised by a sale of the whole village of Toya Gondi (exclusive of the right to minor forest produce for the next 15 years) for Re. 3,325 and of the whole village of Bharregaon (with a reservation of right to collect Harra and gum) for Rs. 4,000, and a lease of the minor forest preduce of all ten villages for 15 At the same for Rs. 45,000. time, R. B. Anantlal worked out a scheme for the re-construction of the Zemindari which was then divided into inconveniently small shares among eight or nine people of whom he said that "most of them are a bad lot, addisted to drinking," to prevent the imminent extinction of the Zemindari, He proposed to leave at its head Aman Bapo, who was, in his opinion, the "only sensible person among the lot" as well as the head of the family. The proposal was that the sons of Kaudu should take the whole village of Salai in lieu of their share, and the three sons of Poran should similarly take the whole village of Bhagi, exclusive of the right to minor forest produce other than Mahua in lieu of theirs, and that the remainder of the Zemindari should be handed over to Aman Вари.

7. These proposals were examined by the Deputy Commissioner of Bhandars, the Commissioner of Nagpur and the Chief Commissioner, and were sanctioned. Six documents were executed on the 6th, 7th and 5th of May 1965 to give effect to this scheme. These were.—

(1) Sale deeds of Bharregaon in favour of Kolhu Mahajan, and of Toya Gondi in favour of Jaikishan Marwari, and of half of Sirpur in favour of the son of Ramdayal Marwari, executed by Aman Bapu, by the sons of Kaudu and by Warlu for himself and as guardian of his two younger brothers.

(2) A lease of the forest produce of all the villages in the Zemirdari for 15 years in favour of Jaikishan Marwari, executed by Aman Bapu alone.

(3) What are called "Farkat nama" or partition deeds in favour of Aman Bapu, one executed by the sons of Kaudu relinquishing their share in the property and taking the whole village of Salai instead, the other executed by Warla for himself and as grardian of his two younger brothers similarly relinquishing their share in the Zemindari and taking the whole village of Bhagi in exchange.

There was, presumably, also a transfer by Jagannath, son of Ramdayal Marwari, of the half share in the ten villages which he was then holding under his foreelosure decrea, but this has not been filed in any of the cases with which we are now dealing. There are two later transfers with which we are also concerned. On the 7th of February 1908 Aman Bapu sold the whole of the village of Rajimdongri to Nev Pawar and his three brothers, and on the 23rd of January 1909 he sold the remaining half share of Nakti to Tukaram and Sarwan Pawar.

8. The seven suits out of which these appeals arise were filed by Tularam, son of Kaman, and the two younger sons of Puran, Bel Singh and Prem Singh, on the 3rd and 7th of June 1917, in the Courts of the Subordinate Judge and the First Munsif of Bhandara. The plaintiffs sought to set aside every one of the eight documents mentioned above on the ground that the documents were executed while they were minors and were not for their benefit and that they were not properly represented by their guardians. One suit was against Aman Bapu and the other co-sharers for concella. tion of the two "Farkat nama" and this was decreed through obvious collusion between the parties. In the other six suits for the eancellation of the other six documents a part of Tularam's slaim was dismissed in the First Court and the rest in the lower Appellate Court and he has not appealed. We are, therefore, now concerned only with the claims of Bel Singh and Prem Singh. The former was born in 1889 and the latter in 1891, so that they were 16 and 14 years of age in 1905 and attained majority in 1907 and 1909 respectively. (I may remark! here that, in assordance with the very common but somewhat incomprehensible custom among Indian litigants, the filing of the

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suits was delayed to the last possible moment. They were filed in the last week of the twelfth year after Tularam admittedly attained majority, though he has been held to have done so before May 1905, and just over twelve years from the execution of the deeds).

9. The desisions of the learned District Judge as regards Bel Singh and Prem Singh in the consolidated appeals in his Court may be summarised as follows. In 1905 their brother, Warla, was their actual guardian but their legal guardain was their mother who was alive then. Unless legal necessity for them could be estab. lished the transfers of the minors' property were, therefore, absolutely void and neither Article 44 nor Article 91 of the Limitation Act would apply to their claim, as was held by this Court in Husen v. Rajaram (1). Proof of legal necessity might validate a transfer made by a person who was guardian de facto and not de jure, but in this case no legal necessity or benefit to the minors has been established. The period of limitation for the suits is that laid down in Article 144 of the Limitation Act, and they are all filed within twelve years of the attainment of majority by the two plaintiffs, Bel Singh and Prem Singh.

10. There has been no appeal against the decision in regard to the lagal necessity and the benefit of the minors, but the question will re-pay examination. It is not difficult to compare the position of the two minors before and after the composition with the ereditors of the family and the re-construction of the family estate. Their position before was that they owned a twelfth share in the twelve villages with a total area of 18,826 agres, a total sir area of 413'75 agres and a total assessment of Rs. 1,610. If we leave out of consideration the very great advantages of compactness, that may be taken as equivalent to a single village with a total area of 1,569 acres, a sir area of 34'43 acres and an assessment of Rs. 134, and on this property was a debt of which the share of these two minors was just over Rs. 3,000. In lieu of this, they got a twothirds share in the village of Bhagi which has a total area of 1,917 acres, includes 39 93 acres of sir and pays Rs. 100 as land revenue

so that the two-thirds share represents a total area of 1,278 acres, a sir area of 26'62 and an assessment of Rs. 66-10-8. value of this is reduced by the pravious sale of the right to collect minor forest produce for fifteen years, but the price paid for that was Rs. 4,500 for all the ten villages and its value for Bhagi alone is certainly not more than Rs. 450 and is very probably much less, as it is the prineipal village of the Zemindari and the residence of the family with a considerable sir area, and is, therefore, almost certainly among the less "Jungly" villages. The facts are insufficient for the formation of any final opinion, but it seems to me, leaving the debts out of consideration, that the value of a share in one village representing 1,278 acres with 26.52 acres of sir and an assessment of Rs. 66-10-8 minus something less than Rs. 450 is itself greater than that of shares in twelve different villages representing 1,569 acres with 31.48 acres of sir and an assessment of Rs. 134.

But the fact that the whole of the debts due by the minors were eleared off puts it beyond all doubt that the arrangement was very much for their benefit. In paragraph 37 of his judgment the learned District Judge has arrived at the conclusion that the share of the debt for which Bel Singh and Prem Singh were liable jointly with their half brother Warlu and their uncle Aman, was only Rs. 1,550. Even then, they were liable for half of this, that is, Rs. 775. But the learned Judge has taken the whole debt to be the amount to which it was reduced by the negotiations and transfers by which the estate was re-constructed, though that reduction is clearly a part of the benefit they received. He has further excluded from the debts due by this branch of the family the sum of Rs. 6,380 which was a part of the consideration for the repurchase from Ramdayal Marwari of the half share in the ten villages originally belong. ing to Ghisu and Isu, on the ground that it was a debt due by Ghisu and Isu. The arrangement, however, did wipe off a debt of Rs. 2,422 which lay on Aman Bapu and the sons of Paran, as has been shown in paragraph 5 above, and this amount must be taken into consideration in comparing the situation of the minors before and after the transfers. Some debts due by Ghisq

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and Isu were included in the general com position with the oreditors of the whole family, but they have been omitted in my calculations of the burden on the rest of the family, and it is quite clear that the amount fairly debitable to Bel Singh and Prem Singh out of the debts due before the reconstruction of the Zemindari, was just over Rs. 3,000. The result of all this is, that in place of shares scattered over twelve villages representing 1,569 agres with 34.48 acres of sir and an assessment of Rs. 134, combined with a debt of Rs. 3,140, the minors got a compact chare in one village representing 1,278 acres with 26.62 acres of sir and an assessment of Rs. 6:-108 com bined with the equivalent of a debt of R3. 450.

12. It seems equally beyond doubt that the defendants in these suits were transferees in good faith for value. They knew that the transfers had all been examined by the Daputy Commissioner of the district, the Commissioner of the Division and the Chief Commissioner of the Provinces, and approved by them all. It is to be noted also that the plaintiffs have never said a word about giving back any of the benefits they have ressived under the arrangements they repudiate. On the contrary, in addition to the shares they say ought not to have been taken from them, they slaim the mesne profits of those shares for three years with interest thereon. For the transferees it was pleaded that before the plaintiffs could get back their twelfth share in the other villages they ought to give back the eleven-twelfthe of Bhagi which they got in exchange, with mesne profits, and ought also to compansate the transferees of the other villages for the improvements they had made in them. Their only reply was to deny that any improvements had been made in the other villages or that they were liable to pay for them if they had, These matters have not, however, been raised in the appeals in this Court and nothing more need be said about them.

13. The one question for decision, on which I think the appeals must succeed, is whether the minors were properly represented by their elder brother Warlu in the various transfers that are impeached. The learned District Judge discusses this matter in paragraphs 33 and 34 of his judgment, which are as follows:—

"Plaintiffs are Gonds and it has been held by Stanyon, A. J. C., that Gonds are not governed by Hindu Law Uityara v. Tilo. chan (2). Defendants have alleged that Gonds in this tract have adopted Hindu proof has been addueed but no to substantiate this allegation. I must, therefore, hold that plaintiffs are not governed by Hindu Law. They may be governed by their own sustom or by the Saccession Act. No proof has been adduced to show what enstoms prevail amongst them in regard to inheritance and guardianship. Under these circumstances, under section 6 of the Central Provinces Laws Act, the Court in desiding questions of inheritance, guardianship, etc., has to act according to justice, equity and good conssience. According to justice and equity and assording to all systems of jurisprudence, father is the natural guardian of his minor shildren, and on his death the right of guardianship devolves on the mother of the minors. In the present case, admittedly, the mother of plaintiffs Nos. 2 and 3 was alive and was living with Aman Bapu, Warla Bapa and her sons when the transfers in question took place. She was the de jure guardian of plaintiffs Nos. 2 and 3, but she did not represent plaintiffs Nos. 2 and 3 in the transaction Aman Bapu, unele of plaintiffs Nos. 2 and 3, and Warlu Bapu, step-brother of plaintiffs Nos. 2 and 3, were the defacto and not the de ure gurdians of plaintiffs Nos. 2 and 3 and one of them, vit, Warlu Bapu, represented plaintiffs Nos. 2 and 3 as their gardian in the several transfers in question.

"Thus, so far as plaintiffs Nos. 2 and 3 are conserned, we have to deal with transfers made on their behalf by their de facto guardian and not by their de jure guardian. I shall later on show that the transfers in question are not for legal necessity and are not binding on plaintiffs Nos. 2 and 3. That being so, the transfers are wholly void and Article 41 of the Limitation Ast has no application? In the case of Husen v. Rajaram (1) the learned Additional Judicial Commissioner has held that an alienation of the property of a minor by a person who is that minor's guardian de facto but not de jure, is not merely voidable but absolutely void and that Articles 44 and 91 of the Limitation Act do not apply to a suit brought by him on his

^{(2) 44} Ind. Cas, 435,

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attaining majority to recover possession of the alienated property; [cf. also Vithu v. Deridas (3) '. The transfer in such a case is either valid or void. If it is valid, i, e, when it is effected for legal recessity, it is binding on the minor; if it is void, as it is when it is effected without legal necessity by a person who is not a de jure but a de facto guardian of the minor, it is wholly unnecessary to sue to set it aside. suit is necessary to set aside a transfer which is voidable but not void such as a transfer by a de ;ure guardian without legal necessity. The transfers in question having been effected by a de facto guardian without legal necessity, it was not necessary to sue to have them set aside within three years from the date on plaintiffs Nos. 2 and 3 attained whish majority. The suits are governed by Article 144 of the Limitation Act and as they have all been brought within 12 years from the date of the transfer, they are clearly not barred by limitation."

14. It has been held by this Court in the case mentioned, which is Ujiyara Tilochan (2), that a Gond is not a Hindu and the onus of proving that a Gond family has accepted the Hindu Law and is governed by it rests on the party alleging it. The matter is by no means free from doubt, and the question is raised in the retitions of appeal here. It appears, however, that in the pleadings in the First Court it was admitted by both parties that, except in a few matters with which we are not now concerned, the plaintiffs are not governed by the Hindu Law, and the position now taken by the appellants was abandoned. The view, therefore, that in the absence of proof of any special custom the question of guardianship must in this case be decided according to justice, equity and good conscience is perfectly sound. Where the learned District Judge has erred is in the assumption that "asserdir g to justice and equity and according to all eyetems of jurisprudence" the mother is the natural guardian after the father, being led into the error by not baying a very elear distinction in his mind between a guardian for the property and a grardian of the person. We are here conserned with a guardian for the

property only, and in neither of the two main systems of personal law with which we have to deal most frequently in India does the mother of a minor become his guardian in respect of his property next after his father. In both Hindu and Muhammadan Law the mother becomes the guardian of the person of her infant shild after the death of the father, but his property would still remain under the management of the karta of the joint family of which he was a member if he were a Hindu, and in Muhammadan Law the mother, being a "remote guardian," would only come in after the "near guardians," which term includes the father's executors. the paternal grandfather, his executors and the executors of such executors, in addition to the father.

15. Turning to one other system of jurisprudence, the English Common Law, we find that there, too, the mother does not necessarily follow the father as custodian of a minor's property, that in fact after the father there is nobody who can be said to be entitled to be such custodian or called a guardian of the property de jure, except in the case of daughters. In Chapter XVII of Blackstone's Commentaries (Book I) the learned author says:—

Of the several species of guardians, the first are guardians by nature, viz, the father and (in some cases) the mother of the child. For, if an estate be left to an infant, the father is by Common Law the guardian, and must ascount to his child for the profits. And, with regard to daughters, it seems by construction of the Statute 4 and 5 PH. and MAR. C. 8 that the father might by deed or Will assign a guardian to any woman child under the age of sixteen; and if none be so assigned, the mother shall in this case be guardian. There are also guardians for nurture; which are, of course, the father or mother, till the infant attains the age of fourteen years."

This point is made even elearer in the following passage from Stephen's Commentaries (Volume II, Book III, page 457):—

"The different Species of Guardians -The guardianships recognised by our law are of the following varieties: -

"(1) Guardianship by nature.—This is said to belong to the father in respect of the person of his heir apparent, or of his heiress presumptive; there being, properly speaking, no other kind of guardianship

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by nature than this. And the term 'natural guardian," as applied to the father or mother with reference to all their children, is rather a popular than a technical mode of expression. For when a father's right to the person of a child who is not his heirapparent is intended, his guardianship is properly that next to be noticed [Co. Litt. 83 b. And see Hargrave's Notes, 11, 12 (18th Edition); Rateliff's case (1593) 3 Reg. 38 b]. It has been doubted whether, since the abolition of tenures in chivalry, guardianship by nature can exist at all, in the strict sense of the term: (Maspherson, Infants, page 57).

"(2) Guardianship for nurture.—This is a species of guardianship that applies to all the children, extending to the person only. It belongs to the father, and, at his decease, to the mother; and it lasts both with males and females only to the contract of the contract o

females only to the age of fourteen."

16. The two minors with whom we are now concerned were living jointly with their paternal ucele, Aman Bape, their grown up step brother, Warlu, and their mother, and the estate was being managed by Aman Bapu and Warlu jointly. Their mother had nothing to do with the management of the property. This state of things is probably due to their living among Hindur, but whatever the reasons for it may be, it undoubtedly did exist. And in matters conserning the share of the three sons of Paran, apart from that of Aman Bapu, Warla was the manager. It is stated in the pleadings by the plaintiffs themselves that women cannot even inherit, and in all the transactions of which we have any knowledge Warlu acted as the manager of the property of his two minor brothers. But, apart from the reasons for thinking it so, it is freely a lmitted by both sides throughout that Warlu was the de facto guardian of the minors in respect of their property, and, in the absence of any positive rule of law, the factum would go a long way towards implying the jue. Warla was the astual guardian of the property of his brothers, he was regarded by the whole of his family and all the world as the natural and rightful guardian, and he would be the natural and rightful goardian under the system of personal law governing practically the whole of the population in the milst of which the family lives, In these oirenmetanoss, it is elearly contrary to justice, equity and good ennieienes to

regard anybody but Warla as entitled to by the guardian of the property of his two step brothers. I hold, therefore, that when the deeds which Bel Singh and Prem Singh seek to set aside in this suit executed, their step-brother Warlu was, in respect of their property, their guardian both de facto and de jure. Article 41 of the Limitation Ast, therefore, applies to all the suits, and the last day on which they could have been filed by the younger plaintiff alone was some day in 1911. All the suits are barred by time and must be dismissed. The desrees of the lower Appellate Court are accordingly set aside and all the suits will be dismissed. The respondents must pay all the costs of the various appellants in the whole litigation.

M. H.

Decrees set aside.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 939 OF 1913.
November 25, 1921.

Fresent: - Mr. Justice Abdul Bacof and
Mr. Justice Martineau.
WARYAMAN AND OTHERS - PLAINTIPES --

APPELLANTS

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KANSHI RAM AND OTHERS - DEVENDANTS -- RESPONDENTS.

Custom - Adoption - Collateral succession,

In the case of an adoption made under the customary law of the Punjab it is to be determined whether it was intended that the adopted boy should be altogether taken out of his natural family and introduced into the adoptive father's family as his son; in other words, whether the adoption was a complete adoption having the effect of severing the connections of the boy with his natural family. [p. 21!, col 1.]

In the case of an adoption in a particular community, where there is no standard of formality and no precise customary rule as to what is to be done to produce all the effects of adoption, all that can be said is that where the adoption is as complete as an adoption in that community ever is, and where the intention to make a complete change of family is manifested, there

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the right of collateral succession may be presumed till the contrary is shown. [p. 316, cols. 1 & 2.] Uttam Singh v. Wazir Singh, 84 P. R. 1887, followed.

Second appeal from a decree of the Additional Judge, Hoshiarpur, at Jullandur, dated the 10th December 1917, affirming that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 7th July 1917.

Mr. Sundar Das, for the Appellants.
Mr. Shamair Chand and Lala Fakir Chand,
for the Respondents.

JUDGMENT.—This was a suit for a declaration that Kanshi Ram, defendant, an appointed heir of Ram Ditta, was not entitled to succeed collaterally to the estate of Kharku and Fattu, brothers of Ram Ditta, and that he was not entitled to have 425 kanals 5 marlas of land, situate in Mausa Bains Khurd, re-partitioned, the land having been partitioned already.

In order to understand the facts of the case reference must be made to the pedigree table printed on page 6 of the paper One Dhuman had seven sons. book. Kanshi Ram was the son of one of these, namely, Sahiba. He was adopted by Ram Ditta, his unele. This fact is evidenced by a deed of adoption dated the 21st Oc. In this deed it is resited tober 1884. that the boy had been adopted at the age of two years and was taken out of the family of his natural father, Sahiba, and was brought up as his son by the The deed further recites that, adoptor. "how by this writing I deelare the said boy as my adopted son and provide after my death he will perform the kirya karam seremony and shall susseed to my property as my son." Ram Ditta, after executing the deed, died three days after, namely, on the 24th October 1884. Kanshi Ram succeeded to the estate of Ram Ditta Some half hearted as his adopted son, objections were made by some of the col. laterals but eventually they were all brushed aside and Kanshi Ram's claim to succeed to the full share of Ram Ditta in the joint holding was recognized. Subsequently, Sahiba, the natural father of Kanshi Ram. died leaving Kanshi Ram and four other sons. Kanshi Ram was excluded from the inheritance in the property of Sahiba, and the rest of his brothers succeeded to the

entire estate. In 1891 Kharke, one of Ram Ditta's brothers, died and Kanshi Ram was allowed to speeed collaterally and his name was mutated in the same manner as the name of a natural born son of Ram Ditta would have been entered. In 1911 Fattu, another brother of Ram Ditta, died and Kanshi Ram was again allowed to succeed as a collateral. In 1916 Kanshi Ram applied to the Revenue Authorities for the partition of the ancestral holding. Waryaman, the grandson of Sewak, a brother of Ram Ditta, along with others filed objections against the application for partition presented by Kanshi Ram. The Revenue Court referred the parties to a Civil Court. Thereupon, Waryaman, along with some of his cousins instituted the present suit for declaration, ground upon which the suit was based was that Kanshi Ram was merely an appointed heir of Ram Ditta and as such he was not entitled to susseed collaterally in the family of his adoptive father according to the custom prevailing among the Hindu Jats of the Hoshiarpur Tabeil in the Hoshiarpur District. The suit was resisted by Kanshi Ram on the ground that he was the adopted son of Ram Ditta and that he was entitled to succeed collaterally to Kharku and Fattu. The Trial Court, after going into the evidence and the eireumstances of the ease, held in favour of Kanshi Ram and dismissed the suit. An appeal was preferred to the lower Appellate Court which was dismissed and the decree of the First Court was upheld.

The plaintiffs have some up in second appeal to this Court and it has been argued by Mr. Sundar Das on their behalf that, according to the custom and decided eases relating to the enstom, Kanshi Ram being only an appointed heir of Ram Ditta was not entitled to sneeed collaterally in the family of his adoptive father. In the alternative, he has also argued that, even if Kanshi Ram be admitted to have been adopted by Ram Ditta, he was not entitled to succeed collaterally for the reason that his adoption was merely an informal adoption and it was not attended with the prevalent among the formal ceremonies The learned Hindu Jats. Judge of the Court below in his judgment makes the following observation :-

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having no sons, appointed one of his nephews Kanshi Ram, son of Sahiba, as his heir. It is not disputed that this appointment was in reality an adoption. In fact, all along, ever sines that date Kanshi Ram has been recognised as the adopted son of Ram Ditta, and this point is not even now in dispute."

Apparently, the fact of adoption was never disputed in the Courts below, and it is searcely open to Mr. Sundar Das to argue that, in reality, there was no adoption and that it was merely an appointment of an heir. The real contention put forward, however, by Mr. Sundar Das is that, unless it is shown that Kanshi Ram's adoption was a formal adoption ascording to the authorities, he would not be entitled to succeed to the property collaterally. Now, it is difficult to understand what the learned Counsel meant by formal adoption. There are certain formalities and ceremonies provided by the Hindu Law for the adoption of a boy according to the Dattaka form. In the Punjab, however, no specific ceremonies or formalities are provided under the Oustomary Law for adoption. In this sense, all adoptions made under the custom must be looked upon as being informal. After a careful perusal of the authorities on this point it appears that, in an adoption made under the Customary Law, it is to be determined whether it was intended that the adopted boy should be altogether taken out of his natural family and introduced into the adoptive father's family as his son; in other words, whether a complete adoption adoption was having the effect of severing the connestions of the boy with his natural family.

In the case of Uttam Singh v. Wasir Singh (1), the Judges of a Division Bench of the Punjab Chief Court made the fol-

lowing observation :-

But in a Jat adoption where there is no standard of formality, no precise customary rule as to what is to be done to produce all the effects of adoption, it is impossible to say that any class of adoptions always carries certain consequences with it. All that can be said is that,

where the adoption is as complete as a Jat adoption ever is, and where the intention to make a complete change of family is manifested, there the right of collateral succession may be presumed till the contrary is shown."

We have, therefore, to see whether in this case it has been shown that the adoption of Kanshi Ram was intended to be a complete adoption and had the effect of bringing about a complete change of family. Admittedly, there is no direct evidense on the record as to the adoption, and after the lapse of such a long period sines 1884 there is nothing strange if direct evidence is not available. The Court below, however, relying upon certain strong eirenmetantial evidence, has come to the conclusion that "Kanshi Ram was the fully adopted son of Ram Ditta." The onus of proving this adoption lay on Kanshi Ram and this, in the opinion of the learned Judge of the Court below, he has successfully dissharged. At this conclusion the Court below arrived from the following proved facts:-

That Kanshi Ram was an agnate being a nephew of Ram Ditta; that he was taken away from the family of his natural father and kept by Ram Ditta as his son from his shildhood, that in 1884 a formal deed of adoption was executed by Ram Ditta, under which Kanshi Ram who was described as his son, was directed perform his kirya karam eeremony after his death; that on Ram Ditta's death he succeeded to his lands and without any serious objection was recognised as his own son; that on the death of Sahiba. his natural father, he was excluded from inheritance, that after Kharku and Fattu he was allowed to succeed collaterally as the son of Ram Ditta to the properties those two persons; that, although Waryaman made a faint attempt to object to the right of Kanshi Ram to succeed collaterally, he did not press the objection seriously; that Kanshi Ram was made to contribute towards the discharge of debts due from Kharku and Fattu : that he was made to contribute ith of the mortgage money to redeem a mortgage of Fattu; and that in fact all along Waryaman and others treated him as the

fully adopted son of Ram Ditta.

(1) 84 P. B. 1887.

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The learned District Judge has also referred to three decided eases which prove the custom set up by Kanshi Ram. It is not necessary to notice in any detail the particulars of the custom pleaded, for the findings of fact fully establish the enditions which, according to the argument of Mr. Sundar Das, are necessary for a complete adoption.

In our opinion the Courts below have arrived at a correct conclusion and this appeal must fail. We accordingly dismiss it with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 873

OF 1919.

August 10, 1920.

Present:—Sir Asutoch Mcokerjee, Kr.,
Acting Chief Justice, and Justice Sir
Ernest Fletcher, Kr.

HAR CHANDRA ROY AND OTHERS
—PLAINTIFFS—APPELLANTS

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MOHAMAD HASIM AND OTHERS-

Mortgage-suit-Omission to make all heirs of mortgagor parties, effect of-Suit, whether should be dismissed for non-joinder of parties.

A mortgage-suit in which all the heirs of the mortgagor are not made parties should not be dismissed for non-joinder of parties but should be decreed for a proportionate share of the mortgagemoney as against the defendants who are on the record. [p. 512, col. 2.]

Appeal against a decree of the Additional District Judge, Tipperab, dated the 25th of February 1919, affirming that of the Subordinate Judge, Second Court of that District, dated the 21st of December 1917.

Babu Goral Chandra Das, for the Aprel-

Babu Sasidhar Roy (Sr.), for the Re-

JUDGMENT.

MOOKERJEE, Acre. C. J .- This is an appeal by the plaintiffs in a suit to enforce a mort. gage recurity. The mortgage was granted on the 9th February 1904 by a man named Terapali Bhunys, and the mortgage morey was re-psyable on the 17th October 1904. It is alleged that two, if not three, sums were paid in part satisfaction of the sum due on the mortgage. The plaintiff instituted the present sait on the 30th October 1916, against persone, who, they alleged, were representatives-in-interest of the original mortgagor. The defendants pleaded that all the beirs who were in enjoyment of the property left by the mortgagor had not been made parties to the suit and, consequently, the suit should be dismissed for non-joinder of parties. They did not, however, state the names and addresses of the parties who, in their opinion, should have been joined. Thereupon, an issue was raised to the following effect: "Is the suit bad for defect of parties?" The Subordinate Judge held on the evidence that a widow of the mortgagor named Aliman. nessa and a daughter who has died sines then, bad not been brought on the record, and concluded that as all the representatives of the mortgegor were not parties, the suit could not be maintained. On appeal the District Judge has taken the same view and has dismissed the spit. We are of opinion that the decree of dismissal cannot be maintained.

It is clear that the plaintiffe were, at the least, entitled to a decree for a proportionate ebare of the mortgage money as against the defendants who were on the record. Even if it be assumed that the persons who had been left cut, could, if joined, have enesses fully urged the plea of limitation, that would not afferd a deferce in favour of the persons who had been joined as parties within the prescribed time. This view is supported by the decision in Imam Ali v. Faij Noth Bam Sahu (1). In that case an objection was taken that certain parties had not been brought on the record in time and that if they were added as parties, the sait must be drened as barred by limitation as epainet them. It was roled that where a purchaser of a pertion ct

(1) | 38 C. 6:3; 10 C. W. N. E51; 8 C. L. J. 676.

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the equity of redemption is added as a party (defendant) not by the Court but upon an application by the mortgages after the prescribed period of limitation, although the mortgage suit is barred as against the added defendants, yet such mortgagee is entitled to succeed in respect of a proportionate part of his elaim as against the remaining owners of the equity of redemption.

The result is, that this appeal is allowed, the decree of the District Judge set saide and the ease remanded to him in order that he may make a mortgage-deeree in favour of the plaintiffe, against the defendants, proportionate to the share of the defendants in the estate of the mortgagor. The District Judge will either himself take or direct the Subordinate Judge to take evidence for the determination of such share. On the facts found by the Subordinate Judge, which apparently have been confirmed by the District Judge, the total sum due on the mortgage will be taken to be Rs. 1,000 with interest at 12 per cent. par annum with a deduction of the sums of Rs. 125 and Rs. 200. The plaintiffs will have their costs in all Courts in proportion to their success, and such costs will be added to the mortgage amount.

FLETCHER, J.-I agree.

B, N.

Appeal allowed.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL No. 845 OF 1920. January 17, 1922. Present:-Mr. Justice Start. SAKTOO MAL -PLAINTIFF - APPELLANT

GOPAL CHAND AND ANOTHER-DIFFENDANTS -Bespondents.

Appeal, second-Finding of fact based on inadmissible evidence-High Court, power of.

Where a finding of the Court below is based in part upon inadmissible evidence, it is vitiated thereby, and a High Court can arrive at findings upon the other evidence on the record.

Second appeal trom a decree of the District Judge, Mainpuri, dated the 12th May 1920,

Dr. M. L. Agarwala and Mr. Baleshwari Prasad, for the Appellant,

Messrs. A. D. Dube and Suresh Churder, for

the Respondents.

JUDGMENT.-The facts are these:-In Etawah city there is a bouse known as Bilas. wala. In the plaint it is stated that this house is in a dilapidated condition. Courts have not arrived at any finding whether the house is or is not occupied or when it was compied last. It is now agreed between the parties that the house was inherited in their equal shares by Ram Dayal, Gopi Nath and Gokul Chand, Chaube Brahmans, sons of Durga Prasad, and own brothers. It is not elear how they inherited the house. Possibly, they inherited it as sister's sons as their mother is said to have been the sister of a man called Bailas. This much is clear that Gokul Chand inherited a ard share, Gokul Chand has a son salled Atma Ram : Gokul Ohand is alive. Ram Dayal is dead. He has been succeeded by his two minor greatgrandsons, Udit and Perkash. Gopi Nath is dead. He is represented by his con Banarsi Das and his grandson Makscdap. On the 30th of November 1918 Gokul Chand agreed with Saktu Mal, Bania, to sell him the whole of Bilaswala house for Rs. 1,000 and took Rs. 25 sarnest money for which he gave a reseipt. The receipt was drafted by his son Atma Ram and was in the names of both Gokul Chand and Atma Ram but was signed by Gokul Chand only. Gokul Chand subsequently refused to take any further steps in the transaction. Saktu Mal then sued Gokul Chand and Atma Ram in the Munsif's Court of Etawah in 1919. He asserted in his plaint that the house in question had some into the possession of Gokul Chand and Gopi Nath's descendants in equal moieties, Ram Dayal's descendants having relinquish. ed all slaim to it, and he asked for specific performance of the agreement to sell to the extent of half of the house for Rs. 500 if the remaining co-sharers refused to sell their moiely, and in the event of the remaining co sharers being willing to sell their moiety, for the sale of the whole house for Re. 1,000. He asked in addition for any other relief which may be found due to him. The written statement find by Gokul Chand was to the effect that he had agreed to sell the house for Rs. 1.000 and had taken Rs. 25 as sarpest money. It continued that he,

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Gokul Chand, had no rights of any kind in the house as he had given up his rights in consideration of receiving other land from Ram Dayal and Gopi Nath. It continued that he had been misled by the plaintiff into concenting to execute a sale-deed for the house and had had Rs. 25 as earnest money foreed upon him. Atma Ram's statement was that he owned nothing in the house in dispute and had taken no part in the agree-When the case came to trial the ment plaintiff produced two letters. One was a letter written to him by a certain Manni Lal and the other was a letter which Manni Lal enclosed, that admittedly had been des patched by Atma Ram to Banarsi Das, the son of Gopi Nath. Banarsi Das was at that time living in Gralier. The defendants admit that the second letter had been sent by Atma Ram to Banarei Das, but they contended that the letter had been sent by post, had been lost while in the possession of the Post Office and had been received by the plaintiff dishonestly with the full knowledge that it had been stolen. I am informed by the Counsel for the appellant that criminal proceedings were instituted by Atma Ram against the plaintiff under section 411, Indian Penal Code, and that those proceedings failed. But there is nothing to that effect on the record. In any circumstances, the letter was admitted to have been written by Atma Ram. This letter, it will be observ. ed, was being sent to Banarsi Das who, both sides agree, had a share in the house in question. It is to the effect that Gokul Chand and Atma Ram had been attempting to sell the Bilaswala house to a Brahman; that at first they could not get an offer for more than Rs. 800, but that they found the present plaintiff ready to give Rs. 1,000; that they had accepted his offer and by representing to Brahmans that the plaintiff was ready to give Rs. 1,000, they had hopes that they would be able to obtain an equal sum from two Brahmans, and that, in these circumstances, the best course appeared to be to repudiate the contract with the plaintiff. The plaintiff put this letter in and also put in evidence to prove that the house belonged solely to Gopi Nath and Gokul Chand. Gokul Chand produced two witnesses, Kishen Lal and Baij Nath. Kishen Lal deposed that thir y years before the date of the suit Gokal Chand, Gopi Nath and the son of Bam Dayal

had made a family arrangement in respect of the Bilaswala house whereby Gopi Nath and the son of Ram Dayal took the whole house in equal shares, and Gokul Chandtook in lieu some other land belonging to the family. Baij Nath deposed to the same effect with the exception that he placed the date of the family arrangement at 15 to 2; years before the date of the suit. I observe that the English note of the evidence of these two witnesses gives very little elue to what they actually stated. The Muneif came to the conclusion that the plaintiff's witnesses were telling the truth; that the house was now the property of Gopi Nath's successors and Gokul Chand, and he direct. ed Gokul Chand to execute the sale-deed convey half to the plaintiff. The learned District Judge of Mainpuri arrived at the conclusion that Gokul Chand had lost all interest in the house. This is what he says :- "The oral evidence produced in this ease and the evidence in the case filed by Bindraban show that Gopi Nath and Kishore Chand, son of Ram Dayal, only had right in the house is suit and Gokul Ohand had no right in the house. Evidence on the record shows that Gokul Chand had got some chabutra land from his brothers in lieu of his share in the house in suit. So from all this evidence it would appear that Gokul Chand has no subsisting right in the house in suit and Atma Ram never had any right. He gives no reasons for That is all, rejecting the plaintiff's evidence. He gives no reasons for accepting the evidence produced by the defendants. He makes no attempt to resonable the discrepancy between the two witnessee, Kishen Lal and Baij Nath, one of whom places the transaction at 30 years before the suit and the other at 15 to 20 years before the suit. doubtful whether these defects would vitiate the finding as a finding of fact, but there is one element in the finding which vitiates it and that is the reference to the evidence in the case filed by Bindra. ban. I have been able to accertain to what the learned District Judge is referring. Bindraban lives in the neighbourhood of the Bilaswala house. He was construct. Some members of the ing a latrine. family complained to the Municipality who directed Bindraban to close that latrine.

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Bindraban then summoned some membere of the family in a Criminal Court under section 352. They were acquitted on the ground that the case was false. dence produced in either of these proceedings was brought on the record, with the exception of the judgment of the Oriminal Court which was inadmissible in respect of the point in issue, this point being whether Gokul Chand had any connection, with the Bilaswala house. So this finding is vitiated by the fact that it proceeds in part upon inadmissible evidence. I do not propose to send the ease back. On the materials, I am in a position to arrive at the following finding. Gokul Chand had certainly a 1 3rd share in the house in question. The evidence produced by him is not sufficient to show that he has no longer any interest in the house in question. I do not propose to arrive at a definite finding for the following reasons: - Gopi Nath's descendants and Ram Dayal's descendants are not parties to the suit. I cannot adjudicate absolutely on Gokul Chand's title without entering into their title. It is inadvisable to be too definite at this stage. It is sufficient to say that Gokul Chand has not been able to establish that he has no title in the property which he purported to sonvey. In these sircumstancer, the plaintiff has a right to obtain a deed of sale from Gokul Chand and Atma Ram in respect of 1-3rd of the house. He has a right to obtain this deed from Atma Ram for Atma Ram, as the son of Gokul Chand, has joint interests in the share and Atma Ram slearly agreed to the sale. The decree will be as follows:-Gokul Chand and Atma Ram will execute a deed of sale of 1/3rd of the Bilaswala house within three months of the date of this decree sabject to the plaintiff pay. ing to them Rs. 2085-4 at the time of registeration in the presence of the Registration Officer and paying the costs of the conveyance. In view of the attitude taken up by Gokul Chand and Atma Ram, I direct that they pay their own costs and those of the plaintiff in all Courts. These costs will include fees on the higher scale in this Court. The appeal is allowed accordingly.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 24 of 1921,

November 25, 1921,

Present:—Mr. Justice Shah and

Mr. Justice Pratt.

CHIKKO BHAGWANT NADGIR—

APPELLANTS

versus

SHIDNATH!MARTAND-RESPONDENTS.

Bombay Land Revenue Code (Act V of 1879), s. 83

Tenancy, commencement of, traceable-Section, wheather applicable.

Section 83 of the Bombay Land Revenue Code applies only where, by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming. Where the commencement of a tenancy can be traced, the section is not applicable. [p. 316, col. 1.]

Letters Patent Appeal from the decision of Maeleod, C. J., in Second Appeal No. 340 of 1917, reported as 63 Ind. Cas. 935, reversing a decree passed by the District Judge, Dharwar, in Appeal No. 219 of 1915 which confirmed a decree passed by the Subordinate Judge at Haveri, in Civil Suit No. 339 of 1912.

Mr. K. H. Kelkar, for the Appellants. Mr. Nilkanth At narum, for the Respondents.

JUDGMENT.

Shan, J.—This is an appeal under the Letters Patent from the judgment of the learned Chief Justice allowing the plaintiffs' slaim for a declaration that the defendants were their annual tenants. It is not nesessary to set forth the previous history of this case. It is enough to point out that in November 1919 the case was remanded for the purpose of determining the nature of the defendants' tenancy, as to which the plaintiffs had sought a declaration. Both the lower Courts found that the tenancy commenced after the gift by the original owners in favour of the ancestore of the plaintiffe' predecessor in title. They applied the provisions of section 83 of the Bombay Land Revenue Code and presumed that the tenancy was permanent, mainly relying on the observations in Ramchandra Narayan Mantri v. Anani (1).

When the second appeal came on for hearing, it was held that section 83 of the Bombay Land Revenue Code did not apply, as the commencement of the tenancy was

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traced, and that it could not be said, as required by section 83, that by reason of the antiquity of the tenancy no satisfactory evidence of its commencement was forthcoming, having regard to the finding that the tenancy commenced after the gift in favour of the ancestors of the plaintiffs' predecessorintials in 1805.

The defendants who have appealed from this judgment, have contended that section 83 does apply to this ease. Though the learned Pleader has questioned the finding of fast that the gift in favour of Shantacharya's ancester was in 1805, and that the tenancy of the defendants commenced thereafter, I do not think that that contention could be allowed. Both the lower Courts have found that as a fact, and it is not shown, nor is it suggested in the memorandum of appeal, that that finding is not supported by the evidence in the case.

For the purposes of the mein argument, therefore, it must be accepted as a fast that the tenancy commenced in or after 1805. It is quite true, as found by the lower Courte. that thereafter the defendants have been in possession of the land on payment of a fixed sum of Rs. 8 either by way of assessment or rent. It is not possible, however, to apply the provisions of section 83 of the Bombay Land Revenue Code, as the commencement of the tenancy is traced. It seems to me that the view taken by the learned Chief Justice on this point is right, and the observations in Ramchandra Narayan Mantri v. Anant (1) must be taken to have been made with reference to the facts of that particular ease, and cannot be so read as practically to modify the terms of the section.

In view, however, of the observations of the lower Courts in their judgments we adjourned the hearing of the appeal on the last occasion to have certain necessary doeuments translated in order to see whether, spart from section &3, there was anything in the case to show that the tenancy in favour of the defendants was of a permanent sharacter. Having regard to the length of time for which they had been in possession on rayment of a fixed sum, it seemed to us necessary in the interests of justice to see whether the plea of permanent tenancy might be otherwise made cut. It must be said, however, with reference to this aspect of the ease, that no such point was taken either

before the learned Ohief Justice when the second appeal was heard, nor is it taken in the memorandum of appeal now. After having read the dosuments, I am unable to hold that there is any real basis for the inference that the tenancy was of a permanent nature. Exhibit 76 is the most important document on this point. It has been read and discussed before us. I am satisfied that there is nothing in that document to support the inference that the tenancy was of a parmanent nature. On the contrary, it seems to me from the letter, the date of which eaunot be ascertained, that Shantacharys, who was the father of the plaintiffs' vendor, wrote to one of the defendants, representing the tenants, that it was not fair on his part merely to offer the assessment, but that he should hand over the land to him (Shantacharya), particularly when he or his ancestors had helped Shantacharya's ancestors in retaining the benefit of the gift which the other members of the Nadgir family had made in favour of Shantacharya's ancestors. The letter, as I read it, shows that Shants. charya then appealed to the Nadgir tenant that it was proper for him to hand over possession of the land to him. This position becomes intelligible on the footing that the Nadgirs were not the permanent tenants of Shantacharya and that they were liable to restore possession to him. On a consideration of this letter other documents, to and which we have been referred, I am satisfied that there is no sufficient basis for inferring that the defendants are permanent terants. I would, therefore, dismiss the appeal with costs.

PRATE, J .- I agree with the construction put upon section 83 of the Bombay Land Revenue Code in the judgment of the learned Chief Justice and that the presumption under that section is not available to the tenants in this case. I agree also that the farther documents which we have had trans. lated for the purposes of this appeal do not disclose evidence that the tenancy was, 69 a matter of fact, a permanent tenaney. Shantasharya's letter, Exhibit 76, shows that he originally derived title to the land in suit from the ancestors of the present Shantacharya's title defendants. attacked by one Litaji Subappa, and the defendants' ansestors assisted Shantacharya in repelling that attack by suit. The defendBAJKALI U. GOPI NATH WAIK.

ants' ease is that as a reward for that assistance they were granted the tenancy of the land in suit. That is probably true. But the letter, Exhibit 76, does not show that that tenancy was a permanent tenancy. Fer contra in that letter Shantacharya seems to be protesting against the defendants retaining the tenancy. However, they did remain in possession as tenants, and the further documents, i. e., the rent-ressipt in 1899, Exhibit 79, and the notice, Exhibit 28, in 1901, go to further than to establish, what is in fact admitted, that the defendents had, as a matter of fact, paid rent at an povarying rate of Rs. 8 per annum ever since they got their tenancy. But it cannot be inferred from that that the tenancy is not annual. Therefore, I agree that this appeal should be dismissed with costs.

W. C. A.

Appeal dismissed,

ALLAHABAD HIGH COURT. FIRST APPRAL PROA ORDER No. 118 OF 1921. November 25, 1921.

I resent: - Mr. Justice Piggott and Mr. Justice Walsh.

BAJKALI AND ANOTHER - DEFENDANTS -APPELLARTS

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1 100 GOPI NATH NAIK-PLAINTIPP -RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 24-Remand of appeal by High Court to District Judge for re-trial-District Judge, power of, to transfer appeal-Jurisdiction.

In the absence of express terms to the contrary. an order by a High Court remanding an appeal to a District Judge to be disposed of according to law, has not the effect of placing any limitation on the powers of the District Judge, under section 24 of the Civil Procedure Code, of transferring the appeal for disposal by an Additional Judge of his Judgeship, and where such an appeal is so transferred, the order of the Additional Judge disposing of the appeal is not liable to be set aside on the ground that it was wholly without jurisdiction, [p. 81°, col. 2.]

. First appeal from an order of the Additional Judge, Gorakhpur,

Mr. Shiva Prasad Sinha, for the Appellants. Mr. Shankir Saran, for the Respondent. JUDGMENT.

Pagarr, J .- This appeal somes before us under enrious and somewhat complicat. ed eirenmetanees. There was a suit instituted in the Court of the Sabordinate

Judge of Gorakhpur upon a hypothesation. band. The plaintiff filed a copy of the bond and pleaded loss of the original. The Trial Court held that the plaintiff had failed to prove by cradible evidence the loss of the original, that the suit was not maintainable upon the copy and dismissed it accordingly. There was an appeal to the Distriet Judge of Gorakhpur and this appeal was heard by Mr. R L. Yorke, who then held the office of the District Judge. effect of his order was to set aside the finding of the Trial Court, although he did The operative not in terms reverse it. portion of his order was that he remanded the suit to the First Court to be tried out on the merits. This order was dated the 4th of September 1919 and against it there was an appeal to this Court. In the meantime, however, the Trial Court was proceeding with the suit, and, on the 19th of December 1919, it passed a decree in favour of the plaintiff in the usual form. This Court's order on appeal was passed on the 21st of May 1920. For reasons given in the judgment, a Bench of this Court allowed the appeal, set aside the order of the Judge of Gorakbpur and directed as followe:-"that the appeal be and it hereby is returned to the Court of the said Judge to be re-admitted on the file of pending appeals and disposed of ascording to law." When this order reached the Gorakhpur District the office of District Judge was filled by Mr. Moir, and Mr. Yorke was holding, in the same Judgeship, the office of Additional Judge. Mr. Moir, no doubt believing that this Court desired and intended that the appeal should return, if possible, to the same officer who had passed the order of the 4th of September 1919, availed himself of his powers of transfer under section 24 of the Civil Procedure Code (Act V of 1908) to send the appeal to Mr. Yorke for disposal. The parties were represented by Counsel before Mr. Yorke and, although Coupsel for the defendants seems in the first instance to have stated that he had no instructions, the question in issue was argued before him. Mr. Yorke recorded a definite finding to the effect that the loss of the original document was proved and that the plaintiff was entitled to maintain his suit upon a copy

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He felt himself apparently in a difficulty as to the proper orders to pass in consequence of this finding, because it seemed useless to re-affirm his original order of remand when this had in the meantime been carried out by the Trial Court and had eventuated in the decree of 19th December 1919. It may be also that he relied upon a passage in the judgment of this Court in which it was said that if the District Judge on further consideration found that the loss of the original document was satisfactorily proved then an order of remand was correct." seems useless to speculate as to what the learned Additional Judge would have done if his attention had been called to a ruling of the Fall Bench of this Court in Uman Kunwari v. Jarbandhan (1), but he contented himself with passing an order which, as it stands, declares a certain sum of money to be due to the plaintiff as a mortgage charge upon certain property, but contains no specific directions fixing any date for the payment of the sum, or laying down the consequences that are to follow upon default of such payment. The District Judge probably believed that a final decree for cale would eventually follow, not upon this decree of his, but upon the Trial Court's decree of 19th December 1919. It seems to me, however, that we cannot possibly anticipate what complications may arise, or what difficulties the plaintiff may encounter upon making application for a decree absolute for sale. We have to deal with the appeal before us, which is an appeal by the defendants against the order of the Additional Judge dated the 21st March 1921, the effect of which has been stated above.

A preliminary objection has been taken to the effect that this order as it stands is not an appealable order at all. Technically, I am of opinion that this objection is well founded; although, if this were the only point to be taken against the appellants, I should have been quite prepared to consider the advisability of allowing them to make such amendments, and to take such other necessary steps as would convert the appeal before us into a second appeal from a decree. Taking this

(1) 30 A. 479; 5 A. L.V. 447; A. W. N. (1903) 195; 4 M. L. T. 162 (.F B.).

view of the matter, we have actually heard . the appellants on the points taken in their memorandum of appeal. clearly not entitled to attack the finding of fast arrived at by the Additional Distriet Judge upon evidence duly considered by him. The one point argued on their behalf has been that, inasmush Court's order of 21st May 1920 directed a remand of the appeal to the Court of the Judge of Gorakhpur (obviously meaning thereby the District Judge), that Court had no authority to transfer the appeal to the Additional District Judge for disposal and the subsequent proseedings in the Court of the Additional District Judge, up to and including the order under appeal, were without jurisdiction. There is some authority for this contention in the care of Sita Ram v. Nauni Dulaiya (2). Authority to the contrary has been quoted in some cases desided by the Calentta High Court, but I think it quite sufficient to point out that this very point was considered by a Single Judge of this Court in Pandohi v. Sheo Bharoie (3). learned Judge pointed out that there had been a change in the law in consequence of the re-drafting of the present section 24 of the Code of Civil Prosedure, correspond. ing with sestion 25 of the former Code of 1882. He held that the older decisions based upon the Code of 1882 were no longer applicable and gave strong reasons for his opinion that, in a case like the present, any order of remand passed by this Court would have no effect to limit the powers of the District Judge under section 21 of the Code of Civil Procedure, unless this Court's order were drawn up in express terms so as to diselose a elear intention of limiting those powers. the present instance the reverse is the The operative portion of Court's order merely directed the Distriet Judge to dispose of the appeal according to law. One of the ways in which a District Judge can dispose of an appeal according to law is to transfer it to the Court of an Additional Judge of his Judge ship for disposal. I have no doubt whatever, speaking as one of the Bench of Judges

(2) 21 A. 230; A. W. N. (1899) 33; 9 Ind. Dec. (N. s.) 856.

(3) 25 Ind. Cas. 141; 12 A. L. J. 1094,

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which passed this Court's order of 21st May 1920, that if the whole position had been laid before us we should have said that it was better, unless the parties could show cause to the contrary, that the appeal should go back to the particular officer, i.e., Mr. Yorke, who had passed the order of the 4th of September 1919. At any rate, I am satisfied that there is no force in the contention that the order now under appeal before us is one wholly without jurisdiction and liable to be set aside on that account. This finding is sufficient to dispose of the appeal before us and I would dismiss it with costs.

Walsh, J.—I entirely agree that the appeal fails. It seems to me that the points raised are unsubstantial and that, in any event, the appellant is debarred by having appeared and taken an order from Mr. Yorke at the second hearing without raising any objection.

As to the existing legal position of the parties it seems to me that there may be ground for future technical controversy and I, therefore, desire, with a view to assisting the parties, if possible, to express my opinion about it for what it is worth. If chronology alone is regarded, it might be argued that the decree passed by the First Court in the suit on the merits dated the 19th December 1919 was void and of no effect because the order of the 4th September 1919 which gave rise to it had been interfered with by the High Court in March 1920, and I can understand the ingenious suggestion that if the foundation is gone the fabrie which rests upon it, must be taken to have disappeared also. In my humble judgment that would be a fallacy in this ease. I have looked at the passages relied on in the judgment of the Fall Bench delivered by Mr. Justice Banerji in Uman Runwari v. Jarbandhan (1), particularly at page 483,* to which I will refer in a moment. and I have some to the conclusion that they are mere dicta which were not necessary for the decision of the case. To my mind, they go a great deal too far. The only point which the Full Bench had to decide was whether an appeal lay at all and if so whether it ought to susseed. In this particular case the remand order when interfered with by the decree of this Court was not necessarily erroneous and has never been declared to be bad. It was merely deslared by this Court Page of 30 A.-[Ed.]

to be premature. One is always entitled to look at the reasons in a judgment for an order or deeree which is passed, otherwise law reporting would be a superfluity. The remand order was set aside provisionally. The decree of this Court was absolute in terms but it invited the Judge below to re-consider the matter and it was distinctly held by the judgment, as my brother has pointed out, that if the Judge found the loss of the original bond proved an order of remand was correct. The learned Judge found on re-consideration which he had considered unnecessary in the first instance, that the loss was proved, and, therefore, his remand order became, in the events which happened, perfectly right. The present order ie, to my mird, a mere interim order completing that which the High Court had directed him to complete, namely, his decision upon the preliminary point. It is not a decision on the merits, and in my opinion the plaintiff would be wrong to treat it as a deeree in his suit. A deeree has been passed in the suit by the First Court. At the time the trial was held and that decree was passed, it was a perfectly lawful proceeding, More than that, it was conducted in obedience of the order of the lower Court remanding the suit to the First Court for trial. In the authority to which I have just referred it is said that the "jurisdiction to hear the suit a second time is derived solely from the order of remand. If that order is errone. ons and is set aside everything done in pursuance of the order must fall to the ground and be of no effect." Again, it is said if the remand order were wrongly made the deerse and, indeed, all the proceedings taken under the remand order are null and void. I think those statements are much too sweeping. It depends on the sircumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any ease, it may be that the proceedings in the Court below fall with it. But in this ease, and it must have happened in many other eases, the proceedings taken in the First Court as a result of the remand order against which there is an appeal must be and ought to be held to be de bene case. The subsequent event in this case resulted in the remand order being shown to have been

YAGADEVAPPA DUNDIPPA HAMPIHOLI U. BHIMA DODDIPPA MALED.

quite right. It seems to me that it would be turning the law into absurdity, and would amount to a denial of justice if a proper trial which has taken place under a remand order made by the Appellate Court and in obadience to such remand order, were held to be invalid when as the result of the High Court's own decision that remand order turned out to have been perfectly justified.

W. C. A.

BOMBAY HIGH COURT. SECOND CIVIL APPEAL No. 138 of 1921. November 28, 1521.

Present:-Sir Norman Maeleod, Kr., Chief Justice, and Mr. Justice shah. MAHADEVAPPA DUNDAPPA HAMPIHOLI-PLAINTIFF-APPELLANT

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BHIMA DODDAPPA MALED-DEFENDANT - RESPONDENT.

Adverse possession-Decree for possession-Sym. bolical possession obtained in execution, effect of.

Where in execution of a decree for possession, symbolical possession is delivered to the decreeholder, such possession is sufficient to intercept any adverse possession prior to the date of the decree, more especially where the person setting up adverse possession was a party to the proceedings in execution of the decree.

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 50 of 1920, confirming a decree passed by the Subordinate Judge at Bail-Hongal, in Civil Suit No 337 of 1918.

Mr. D. R. Manerikar, for the Appellant. Mr. G. R. Madhbhavi, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J - The plaintiff filed this soit for possession and mesne profits. Trial Court dismissed the sait and an appeal from that decree was dismissed with costs. The question is whether the defend. ants could ausceed against the plaintiff who had obtained a decree for possession on the 28th February 1914. It was alleged that in execution of that decree the plaintiff was put in possession on the 5th February 1915. The learned Judge says, "the main question, as was frankly stated by the learned Pleader. is whether the possession delivered on the 5th February 1915 was symbolical posses. sion or real possession," and the learned Judge came to the conclusion that the posses. sion was only symbolical.

In Mahadeo Sakharam v. Janu Namii (1), it was decided by a Fall Bench that merely formal possession of immoveable property by a purchaser at a Court-sale sannot prevent limitation running in favour of the jadgmentdebtor where the latter remains in actual possession, and the property is not in the ossupancy of a tenant or other persons entitled to occupy the same. Symbolical possession is not real possession nor is it equivalent to real possession under the Civil Prosedure Code except where the Code expressly or by implication provides that it shall bave that effect.

Bat in Radha Krishna v. Ram Bahadur (2), it was decided by the Privy Council that symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution proceedings in which the symbolical possession was given. Their Lordships approved of the decision in Juggobundhu Zuker ee v. Ram Chunder Bysack (3). This decision of the Privy Council appears to throw considerable doubt on the desision of this Court in Mahades Sakharum v. Janu Nam: (1) which may bave, when the oceasion arises, to be re-considered.

In my opinion, in this case it cannot be said that the question of adverse possession arises in the face of the plaintiff's decree of February 1914. That would put a stop to any adverse possession prior to the date of the decree, and even if that were not so, considering that the defendants were parties to the execution proceedings, the decision in Radha Kreshna v. Ram Bahadur (2) would be applicable. plaintiff, therefore, would be entitled to succeed, and the appeal must be allowed and a decree passed for possession with soats throughout. There will have to be inquiry with regard to mesne profits for the past three years before suit and also with regard to future mesne profits.

SHAH, J .- I agree.

W. C. A.

Appeal allowed.

(1) 14 Ind. Cas 447; 36 B. 873; 14 Bom. L. R. 115 (F. B).

(2) 43 Ind. Cas. 268; 20 Bom. L. R. 502; 16 A. L. J. 31; 23 M. L T. 26; 4 P L. W. 9; 84 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 830; 27 C. L. J. 191; (1918) M. W. N. 163 (P. C.).

(3) 5 C. 584; 5 C. L. R. 548; 3 Shome L. B. 68, 8

Ind. Dec. (S. E.) 979.

ISHWAR DAS U. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 553 OF 1921.

December 14, 1921.

Present:—Mr. Justice Jwala Prasad.

ISHWAR DAS VARSHANI—Accosed—
Petitioner

versus

EMPEROR-PROSECUTOR.

Railways Act (IX of 1890), ss. 63, 98, 108, 109— Overcrowding in trains—Passengers, right of—Pulling Alarm signal—Reasonable and sufficient cause,

Accused, a passenger by Railway train, complained to the Station Staff that the compartment in which he was travelling contained more than the maximum number of passengers allowed by the rules made under section 63 of the Railways Act, but his complaint was unheeded: after the train left the station, he felt a sensation of suffocation and pulled the communicating chain and stopped the train, in order to complain to the guard. He was convicted under section 108 of the Act for having, without reasonable and sufficient cause, pulled the communicating chain and so stopped the train:

Held, that, no hard and fast rule could be laid down as to what would constitute reasonable and sufficient cause, that each case depended upon its own circumstances, and that under the circumstances of the present case the accused was justified in pulling the communicating chain and stopping the train inasmuch as he had the right to have the compartment vacated so as to reduce the number of passengers therein to the prescribed limit. [p. 321, col. 2; p. 322, col. 1.]

Application against an order passed by the Additional Deputy Commissioner, Dhanbad, affirming the sentence passed by the Deputy Magistrate of that place.

Messrs. M. Yunus and Subal Chandra Masumdar, for the Petitioner.

JUDGMENT.

JWALA PRASAD, J.—The petitioner has been convicted under section 108 of the Railways Act (Act IX of 1890) for having pulled the chain of his compartment which caused the train to stop.

The chain was intended to be used as an alarm signal. The reason for pulling the chain is said by the accused to be that the compartment had become over-crowded on account of 70 passengers having entered into it, whereas the compartment was marked for 27 passengers only. He states that the compartment in question was an Inter-Class Compartment, whereas most of the passengers had only third class tickets. He further states that at Dhanbad when his compartment became

employees but received no attention, and then, when the train started, he felt sufficiating sensation and consequently he pulled the chain in order to stop the train. These facts are not disputed; but it is said that they do not exonerate the accused. The Magistrate evidently thought that there should have been a more serious case in order to entitle the accused to pull down the chain, such as that stated by the Guard, namely, murder or fire. Section 108 of Railways Act runs as follows:—

"If a passenger without reasonable and sufficient cause makes use of or interferes with any means provided by a Railway Administration for communication between passengers'and the railway servants in charge of a train, he shall be punished with a fine which may extend to Rs. 50."

It is evident that no hard and fast rule can be laid down as to what must constitute reasonable and sufficient cause and that it must depend upon the circumstances of each case whether there was such a cause as to justify a passenger interfering with the pulling of the chain. No doubt, the ease of murder and fire stated by the Guard is an extreme case. In order to prevent any danger to the health and life of passengers the Act provides in section 63 that the limit of passengers to occupy a compartment must be fixed and must be exhibited in some conspicuous place inside or outside the compartment, and the Railway Company is enjoined to comply with the provisions of section 63 on pain of a fine of Rs. 20 per day under section 93 of the Act. A corresponding obligation has been east under section 109 of the Ast upon passengers to obviate entering a compartment which contains the maximum number of passengers exhibited therein or thereon. These provisions of the Act, therefore, confer a right upon the occupants of a compartment to resist the entry of passengers, and in the present case the compartment had already contained the maximum number allowed under the aforesaid rules. order to enforce this right every passenger is entitled to invoke the aid of the railway officers in any station, or of the officer in sharge of the train when it is in motion or is not in any station. In the present

SEUJA DD. DIN AHMAD U. EMPEROR.

ease the petitioner's requests to the percons in charge of the Dhanbad Station proved abortive and, therefore, he had no a terrative but to draw the attention of the Guard when the train moved and when he found that he was packed to suffocation. He was, therefore, justified in pulling the chain and in stopping the train for enforceing his right to have the compartment vacated so as to bring down the numbers of passengers therein within the maximum limit prescribed. Therefore, in the sirsumstances of the present case, the petitioner did not act without reasonable and enffieient cause. Section 108, consequently, does not apply.

The conviction of the petitioner is illegal and is set aside. The fire, if already realised, should be refunded.

The railway people were guilty of negligence in not earrying out the provisions of the Act which are meant entirely for the eafety and comfort of passengers, and instead of thanking the petitioner for having drawn their attention to it they prosecuted him and thus transferred their own liability to the shoulders of the petitioner.

W. C. A.

Kule made absolute.

ALLAHABAD HIGH COURT.
CEIMINAL AIPEAL No. 121 (F 1922.
Maich 24, 1922.
Freeent:—Mr. Justico Gokul Presad.
SHUJA UD.DIN AHMAD— APPELLANT
verens

EMPEROR- UPPOFITE PASTY.

Criminal Procedure Code (Act V of 1828), ss. 224,
235 - Joinder of charges - Irregularity - Penal Code
(Act XLV of 1860), ss. 408, 477.

Under section 235, read with section 234, of the Criminal Procedure Code there cannot be a joint trial of three charges for offences under section 408, Penal Code, and of one under section 477 (At, Penal Code,

Criminal appeal from an order of the Sessions Judge, Benares.

Mr. Kumuda I rasad, for the Appellant. Mr. Sank r Saran, Government Pleader, for the Crown.

JUDGMENT. - In this case the appellant, Shuja Ud-dir, has been convicted of the offence of oriminal breash of trust by a public servant in respect of three items and also of falsification of accounts in order to conceal the defaications under sestion 477A of the Irdian Penal Code. He appeals, and one of the grounds proseed before me by the learned Vakil for the appellant is, that there has been a misjoinder of charges which vitiates the trial. The charge on which the accused was committed to the Sessions Court admittedly different. The learned Judge amonded the charge before the trial, and the cosused has been botoivaco sentenced. It is urged before me that sessions 234 and 23) of the Code of C:iminal Prosedure do not warrant such a joinder of charges, that is, three under section 402 and one under section 477A of the Indian Ponal Code, I was at first iuslined to the view that this could be done having regard to the provisions of section 235, read with the provisions of section 2:4, bu: I find that in a similar sase the contrary view was taken by Tudball, I, Sheo Saran Lal v. Empercr (1). I agree with the view of the law taken thereir. I, therefore, allow appeal, set aside the convictions sentences and order the re-trial of the appellant on the charges preferred against him in accordance with the law. It will be open to the Sessions Judge to divide the charges into two or three trials as he thinks fit.

J. P.

Apreal allowed; he trial orderes.

(1) 5 Ind. Cas. 896; 32 Δ. 219; 7 A. L. J. 225; 11 Or. L. J. 255. MATHUBBAI U. BMPEROR.

BOMBAY HIGH COURT. OSIMINAL APPLICATION FOR REVISION No. 262 or 1921,

November 16, 1921. Present :- Sir Norman Maeleod, Kr., Ohief Justice and Mr. Justice Shah. MATHUBHAI M. SHAH-APPLICANT

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EMPEROR-OPPONENT.

Bombay District Municipal Act (III of 1901), 64. 3 (7., 93-Charge -Offence charged not proved -Magistrate, whether can convict for offence not charged -"Building," meaning of-Construction of Statute -Penal provisions

Where a person is charged with having committed a specific offence, and the Magistrate finds that that offence has not been committed the Magistrate is not competent to alter the charge, and to convict the accused of an offence of which he has had no notice, [p 3 !1, col. .]

Although under section 3 7 of the Bombay District Municipal Act word "building" include any hut, shed or other inclosure, whether used as a human dwelling or otherwise, it does not include a hut or a shed at every other place where it is used in the Act. [p 32', col 1.]

All penal provisions of a Statute must be very

strictly construed. [p 324, col 1.]

: Oriminal apolication from conviction and sentence passed by the Rasident Magistrate, First Class, Bandra

Mr. B. J. Deszi, (with him Mr. P. B. Shingne), for the Applicant.

Mr. Coyves, (with him Mr. S. V. Bhandarkar), for the O innent,

JUDGMENT.

Macico, C. J - The accused was charged with an offense neben esteefto 93 (5) of the Bumbay District Manieinal Act, III of 1901. The complainant, Mr. Sniade, the Sarretary of the Ghatkoper Kirol Municipality, alleged that the assessed bad commenced eresting a number of temporary hats on Sarvey No. 31 of Gratkoper village, situate within the limits of the Gratkoper Kicol Manieipality without having obtained permission from the Manieipality under clause (1) of section 95 and thus had committed an offence punishable under section 96 (5) of the Ast,

The Magistrate came to the conclusion that no offence had been committed under section 95 (5), but on the facts he dealt with the case as if the Munisipality had given notice to the accused under sestion 97, and that the assused not having obeyed the requisitions of the Municipality had committed an offenes under section 155 of the Act, and

fined him Ra. 50, or in default simple imprisonment for one month.

On the 18th January 1921 the assused wrote to the Municipality that he was a registered cosupant of several pieces of land at Ghatkoper, and as such had applied for permission to the Salsette Davelopment Officer to appropriate the said lands to building purposes, and for the purpose of giving facility to the workmen and servants employed by him for developing the land and making roads and plots and for erecting buildings he had commenced creeting temporary sheds bas shops. would be removed after the buildings were erseted.

Then he made eartain inquiries with regard to the building rules and regulations which had been framed by the Municipality. But for the purposes of this case those inquiries are irrelevant.

In answer to this letter of the 18th, the Municipality, on the 25th of January, raplied that the permission of the Municipality was equally necessary before proceeding with the work mentioned in the letter under reply. The work in question was, therefore, purely unauthorized and was proseeded with not withstanding the repeated verbal as well as written warnings given to the accused's staff in charge of the work. Reference was then made to the Manieipal rules and byelaws, and the letter concludes: "Lastly, I may take this occasion to add that if these unauthorized structures are not removed within four days from the reseipt of this n itise nesessary action will have to be ad iptel against you under the provisions of the District Manieipal Act,"

On the 27th January 1921, at a meeting of the Managing Committee under the heading "Baildings erested without permission on Agra Road at Gratkoper by Mr. Matu. bhai M. Shab," it was resolved that Mr. Matubhai M. Shah be prosecuted section 93 (5) of the District Municipal Act for carrying out building work without obtaining previous permission of the Municipality.

It is obvious, therefore, that the Municipality treated the accused as having commenced to erect a building without giving notice as required by section 96 (1), or without furnishing the documents and affording the information prescribed by the section, EMPEROR U. ALI BAHADUR.

and that, therefore, he was liable to be charged under section 96 (5). The learned Magistrate said:—

"I agree with the learned Pleader, Mr. Shingne, in so far that section 95 is not applicable to hute and sheds although the word building includes hute and sheds as per section 3 of the Bombay District Municipal Act. If this section is made applicable to hute and sheds sections 97 and 98 will ever remain dormant and no Municipality will have occasion to use them, and that does not appear to be the motive of the Legislature."

I agree that the view taken by the learned Magistrate was correct. Although under section 3 (7) "building" would include any but, shed or other enclosure, whether used as a human dwelling or otherwise, it does not follow that whereever the word "building" is used in the Act it includes a but or a shed.

Sections 96, 97 and 98 come under the heading in Chapter IX of "powers to regulate buildings, etc." and it was clearly the intention of the Legislature that while the provision of section 96 should apply to buildings in the ordinary sense of the word, special provision was made for huts and built for temporary pursheds whether poses or for a more permanent object, so that when the accused wished to erect buts or sheds of his development scheme, he was bound to give previous notice to the Municipality. Then the Municipality might have made certain requisitions, and it is only when any hut or shed or range or block is built without giving proper notice to the Municipality or otherwise than as required by the Municipality, that the Municipality may give written notice to the owner or builder thereof requiring him within a certain specified time to take down or remove the same or to make such alterations therein or additions thereto as, having regard sanitary considerations, the Municipality may think fit; and it is only when the directions given by the notice have not been complied with that proceedings can be taken under section 155 against the person to whom notice has been given.

I do not think, therefore, that the Magistrate, once he had come to the conclusion that the proposed buildings of the accused did not some within section 96,

could alter the charge and treat the offence as if it was punishable under section 155. All penal provisions of a Statute must be very strictly construed, and it is impossible to say that the accused in this case brought himself within the provisions of that section. I think, therefore, that the conviction was wrong and must be set aside, and the fine, if paid, refunded.

SHAH, J .- I agree. I desire to add that the proceedings in this case baying been started under section 96 (5) of the Bombay District Municipal Act, III of 1901, the proper course for the Magistrate was to decide whether the facts necessary to bring the case within the scope of that sub section were established. It is clear, however, that having regard to the nature of the building set up by the accused, the case would be covered by the provisions of section 97; under the circumstances, the prosecution under section 96 (5) would not be justified. The learned Magistrate has taken that view; but he has convicted the accused under section 57, read with section 155. I do not think that in these proceedings the facts necessary for that purpose have been established, nor is there anything in the ease to show that the accused had sufficient notice to meet the case under section 97, read with section 155. The present proeeedings must be treated as having been taken under section 96 (5) and disposed of on that footing. It may be that if the Municipality were so minded, they may be able to give a proper notice under section 97 and to take further steps against the accused.

W. C. A. & J. P.

Contiction set aside,

OUDH JUDICIAL COMMISSIONER'S COURT.

Caiminal Reparence No. 34 of 1921 September 20, 1921.

Present:—Mr. Dalal, A. J. C.
EMPEROR, THROUGH WAJID ALI—
COMPLAINANT

versus

ALI BAHADUR—Accused.

Criminal Procedure Code (Act V of 1898), s. 522, applicability of Accused acquitted of trespess—Jurisdiction to order possession to complainant—Courts, duty of,

DECNABAIN MARTO E. CHHATOO RAUT.

A Magistrate, after acquitting an accused person of trespass under section 447. Indian Penal Code, cannot proceed to pass an order under section 522 of the Criminal Procedure Code and put the complainant in possession of the land in dispute, inasmuch as section 522 of the Criminal Procedure Code gives jurisdiction to the Criminal Court only when a person is convicted of an offence attended by criminal force.

Courts are not to deal with questions of abstract justice but are tied down by the wording of the Statute Law on the subject.

Reference by the District Magistrate,

Gonda ..

Mr. H. N. Das, for the Complainant. Mr. Mahmud Beg, for the Accused.

JUDGMENT .- The Tabsildar Magistrate, after acquitting an assured person of trespass under section 447, Indian Penal Oode, proceeded to pass an order under section 522 of the Code of Oriminal Proeedure and put the complainant in possession of the land in dispute. The learned District Magistrate of Gonda has rightly submitted the order to this Court for revision. The wording of section 522 is very clear and gives jurisdiction to the Oriminal Court only when a person is convicted of an offence attended by criminal fores. The Tabsildar-Magistrate places the assured Zemindar on the horns of a dilemma. If the Zomindar ejected the tenant he was guilty of trespass and if he did not eject then the Zymindar ought not to object to possession being maintained with the complainant tenant. We have, however, not to deal with questions of abstract justice but are tied down by the wording of the Statute Law on the subject.

I set aside the order of the Tahsildar-Magistrate under section 522 which was

without jurisdiction.

J. P.

Order set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 603 of 1921.

February 27, 1922.

Present: -Mr. Justice Jwala Prasad.
DEONARAIN MAHTO-COMPLAINANTPRINTINEE

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ACCIBED - OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 250
(a), 367, applicability of-Direction mandatoryFailure to comply, effect of.

The direction contained in proviso (a) to section 250 of the Oriminal Procedure Code are mandatory, and the failure by a Magistrate to record and consider each and every objection urged by a complain.

ant vitiates the proceedings.

The provisions of section 367 of the Criminal Procedure Code apply to appeals against an order directing a complainant to pay compensation, and where an appellate judgment in such a case omita to set forth the points for determination, the objections of the appellant, the decision thereon, and the reasons for the decision, the judgment is not in accordance with law, and is liable to be set aside.

Application against an order passed by the District Magistrate, Muzaffarpur, confirming that of the Honorary Magistrate, Hajipur,

Mr. Nawal Zishore Prasad II, for the Peti-

Mr. Janak Kishore, for the Opposite Parly.

JUDGMENT.—This is an application against an order of the Magistrate, dated the 9th August 1921, directing that the complainant should pay compensation of Rs. 10 to each of the seven accused, under section 250 of the Code of Criminal Procedure. The order was upheld by the District Magistrate on the 17th of September 1921.

The petitioner impugne the validity of both the orders of the Trial Court as well as of the lower Appellate Court. The order of the Trial Court is assailed on the ground that the Magistrate did not record and consider the objection urged by the complainant to his making the direction to pay compensation to the accused. While acquitting the accused the Magistrate called upon the complainant to show cause why he should not pay Rs. 10 as compensation to each accused person. Cause was shown by the complainant by means of a written petition. The Magistrate did not state in his order what the objection

MALAYA GOUNDAN U. EMPREOR.

of the complainant was, nor does he appear to have considered the objection. He simply says that,

the complainant filed a petition showing cause and the cause shown is not reasonable at all."

The petition has been read to me and the complainant has provided therein a number of objections. None of these objections set forth in the petition seem to have been considered by the Magistrate nor have they been recorded by him. Provide (a) to sestion 250 of the Code clearly states that,

"the Magistrate shall record and consider any objection which the complainant or informant may arge against the making of the direction."

The direction in the said proviso is mandatory, the non compliance whereof has vitiated the order of the Magistrate directing compensation to be paid by the complement. This was the view taken in the case of Sekh Janab Ali v. Hiralal Pashan (1) as well as by Heyward, J. O., in the case of Minhomal Lilaram v. Emperor (2).

The order of the lower Appellate Court is assailed upon the ground that the judgment written by the District Magistrate disposing of the appeal of the complainant is not in accordance with law. This ground appears to be substantial. The learned District Magistrate has simply stated that there was trouble between the complainant and the accused, Gokhul, and that after reading the judgment and evidence he considered that the decision of the lower Court was correct and the compensation was rightly awarded, This is not disposing of the objection of the complair ant as to the order of the Magistrate directing compensation to be paid by the ecmplainant. The judgment of the District Magistrate has failed to comply with the directions contained in section 267 of the Code of Criminal Procedure, which applies by reason of section 424 to an appellate judgment also.

It has, however, been contended that both these testions 267 and 424 of the Code do not apply to a judgment passed by an Appellate Court in an uppeal from an order directing the complainant to pay compensation.

There is no substance in this contention, Section 250, clause (3), expressly provides for an appeal to the District Magistrate from an order of a Magistrate of the Second or Third Class to payecmpensation to an accused percon. The appeal to the District Magistrate was, therefore, presented under Chapter XXXI, which lays down the procedure for an appeal "from any judgment or order of a Criminal Court:" (tide section 404 of the Code). Section 423 lays down the power of an Appellate Court in dealing with an appeal from a judgment as well as from an Section 424 relates to a judgment passed by an Appellate Court dealing with either an appeal from acquittal or conviction or an appeal from an order, such as the one in question. The District Magistrate was, therefore, bound to record a proper judgment, setting forth the points for determination, the objections of the appellant, his decision thereon, and the reasons for his desision, The judgment of the lower Appellate Court in the present case lacks in all the aforesaid details and ie, therefore, not in accordance with law.

Therefore, the orders of both the Courts below are bad in law and must be set aside, and the case sent back to the Trial Court to be disposed of in accordance with law, as was done in the case of Minhomal Lilaram v. Emperor (2) referred to above.

W. C. A. Cose sent back,

MADRAS HIGH COURT.
REFERRED TRILL NO. 70 OF 1921.
September 8, 1:21.
Preced: - Mr. Justice Speccer and
Mr. Justice Kumareewar i Sastri.
MALAYA GUUNDAN ALD OTHERE—

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EMPEROR - RESPONLENT.
Crimical Procedure Code (Act V of 1898), 8, 288-

^{(1) 11} C. W. N. lxii notes,

^{(2) 25} Ind Cas. 994; 8 S, L, B, 25; 15 Cr, L, J, 666.

MALAYA GODNOAN U, EMPEROR.

Statements recorded tefore monegar-Corroborative or substantive evidence.

A statement made by a person before the moneyar of a village scortly after the commission of a crime cannot be used as substantive evidence against an accused person tried for such offence as it is not a statement recorded on oath in the presence of the accused by a Magistrate empowered to take down evidence

The only use of such statements is to corroborate or contradict statements made on oath at the trial.

Trial referred by the Court of Session of the Coimbatore Division, for confirmation of the sentence of death passed on the prisoners in Care No. 58 of the Calendar for 1921.

Criminal Appeals Nos. 453 and 459 of 1921 by the prisoners against the said conteness.

Messrs, L. A. Govind tragavi Iyer and S. Subramanya Aiyar, for the Prisoners.

Mr. J. U. Adan, Public Prosessator, for the Crown.

JUDGMENT .- The seven ascased have been sentenced to death for the murder of one Venkatasami Naioken of Nagarakalandai. The only evidence to connect them with the erims is the statement of prosecution witness No. 2, who says he ascompanied the decrased to Malayandipaliem on the day of his death. The evidence of prosecution witness No. 3, who says be also went with the deceased, is useless for the purpose of connecting these accused with the crime, since he stated at the trial that he ran away as soon as he saw five or six persons at the madam without recognising any of them, The joint statement (Exhibit E) that this witness and prosecution witness No. 2 signed before the moneyar ounno be used as sab tantive evidence of this witness against the assure as it was not a statement recorded on oath in the presense of the accused by a Magistrate empowered to take down evidence. See Enperor v. Oherath Choyi Kutti (1). The only use of such a statement would be to corro. borate or contradict statements made on cath at the trial The evidence of proseaution witness No. 2 is to the effect that, before he ran away, he saw the first accused beat the deseased with a stick on his right ear and that the second accused stabbed him with a spear on his head.

Os the body at the post morten about six ireised wounds and about thirty one stick marks were found, the spleen was also ruptured, nine ribs were broken, and the lungs were pierced by pieces of broken ribs, but no nark corresponding to the blow with a stick dealt in the region of the right ear was noted by the Sab-Assistant Surgeon, and it would have been natural to expect punctured wounds rather than incised wounds to result from the use of a spear. This witness (prosecution witness No. 2) told the monegar that the other five accused came running taking sticks. He did not then mention that they committed any act which contributed to the deceased's death. The evidence against accused Nos. 3 to 7 is thus obviously insufficient to support their convictions. The body was eventually found by the acting moneyar lying outside the pen of fifth accused with a dead goat beside The fifth assured's father and a small boy were lying in a hut inside the pen. It is not reasonable to suppose that, if the asoused killed the deseased at the place where prosecution witness No. 2 says he first met them (i.e.,) at the Madam near the hill, and under the sirenmstances spoken to by this witness, they would have taken the orrpse to the fifth assused's pen and left it there. If the murder was committed by others, or if the deceased who, as the Judge observer. was known to be a cattle thisf had been caught in the act of stealing a goat and beaten to death, it would have been natural that his body should have been found where it was. If the accused murdered him and wished to avert suspicion from themselves. and at the same time to provide some justification for their act in case of detection they would have left the body at a distance and brought a dead goat and placed it along side.

Apart from the improbability of the prosecution story in this respect, the evidence
of prosecution witness No. 2 is not, in our
opinion, so reliable that it would be safe to
base the convictions of the first and second
secused on his word alone. It is proved by
Exhibit II that first accused's father made a
complaint against this witness three years
ago, and his statement at the trial as to the
number and identity of the persons recog-

KHUSIRAM MAHARAJ U. ESPEROR.

nised by him at the pen differed considerably from what he told the monegar in Exhibit E.

We set aside the convictions of all the accused, acquit them and direct their release.

M. C. P.

Convictions quashed.

JOGIDAS BABU U. BMPEROR.

an article is found is one to which several persons have equal right of access, it cannot be said to be in the possession of any one of them."

It cannot, in my opinion, be said that the place in which the opium was found is not one to which several persons had equal right of access. If that be so, however the case may stand on law, it must be extremely difficult to convict the petitioner on facts. I am of opinion that, on the whole, the conviction ought not to stand. I would set aside the conviction and direct that the fine, if paid, be refunded. W. C. A.

Rule made absolute.

PATNA HIGH COURT.

CHIMINAL REVISION No. 490 OF 1921.

October 24, 1921.

Present :- Mr. Justice Das.
KHUSIRAM MAHARAJ-PETITIONER

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EMPEROR-OPPOSITE PARTY.

Opium Act (I of 1878), s. 9C-Exclusive possession -Place used by several persons.

Where the place in which an article is found is one to which several persons have equal right of access, it cannot be said to be in the possession of any one of them.

Messrs. Yunus and K. C. Roy, for the Petitioner.

JUDGMENT.—The petitioner has been convicted of an offence under section 90 of the Opium Act, I of 1878, and has been sentenced to pay a fine of Rs. 100. It is admitted that the opium was found on the roof of the petitioner's cook room. The question, therefore, arises, can it be said that the petitioner was in possession of the opium? Now, on this point a passage from the judgment of Sir Lawrence Jenkins in the case of Jog iban Ghose v. Emperor (1) has been cited:

"Now, on this evidence, can it be held, consistently with legal principles, that it has been proved that Santosh was in possession of the bomb? It is well established, and is an elementary rule founded on common sense, that where the place in which

(1) 2 Ind. Cas. 681; 13 C. W. N. 861 at p. 892; 9 C. L. J. 863; 10 Cr. L. J. 125, BOMBAY HIGH COURT. CRIMINAL APPEAL No. 664 of 1921, November 15, 1921.

Present—Sir Norman Macleod, Kr., Chief Justice, and Mr. Justice Shab. JOGIDAS BABU—Accused—Appellant

versus

EMPEROR-RESPONDENT.

Penal Code (Act XLV of 1860), s. 467—Money order—Affixing false signature and receiving money—Offence—Sentence—High Court, when will interfere.

H. remitted a sum of money by money-order to B. in order that the money be paid to P. in liquidation of a debt due to him. When the money order arrived, P. represented to the postman that A. was B. and induced him to accept A's signature as the signature of B. and by that action got the money. B. was not informed of what had taken place:

Held, that P. and A. were guilty of an offence punishable under section 467 of the Penal Code, viz. of forging a valuable security, i. e., the money order receipt.

A High Court will not interfere with a sentence of imprisonment, unless it can be shown that it has been imposed without any regard to the facts of the case, or the nature of the offence, or is so out of proportion to the facts proved that no Judge would reasonably impose it.

Oriminal appeal from conviction and sentence passed by the Sessions Judge, Khandesh, JOGIDAS U. EMPEROR.

Mr. G. N. Thakor, for the Appellant. Mr. S. S. Pathar, Government Pleader, for the Orown.

JUDGMENT.

MACLEOD, C. J .- The first accused in this ease was convicted of an offence under section 467 of the Indian Penal Code, in that he received Rs. 38. which were despatched by one Hari Lahanu Sonar to his son Bhila by money order, by indus. ing the accused No. 2 to sign as if he were Bhila. The accused was asked by the postman whether one Bhila was living in his village, and the assused No. 1 then told the postman that accused No. 2 was Bhila. Whereupon accused No. 2 signed the receipt for the money which came to the hands of the first assased. There was no dispute as regards the facts and consider. ing the relations between the Post Office and the public there would be extreme difficulty for the first accused to satisfy the Court that he had no dishonest intention or no intention to cause damage or injury to the public or to any person or that, generally, the provisions of section 463, Indian Penal Code, would not apply. I doubt myself whether the assused in a case like this would be even entitled to urge that be committed no offence because what he did only resulted in money going straight to his pocket which would have eventually been given to him when paid by the Post Office to Bhila. Speaking for myself, I should say that when the accused induced the postman to accept the signature of accused No. 2 as the signature of Bhila. and by that action got the money the offence was committed. I do not think that we should interfere with the finding of the Judge that the first assused did not tell Bhila that the money was received. If, immediately, after receiving the money from the postman, the first accused bal told Bhila Hari that the money which was despatched to him by his father in order that it might be paid to the first aceased had been received, then the proof of that fact could certainly be urged in mitigation of the panishment. I do not think for a moment that that fast, even if proved, would be sufficient to justify the Court in desiding that there was no evidence at all of the offence having been

committed. I think, therefore, the con-

viction is right.

The next question is, whether the sentence imposed by the Sessions Judge should be interfered with. On general principles I am very loth to interfer with the sentences given by the lower Courts unless it can be shown that a sentence has been imposed without any regard to the facts of the case or the nature of the offence, or is so out of proportion to the facts proved that no Judge would reasonably impose it. Considering that the Judge was of opinion that the first assused did not tell Bhila Hari that the money was paid, and there was even evidence which made it probable that the second payment had been made, although he has given the accused the benefit of the doubt with regard to that fact, I do not think that the sentence which was imposed upon the first accused was one which should be interfered with. I would, therefore, dismiss

the appeal. SHAH, J.-I agree that the appeal must be dismissed. The point which presents some difficulty to my mind is, whether it is shown that the appellant asted fraudulently so as to bring the case within the scope of the definition of forgery, It is essential, in my opinion, that the prosecution ought to establish that the act attributed to the assused was fraudulent or dishonest. If, in the present case, for instance, after receiving money, it was clear on the record that he had given intimation of the receipt of money to Bhila, and that in substance and in effect the money was received by the accused on behalf of Bbile. speaking for myself, I should say that the conviction would not be right. is far from clear on this record that after receiving the money he ever informed Bhila of the fact as he would have done if the postal receipt was not dishonestly or fraudulently signed. Bhila and his father denied that any such intimation was given to Bhila. It appears from their conduct in making inquiry at the Post Office after the payment was made that Bhila was not informed of the fact. This omission on the part of the appellant supports the inference drawn by the Trial Judge as to the frandulent intention of the assused. On these grounds I think that KANDAMANI DEVI U. ESPEROR.

the conviction of the appellant is right; and the sentence cannot be said to be unduly severe or inappropriate on the facts of the ease.

W. C. A.

Appeal dismissel.

MADRAS H GH COURT. CRIMINAL REVISION CAPE No. 9 . OF 1922. (CHIMINAL RAVISION PETITION No. 8' OF 1922.) ORIMINAL MICCELLANBOUR PETITION No. 54 CF 1922.

January 27, 1922.

Present: - Mr. Justice Kamaraswami Sastri. Srifri Sri KANDAMANI DEVI-ACCUSED-PETITIONER

versus

EMPEROR-OPPORITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 353-Ch. XII-Sessions trial-Purda-nashin accused-Personal attendance till conviction, whether can be excused

A Sessions Judge has powers under the provisions of section 353, Crimical Procedure ' ode, to dispense with the personal attendance of a purda-nashin accused and permit her to appear by Pleader during the Sessions trial inasmuch as in the interests of justice, purda-nashin ladies should not be compelled to appear in public at least until they are convicted.

IN CR. R. C. No. 93 (P 1922.

Petition, under sections 435 and 4.9 of the Code of Criminal Procedure, 1893, praying the High Court to reviee an order of the Court of Session, Ganjam Division, dated the 20th January 1922, in Sesions Case No. 2 of 1922.

IN OR. MIS. P. No. 54 CF 1922.

Petition praying that, in the eireumstances stated in the Memorandum of Criminal Revision Case No. 93 of 1922, the High Court will be pleased to issue an order directing that the personal appearance of the petitioner herein, in Sessions Case No. 2 of 1922 on the file of the Coart of Sassion, Ganjam Division, be dispensed with.

Mr. Sambasica Row, for the Petitioner.

ORDER,-The third accused is a Gosha lady and belonge to a respectable Zamindar family of Ghumerr. I am of opinion that the Sessions Judge has powers to dispense with the personal at endance of the accu-ed and permit her to appear by Pleader during the Sessions trial. Section 205 of the Code of Criminal Procedure empowers a Magistrate to do so and section 353 of the Code of Criminal Procedure, which refers to the mode of resording evidence in trials, it eluding sessions trials, states that evidence shall be taken in the presence of the assused except where personal attendance is dispensed with in which case it shall be taken in the preserce of his Pleader. I do not think that there is anything in the Code to prevent the Sessions Judge from doing what a Magistrate is empowered to do as regards attendance by the assused and section 353 impliedly gives the power, as Chapter XXIII, which relates the trials before the High Court and Courts of Session, is included in section 353. in Emreior v. O W. King (1) it was held that the High Court has power under the provisions of section 353 of the Code of Criminal Proeedure to dispense with the attendance of the accused during the Sessions trial. In Raj Raieswari Debi v. Emperor (2) Imam and Ohapman, J.J., directed purdu-nashin ladies to appear by Pleader toth in the Magis. trate's and Sessions Courts, subject to their baving to appear in Court to hear sentence in case of echviction.

Having regard to the habits and sustoms of the country and the social stigma that attaches to Gosha ladies breaking purda, I think it will be in the interests of justice that they should not be compelled to appear in public at least until they are eonvieted.

On the merite, I think that, having regard to the nature of the evidence against the petitioner in the Committing Magistrate's Court, I will be exercising a proper discretion in allowing her to appear by Pleader and dispensing with her personal attendance.

M. C. P.

Order accordingly.

J. P.

(1) 15 Ind. Cas. 9d; 14 Bom. L. R. 236; 13 Cr. L. J. 494; 1 Bom. Cr. Cas. 111.

(2) 23 Ind. Cas. 459; 17 C. W. N. 1248; 5 Cr. L. J.

281.

ARDESHAR JIVANJI U. EMPEROH,

BOMBAY HIGH COURT.

ORIGINAL APPLICATION FOR REV.S.ON

No. 261 OF 1921.

November 10, 1921.

Fresent:—Sir Norman Maelsod, Kt,

Chief Justice, and Mr. Justice Shah.

ARDESHAR JIVANJI MISTRI—Accused

—Applicant

teraus

EMPEROR-OPPOSITE PARTY.

Bombay District Municipal Act (III of 190') -Notified area, rules for - Application to erect new building - Committee, power of, to refuse permission.

A applied to the Committee of a Notified Area to build on his own land; the Committee, purporting to act under clause (3) of rule: 7 of the rules framed under section (88 (1) of the Bombay District Municipal Act, refused permission. A, however, erected the building, and was convicted uncer clause (5) of the above rule:

Held, that the conviction was not justified, as all that a Committee could do under rule 27 (3 was to pass a provisional order directing that, for a period not exceeding one month, the intended work should not be proceeded with, and that as such an order had not been issued, nor an order passed under sub-rule 21, A. was entitled to build. [p. 831, col. 2; p. 362, col. 2.]

Criminal application for revision against an order passed by the Magistrate at Bandra.

Mr. Coyages, (with him Mr. P. B. Shingne), for the Applicant.

Mr. S. S. I atkar, Government Pleader, for the Crown.

JUDGMENT.

Macreco, C. J .- The accured in this care were convicted under rule 27 (5) passed by the Government order the powers conferred by section 188, sub section (1), of the Bombay District Municipal Act. The facts are correctly stated in the petition which the assueed has made to this Court in revision. I need not set them out again. The accused had asked for permission in the proper form to build on his own land. He got what is called a model reply on the 5th November 1920 "permission refused," and it is necessary to point out that, although that model reply purports to have been sent assording to the provisions of rule 27 (3), all that the Committee sould do was to pass a provisional order directing that, for a period, which shall not be longer than one mouth from the case of such order, the intended work shall not be proseeded with. On the face of it, this

order refusing permission was for an indefinite period.

Under sub rule (4), a person who has given notice under sub rule (1) may proceed with his building, if the Committee within one month from the receipt of the notice given under sub rule (1) have neither passed orders under sub rule (2), nor is used under sub-rule (3) any provisional order or any demand for further particulars.

The Committee had not issued proper orders under either sub-rule (2 or sub-rule (3), and consequently the petitioner was entitled to build. After the petitioner received the order of the 5th November, he called on the Chairman of the Committee and requested him to give the grounds for

and requested him to give the grounds for refusing permission. Thereafter, the petitioner was informed by a letter dated the 20th November 1920 that permission to build was refused because there was no existing metalled road there and none projected, and also that a bungalow there would lead to

undesirable congestion.

We have been shown a plan of the petitioner's land, and it shows that on three sides, there is a Gawan or eatile track about ten or twelve feet wide. On the other side of the eatile track to the south is the property of Mr. Guzdar, and the petitioner alleges that permission for him to build was refused because Mr. Guzdar was desirous of buying up petitioner's land. However that may be, it appears to us that naither of the ressons given in the letter of the 20th November was justified by the circumstances of the case or by the rules.

A reference was made afterwards to byelaw 38 which provides as follows: "notwithstanding anything contained in rule 27 (4) no person shall commence to erect any building which would not front on a public street unless he, having duly obtained the approval of the Committee under rule 22 B, has constructed a street in accordance with the orders of the Committee providing access to

the building from a public street."

Nothing is said in the bye law about metalled roads, and if the provisions of that bye law had been followed, the Committee might have called upon the petitioner to provide assess to his building from the public street. We think, therefore, that there was no justification for the conviction under rule 27 (5) as the petitioner had given

MUHAMMAD SHAH U. EMPEROR.

notice as required by sub-rule (1). He had furnished the documents and afforded the information which was required of him, and no legal order had been served on him which would prevent him from building. We think, therefore, that the conviction was wrong and should be set aside, and the fine, if paid, refunded.

SHAH, J .- I agree.

W.C.A.

Conviction and sentence set aside.

LAHORE HIGH COURT. CRIMINAL APPEAL No. 822 OF 1:21. December 13, 1921.

Fresent :- Sir Shadi Lal, Kr., Chief Justice, and Mr. Justice Abdul Q dir. MUHAMMAD SHAH alias BUGGA SHAH

AND OTHERS-CONVICTS-APPELLANTS

tersus

EMPEROR-RESPONDENT.

Criminal Procedure Code (Act V of 1838), ss. 239, 537-Joinder of charges-Same transaction - Misjoinder - Illegality.

The foundation for the procedure sanctioned by section 239, Criminal Procedure Code, is the association of two or more persons concurring from start to finish to attain the same end. [p. 333, col. 1.]

A series of acts, however, separated by intervals of time are not excluded from the purview of section 239 of the Criminal Procedure Code, provided that those jointly tried have been directed throughout to one and the same objective. [p. 333,

Emperor v. Datto Hanmant Shahapurkar, 30 B. 49; 7 Pom. L. R. 633; 2 Cr. L. J. 578, relied upon.

Four persons were discovered committing theft, They ran away and lay in wait, at a short distance, for the persons who had surprised them. When the latter passed near the spot they were attacked by the thieves, and one of them was killed by two of the latter. Subsequently three more persons came up and joined two of the thieves in beating the companions of the deceased and thereby committed riot :

Held, (1) that the riot did not form part of the same transaction with the theft and the murder, and could not be tried jointly with those two

offences; [p. 838, col. 1.]

(2) that the four persons who had gone to com. mit theft were prepared to use force in the event of any interference with them, and that the fatal assault on the deceased was made simply because he and his companions had prevented the thieves from taking away their booty; [p. 333, col. 2.]

(3) that the two acts were connected together by proximity of time, community of criminal intent and the relation of cause and effect, and they constituted the same transaction: [p. 333, col. 2.]

(4) that, therefore, they could be tried jointly at

one trial. [p. 338, col 2.]

The disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by section 537 of the Criminal Procedure Code, nor can it be cured by the consent of the accused. [p. 333, col. 2.]

Subrahmania Ayyar v. King-Emperor, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.), follow-

ed. Criminal appeal from an order of the Sessions Judge, Jhelum, dated the 5th September 1921.

Mr. Philip Morton, for the Appellants, Mr. H. A. Berbert, for the Respondent.

JUDGMENT .- After hearing the learned Counsel for both the parties, we are of opinion that the trial held by the Sessions Judge is bad for misjoinder of charges and must, therefore, be quashed. The relevant facts, as alleged by the procesution, are briefly as follows .- On the night of the 22nd/23rd February 1921, Diwan Shab, upon receiving the information that four persons, tiz, Hakam Shah, Bugga Shah, Sharaf Shah and Walli Shah, had gone to out gram in his field, went out in purenit along with three persons. When Diwan Shah and his companions were at a distance of about 10 karams from the field, the four thieves who had been outting the gram left the field away. Thereupon Diwan Shah and his party collected the out gram and started back for the village, two of his companions carrying two bundles of gram. They had not gone very far, when the four thieves suddenly sprang up attacked them. Diwan Shah, who leading, fled into a field followed by Hakam Shah and Bugga Shah who knocked him down and beat him to death. Two of Diwan Shah's companions attempted to go to his resoue but they were prevented by Sharaf Shah and Walli Shah who attacked them with sticks. Thus beffied, the three comrades of Diwan Shah ran towards the village, and they were pursued

MUHAMMAD SHAH W, EMPEROR.

by Sharaf Shah and Walli Shah. After they had gone about 400 karams they were met by the three accused, Hussain Shah, Waleyat Shah and Diwan Shah, who were coming up from the village with sticks in their hands. They were thus caught between two parties and were beaten by them with sticks.

Now there can be no doubt that three different offences were committed; namely, theft, murder and riot; and the question for consideration is whether they constituted one transaction within the meaning of section 239, Criminal Procedure Code. facts, as stated above, make it perfectly clear that the three accused, namely, Hussain Shab, Walayat and Diwan Shah, who same up from the village and joined with Sharaf Shah and Walli Shah in attacking the companions of the deceased Diwan Shah had nothing whatever to do with the offences of theft and murder. The foundation for the procedure sanctioned by section 239. Criminal Precedure Code, is the association of two or more persons concurring from start to finish to attain the same end, and it is obvious that the three accused, who came from the village did not in any way associate with Hakam Shah and Bugga Shah who did not participate in the riot, We have, therefore, no hesitation in holding, and indeed the learned Government-Advocate admits, that the riot did not form part of the same transaction with the theft and the murder.

The question whether the offences of theft and murder were committed in the same transaction is a debatable one. It is to be observed that the same four persons are accused of both these offences, which, however, were not committed at the same place and were also separated by a short interval of time. But we have no doubt that a series of acts separated by intervals of time are not excluded from the purview of section 239, Criminal Procedure Code, provided that those jointly tried have been directed throughout to one and the same objective, Vide Emperor v. Datto Hanmant Shahpurkar (1). Indeed, it often happens that two or more offences, which are admittedly committed in the same transaction,

are separated by intervals of time; and it is nowhere laid down that unless the offences are committed at one and same time, they cannot be included in one indistment. It seems to us that the four persons, who had gone to commit theft, were prepared to nee force in the event of any interference with them, and there can be little doubt that the fatal assault on the deceased Diwan Shah was made simply because he and his companions had prevented the thieves from taking away their booty. The two acts were connected together by proximity of time, community of griminal intent and the relation of esuse and effect, and they constituted the same transaction.

The result is that, while holding that the charges of theft and murder could be joined in one trial, we are of opinion that there should have been a separate trial with reference to the charge of riot. As laid down by their Lordships of the Privy Council in the well-known case of Eubrahmania Ayyar v. King. Emperor (2) the dieregard of an express provision of law as to the mode of trial is not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. The prosedure of the learned Sessions Judge was illegal, and that illegality could not be enred by the consent of the accused. We are accordingly constrained to quash the proceedings and, accepting the appeal, we direct the Sessions Judge to try the accused separately in the manner indicated above.

2, K, & J, P.

Appeal accepted.

(2) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C, W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C).

^{(1) 80} B. 49; 7 Bom, L. B. 634; 2 Cr. L. J. 578,

GOVIND MARTON U. BMPEROR.

PATNA HIGH COURT.
CBIMINAL REVISION NO 549 OF 1920.
January 21, 1921.
Present: - Mr. Justice Das.
GOVIND MAHTON-AccusedPetitioner

versus

EMPEROR-OPPOSITE PARTY.

Penal Code (Act XLV of 1:60), ss. 109, 3:9, 381-Theft, abetment of-Abetment, what constitutes-Criminal Procedure Code (Act V of 1898), ss. 2:6, 237, applicability of.

To sustain a conviction of abetment of theft, it must be shown that the accused was engaged in a conspiracy with the principal offender for committing the theft, the mere fact that he was standing by the principal offender is not sufficient.

The provisions of section 237 of the Criminal Procedure Code which are controlled by section 23%, only apply when, from the evidence led by the prosecution, it is doubtful which of several offences has been committed by the accused. If that evidence leads to one conclusion only the provisions of that section would not apply.

Application against an order of the District Magistrate, Dhanbad.

Mr. H. L. Nandkeolyar, for the Petitioner, JUDGMENT .- The petitioner, who was charged with having committed an offence under section 372, Indian Penal Code, bas been convicted of an offense under section 381 read with section 104, Indian Penal Jone, and has been sentenced to undergo rigorous imprisonment for one month. In my view the conviction is uncustainable on two grounds: first, on the ground that the facts found by the learned District Magistrate do not establish that the petitioner absited any offence by the principal offender, and secondly, on the ground that he should not have been convicted under section 381, read with section 109, Indian Penal Code, when he was not charged with having committed that offence.

On the first point, the evidence against him is that he was standing by the thief. Now there is no evidence at all to lead one to the conclusion that he was engaged in any compiracy with the principal offender for the doing of the theft, and I do not think that on the evidence the learned District Magistrate should have some to the conclusion that he was guilty of abotting the theft. The learned Magis.

"I cannot agree that a man who comes with a thief to steal an article and stands by to receive that article, is not aiding and abetting theft."

Now the only fact deposed to by the witnesses is that he was actually standing by the side of the man who ultimately turned out to be a thief. The learned District Magistrate has assumed that he was standing by to receive the article and that he accompanied the principal offender knowing that he was out to steal an article. I am of opipion that the conviction is unsustainable on facts.

In the next place, he should not have been convicted of an offence under section 381 read with section 109 since he was not charged with having committed that offense. I dealt with this print at some length in the one of theor ini v. Enperor (1). I pointed out in that case that "section 257 of the Criminal Procedure Code is limited by the express provision of that section only to the case mentioned in section 236," that is to say, to a case where it is doubtful which of several offences the facts which can be proved will constitute. In such a esse cestion 237, Criminal Prosedure Code, authorises the Court to convict a person for an offence with which he has not been charged but for which he might have been charged under the provision of section 236, Criminal Procedure Code. 1 pointed out that section 236 which must control section 237 only applies when from the evidence led by the prosecution, it is doubtful which of the offeness has been committed by the petitioner. Now, in this ease if the evidence which has been led by the presecution leads to one result only, it caunot, in my view, be said that it is doubt. ful which of the offences has been committed by the petitioner.

I hold that the conviction is unsustain. able and order that the petitioner be set at liberty.

W. C. A.

Rule made absolute.

(1) 51 Ind, Cas. 252; 21 Cr. L. J. 41.

BORTI SINGH U. MAKHDUM KALWAR,

OUDH JUDICIAL COMMISSIONER'S COURT.

ORIMINAL REVISION No. 142 of 1921. November 22, 1921.

Present: - Pandit Kanhaiya Lal, ROHTI SINGH - ACCU: EU - APPLICANT

Lersus .

MAKHDUM KALWAR-COMPLAINANT
- OPPOSITE PARTY.

Criminal Procedure Code 'Act V of 1898), ss. 249, 431-Withdrawal of complaint against some accused, effect of-Revision-Acquittal-Magistrate, power of-High Court, power of.

The withdrawal of a complaint against one person out of several accused does not amount to a withdrawal of the complaint against others.

Shyam Behari Singh v. Sagar Singh, 53 Ind. Cas. 824; 1 P. L. T. 82; 20 Cr. L. J. 8, 4 and Chandra Kumar Das v Emperor, 7 C. W. N. 176, dissented from.

A District Magistrate has no authority to set uside an order of acquittal by a Subordinate Magistrata in revision or to act otherwise than as provided by section 438 of the Criminal Procedure Lode. A High Court can take action of its own motion and set aside an order of acquittal and direct a re-trial.

Application against an order of the Distries Magistrate, Sultanpur, dated the 1sth August 1921 setting aside an order of the Magistrate, Third Class, Sultanpur Tahail, dated the 1st August 1921.

Mr. Niamat Ullah, for the Applicant.
Mesers A. P. Sen and S. N. Sinha, for the
Opposite Party.

JUDGMENT .- The complainant, Makh. dum, charged Jagannath bingh and three others with offences under sections 447 and 352 of the Indian Penal Code. One of the persons charged was a boy named Ankns. He subsequently filed an application, stating that as Ankus was a minor he did not want to proceed with the case against him and his name might be removed from the complaint. The Court treated the application as che for the withdrawal of a compoundable ease against Ankus and directed that he be acquitted. The other accused persons thereupon asked that the case should be treated as withdrawn against them also. The learned Magistrate, following the decision in Skyam Behari Singh v. Sagar cingh (1)

(1) 58 Ind. Cas. 824; 1 P. L. T. 22, 20 Cr. L. J.

beld that the withdrawal of the case against Ankue operated as a withdrawal of the case against the remaining accused and he acquitted them all.

Section 248 of the Code of Criminal Prosedore leys down that if a complainant, at any time before a final order is passed in any case, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his ecoplaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accu-ed. If a complaint is, however, made against several persons and the withdrawal is asked for against only one of them on some grounds which the Magistrate considers to be sufficient, it is open to the Magistrate to permit withdrawal against that person. The complainant did not intend in this case to withdraw the complaint as against the other persons and there was no anfilient reason for the Magistrate to have arquitted them without trial. The withdrawal of a complaint against one person does not amount to a withdrawal of the complaint against others for, as pointed out in Chandan v. Emperor (2), a complaint of trespass against four persons amounts really to a complaint of four sets of trespass, committed more or less simultaneously by different persons. In one sense the act complained of is a joint offence, because it is committed together or in complicity, but in another sense it constitutee separate acts of by each trespasser. In Muthia Naik v. Emperor (3) it was held that the composition of an offence with one of several persons does not effect the acquittal of others. Tho view taken in Shyam Behari Singh v. Sagar Singh (1) and Ohandra Kumar Das v. Emperor (4) cannot, therefore, be accepted.

The learned District Magistrate, who est aside the order of acquittal of the present applicants in revision, had, however, no authority to pass an order to the prejudice of the accused or to act otherwise than as provided by section 438 of the Code of Criminal Procedure. The omission to issue a notice to the accused was merely an irregularity; but he could not

^{(2) 61} Jud. Cas. 109; 19 A. L. J. 374; 22 Or. L. J. 858; 48 A. 483.

^{(8, 48} Ind. Cas. 592; 41 M. 323; 19 Cr. L. J. 178, (4) 7 C. W. N. 176.

RIGHUPAT SAHAY U. EMPEROR.

set aside the acquital. If he wanted to set aside the acquital, it was open to him to have made a report to this Court to that effect. This Court can, however, take action of its own motion and restify the error by setting aside the acquittal and directing a re-trial.

The application is, therefore, allowed, in so far that the order of the learned District Magistrate is set aside, but in the exercise of the revisional powers of this Court, the order of the Trying Magistrate is also set aside and the case is sent back to him with a direction to try it against the accused other than Ankus in the manner required by law.

J. P.

Revision accepted.

PATNA HIGH COURT.

CEIMINAL REVISION No. 547 of 1921.

December 1, 1921.

Present:—Justice Sir John Bucknill.

RAGHUPAT SAHAY—PETITIONER

EMPEROR-OPPOSITE PARTY.

Malicious prosecution - Appellate Court differing with Trial Court - Discretion, exercise of.

Although a Court directing prosecution for malicious prosecution is endowed with considerable discretion, yet it is neither safe, nor desirable, on the part of an Appellate Court to conclude malice where there is a split of opinion on the point between the First Court and itself.

Application against an order passed by the District Magistrate, Motihari, dated the 24th October 1921, reversing that of the Sub-Deputy Magistrate, Bettiah, dated the 31st August 1921.

Mesers. Shiveshwar Dayal and Brij Kishore Prasad, for the Petitioner.

Mr. Sultan Ahmad, Government Advocate, for the Opposite Party.

JUDGMENT .- This is an application in Criminal Revisional Jurisdiction made by one Raghupat Sabai under the following circumstances. He charged early in this year two men with having committed theft in his They were arrested and were convisted by the Sub-Deputy Magistrate of Bettiah; however, they appealed and as a result of their appeal the District Magistrate of Champaran came to quite a different conclusion to that which had been come to by the Sub Daputy Magistrate of Bettiah and allowed their appeal and quashed their convictions; but he did rather more than that, for he formed the opinion that the applicant had commenced these prosecution proceedings maliciously, and subsequently indeed he issued notice on the petitioner to show cause why a prosecution under section 211, Indian Penal Code, should not be instituted against him. I dare say that there may be something wrong in the applicant's behaviour, but at any rate his proceedings against the two men were of such a character that he was able to convince one Court that they were guilty, whilst another Court, which did not see the witnesses but was an Appellate Court, came to the conclusion that they were innocent. The matter is a very petty one, and where one sees split opinions of two different Tribunals, it may be taken as generally a normally safe guide to suggest that definite expressions as to the malice of either party are probably somewhat undesirable. Of course, it must be realised that in giving instructions for a prosecution to be instituted against a person on a ground that he himself instituted malicious prosecution, the Magistrate, who directs the prosecution, is endowed with considerable discretionary powers. At the same time, this Court should not hesitate to exercise discretion in its revisional jurisdiction whenever eireumstances seem clearly to justify its so doing.

I must accordingly set aside the order of prosecution on the above ground,

N. H.

Rule made absolute,

JAGARNATH DAS C. JANEI SINGH.

FRIVY COUNCIL.

APPEAL PAOA THE PACKA HIG & COJET. January 20, 1 22. Present :- Lord Backmester, Lord Carson and Sir John Edge,

Mahonth JAGARNATH DAS-PLAINTIPF - APPELLANT

versus

JANKI SINGH AND OTHERS-DIFENDANTA RESPONDENTS.

Bengal Tenancy Act (VIII of 1895), Sch. III, Art. .I 'a , applicability of-Suit to eject tenant of private land Non-occupancy tenancy, creation of.

Article 1 (a) of Schedule III to the Bengal Tenancy Act, does not apply to suits to eject persons who are not in law non-occupancy tenants [p. 31', col. ',]

The right of a non-occupancy tenant can only be acquired under Chapter VI of the Bengal Tenancy Act, and as that hapter does not apply to private (ziruat lands, no such right can be acquired in such lands [p. 310, col 1]

Therefore Article I (a) of Schedule III to the Bengal Tenancy Act would not apply to a suit by landhold r for possession brought on expiry of lease of private zirant land [p 41, col 1.]

The mere fact that a person has been for a term a tenant of private ziraat land, and has not been a raivat hilding at a fixed rate, or an occupancy tenant, does not raise any presumption that he has acquired the status or the rights of a non-occupancy tenant. [p. 841, col. 1.]

Appear trom the Full Brush decision, dated 24th July 1917, of the High Court of Judiesture at Patna, (Chamier, C. J., Mullick and Roe, JJ, Chapman and J vala Prasad, JJ. disseating) and reported as 42 Ind. Cas. 177, setting aside on Letters Patent Appel (No. 43 of 1917) the decision, dated 7th Fabruary 1917, of Atkinson, J., in Second Appeal No. 1297 of 1915, reported as 39 Ind. Cas. 339, who confirmed the decision of the Additional Subordinate Judge, Monghyr, dated 29th March 1.115, and the Munsif, Bagusarai, dated 31st March 1914.

Mr. J. M. Parith (with bim Mr. R. M. Palat), for the Appellant.

JUDGM ONT.

Sta John Engs .- This is an appeal from a decree, dated the 21th July 1917, of the High Court at Patna, which dismissed the plaintiff's suit to eject the defendant No. 1, Janki Singh, from certain land in Bihar. The suit was dismissed by the High Court on the ground that it had not been brought within time. The land in question is small in extent and in value, but the question of limitation involved is of importance in Districts to which the Bengal Tenancy Act,

1885, as amended by the Bengal Tenancy

(Amendment) Act, 1937, applies.

The land in question is within the meaning of section 1:6 of the Bengal Tenancy Ast, 1885, proprietor's private land known in Bengal as khamar, nij, or nij jote, and in Bihar as siraat, nij. sir or khamat. The plaintiff is the proprietor of the land, as was his predecessor in-title before him. Janki Singh held the land as a tenant under a lease which had been granted by the predecessorin title of the plaintiff for a term of nine years, which expired on the 31st May 1912. On the expiration of the term the plaintiff demanded possession of the land, but Janki Singh refused to quit and give up possession, hence the suit in which this appeal has arisen. The suit was brought on the 5th December 1912 in the Court of the Munsif of Begusarai, in the District of Basgalpur. The only question which it is now necessary to consider is-Was the suit brought within time? That question depends on whether the period of limitation applicable in this case is that prescribed by Article (1) (a) of Schedule III of the Bangal Tenancy Act, 1285, which for suits to eject a non-occupancy raigat on the ground of the expiration of the term of his lease," is six months from the expiration of the term, or is that prescribed by the Article 139 of Schedule I of the Indian Limitation Act, 1905, which is twelve years from the de-

termination of the tenancy. In his plaint the plaintiff alleged that the land in question was his khudkasht land, prayed for a declaration that the land was his khamut land, and that he was entitled to possession, and asked for a decree possession, and for mesne profits, In his written statement Janki Singh denied that the land was khamat khudkasht land of the plaintiff, alleged that plaintiff's elaim for a deslaration that the land was his khamat khudkasht was barred by limitation, and alleged that the land was raigati mal land in which he had a right of occupancy. It is to be noticed that Janki Singh in his written statement did not suggest that he was a non occupancy raigat or had any right of a non-occupancy raigat to resist the

plaintiffs' suit to eject him. Janki Singh

in his written statement was apparently

relying upon a failure of the plaintiff at the

trial to prove that the land was the plaintiff's

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private land as proprietor, his khamat siraat land.

The fifth issue as fixed by the Munsif was, "whether any part of the claim is barred by limitation."

In his judgment the Munsif stated that the fifth issue had been "left untoushed in arguments' by Janki Singh's Pleader, and he desided the issue of limitation against Janki Singh.

The seventh issue, which was considered by the Munsif to be the most important issue in the case, was not directed to the question of limitation, but had indirectly a bearing on that question : it was, "Whether the land in suit is the khudkasht of the plaintiff, or the raivati jots of the defendant

first party?"

The Munsif's finding on that issue was that the land in suit was "khudkasht of the plaintiff and not raigati-icte of Janki Singh. It is not quite clear what the Munsiff precisely meant by " khudkasht of the plaintif." He probably meant land cultivated by the plaintiff as his own. In the plaint the land in question was alleged to be the plaintiff's khudkasht kamat landthat is, khudk sht private land of the plaintiff as proprietor. In his observations on the sixth issue the Mansif apparently treated sirant and "khudkasht of the Maha th (the plaintiff) alone" as convertible terms. In his observations on the seventh issue the Mansif mentioned section 120 of the Bengal Tenancy Act, 1825, which relates to the recording by a Revenue Officer of a proprietor's private land (khamar khamat, siraat, etc.). On the whole, their Lordships are of opinion that the Munsif by his finding on the seventh issue meant that the land in question was the proprietor's private land (khamat, ziraat), and was not land in which Janki Singh had, or could have, a right of occupancy. The Munsif had the Bengal Tenancy Act, 18:5, before him, and he should have used the terms specified in the Act and not terms which might be ambiguous. The Munsif, on the 31st March 1914, gave the plaintiff a decree for possession, and dismissed his claim for mesne profits.

From that deeree Janki Singh appealed to the Court of the Sabordinate Judge of Monghyr on the ground that the suit was barred by limitation, and that the land

was not khamat (private, ciraat) land of the plaintiff. The plaintiff entered a crossappeal against the dismissal of his claim for mesne profits. The Additional Subordinate Judge, before whom the appeals came, found that the land was khamat land, and that Janki Singh had no right to hold over, after the expiration of the term of his lease. In his judgment he said:-

it is faintly urged that the suit is barred by limitation. But there is nothing to show that the rule of limitation of six months applies to the case. Moreover, the character of the land being khamat, no limitation arises

in the case," and he, on the 2 th March 9.5, made a decree dismissing Janki Singh's appeal, and in the cross-appeal decided that the plaintiff was entitled to mesne profit and directed the Munsif's Court to assess the mesne profits in the executing of the

decree The rule of limits ion which the Additional Subordinate Judge held did not

apply, as the land was khamat land, was that of Article 1 (a) of Schedule II of

the Act.

deeree of the Additional From the Sabordinate Judge Janki Singh appealed to the High Court at Calcutta. The appeal came on for hearing as a second apoeal before Mr. Justice Atkinson in the High Court at Patna. The only grounds of the appeal to which it is now necessary to refer are that the suit was barred by limitation; that the land in question was not khamat land, and that the Additional Subor inste Judge had erred in desreeing costs and meene profits. The ground that the land in question was not khanat land was concluded by the finding of fact of the Additional Subordinate Judge. The ground that the Additional Subordinate Judge had erred in decreeing costs and mesne profits does not appear to have been supported in the High Court. In the course of the arguments in the appeal, a decision of Mockerjee and Beacheroft, JJ., in Ganpat Mahton v. Richal Singh (1), in which they had held that Article 1 (a) of Schedule Ill of the Bangal Tenancy Act, 1c85, did apply to circut land and the decision of Woodroffe and Chaudhuri, JJ., (overruling a decision of Newbould, J., in Dwarkanuth Ohowdhury v. Toficar Rahaman arkar (2), in

(:) 33 Ind. Cas 978; 20 C. V. N. 14 at p. 18. (2) 39 Ind, Cas. 64; 20 C. W. N. 1097, 44 C. 267. JAGARNATH DAS U. JANKI SINGH.

which they had held that Article 1 (a) did not apply to khamat lands were sited. Justice Atkinson rightly regarded the deeision of Mookerjee and Beachcroft, JJ, as academical, as those learned Judges had already in the appeal before them decided that the land there in question was not ziraat land. Mr. Jastice Atkinson agreed with the decision of Woodroffe and Chaudhuri JJ., that Article 1 (a) of Schedule III did not apply to private land of a proprietor, and by desree of the 7th February 1:17 dismissed Janki Singh's appeal with costs in the High Court, in the lower Appellate Court, and in the Munsit's Court.

From that decree of Atkinson, J., Janki Singh appealed under the Letters Patent of the High Court, and as the appeal raised a question of limitation of considerable importance, it was heard by a Fall Bench of the High Court at Patos, constituted of Sir Edward Chamier, C. J., Chapman, Mallick, Ros and Iwala Prasad, JJ. Tuese learned Judges differed on the question of limitation, the Ohief Justice, Mallick and Roe, JJ., holding that Article 1 (a) of Smedule II of the Bengal Tenancy Act, 188, applied, dismissed the suit as barred by lim totion. On the other hand, Chapman and Jwala Prasad, Jl., hell that the Article did not apply. Each Judge gave his own reasons for his conclusion, and some of the judgments contain much historical information.

Although the question as to whether this suit, when it was brought on the 5:n Desember 1912, was or was barred by limitation must depend on the true construction of the Bengal Tenancy Act, 1885, as amended by the Bengal Tenacey (Amendment) Act, 1507, some historical information as to the origin and development in Bengal of rights of ocenpancy in agricultural land held by raigule year." is interesting. It appears that in the Permanent Settlement of Bengal the proprietor's private lands (zirant, demesne lands), which were kept for his own and his family's calcivation, as distinguished from his lands which were usually let to raivits, were resognised; that it seems to have been the policy of the Government for many years that no rights of osenpaney in such private lands should be

acquired by raigats, and that the Legislature for the first time by section 6 of Act X of 1959 defined how a right of occupancy could be acquired. By section 6 of Act X of 1259 it was further enseted, "but this rule (as to sequiring a right of occupancy) does not apply to khamar, nii jote, or sir land belonging to the proprietor of the estate or tenure and let by him on lease for a term or year by year" Tue Bengal Tenancy Act, 1885, repealed Act X of 1859, and by Chapter V it was enasted how rights of cesupancy could be asquired by raigats. Chapter VI apparently erested the "non-occupancy-raigats," and for the first time conferred upon him, a status and rights, but by sestion 116 of that Act it was enacted :-

"116. Nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter Vi shall apply to a proprietor's private lands known in Bengal as, khamar, niv or new ote, and in Bihar as civaat, niver or khimit, where any such land is held under a lease for a term of years or under a lease from year to year."

By section 40 of the Bangal Tenansy (Amendment) Act, 1907, section 116 of the Bangal Tenancy Act, 1885, was amended, and, as amended, it is as follows: —

"11. Nothing in Chapter V shall earfer a right of occapancy in, and nothing in Chapter VI shall apply to, lands acquired under the Land Acquisition Act, 18.4, for the Government or tor any Local Authority or for a Ballway Company, or lands belonging to the Government within a Cantonment, while end I lands remain the property of the Government, or of any Local Authority or Ballway Company, or to a proprietor's private lands known in Bangalas kha nar, nit, or nit jots, and in Binar as sirant, nit, sir or known where any each land is held ander a lease for a term of years or under a lease from year to year."

Section 45 of the Bangal Tenancy Act, 1855, which was in Chapter VI as it stood before the Amending Act of 1907 was passed, was as follows:—

"45. A suit for ejectment on the ground of the expiration of the term of a lease small not be instituted against a non-ossupancy raivat unless notice to quit has been served on the raivat not less than six months before the expiration of the term, and shall not be institut.

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ed after six months from the expiration of the term."

As that section contained a prohibition against instituting a suit unless a notice to quit had been served six months before the expiration of the term, it was properly inserted in Chapter VI and not in a Schedule of Limitations. Section 45 was repealed and the period of limitation which had been prescribed by it, was by the Bengal Tenancy (Amendment) Act, 1907, inserted in Schedule III, as Article 1 (a). As section 45 stood in Chapter VI, no one could have doubted that the non occupancy raigat to whom it referred was a person who had obtained the status and rights of a nonocenpancy-raigat by reason of his having been a person upon whom that status and those rights had been conferred by Chapter VI.

But it would appear from the judgments of the Chief Justice, and Mullick, and Roe, JJ., that those learned Judges considered that the effect of the repeal of section 45 and the insertion of Article 1 (a) in Sche dule III was to extend the limitation of six months to suits to eject persons who had not been non occupancy raigats within the meaning of section 45. It is quite elear that Article 1 (a) did not create or confer upon any one the status or rights of a nonoccupancy raigat, and did not extend the limitation of six months to suits to eject persons who had not been non-occupancyraigats within the meaning of the repealed non-occupancy-raigat of The section 45. Article 1 (a) must be a person who, before his term had expired, had acquired the status and rights of a non-occupancy. raiyat.

The erueial question in this case is—When, if at all, and how, had Janki Singh acquired before the 31st May 1912 the status and rights of a non occupancy-raiyat? He had not acquired that status or those rights under Chapter VI, as that Chapter does not apply to the private lands of a proprietor, and it appears to their Lordships that it was only under Chapter VI that the status and rights of a non-occupancy-raiyat could be acquired.

The learned Chief Justice apparently was of opinion that Jarki Singh had acquired the status and rights of a non-occupancy.

"tenant" in section 3 (3) of the Bencal Tenancy Act, 18-5, read in conjunction with section 4 (c) of that Act. As the decisions of the Chief Justice deservedly command respect, their Lordshins will now, in conclusion, refer to sections 3 (3) and 4 (c), Section 3 (3) is as follows:—

"3. 'Tenant' means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent

for that land to thet person."

That is merely a definition. That definition applied to the position of Janki Singh during the continuance of the term for which he held the land, and did not apply to Janki Singh's position after his term had expired, as, then, in the circumstances of this case, Janki Singh became a trespasser liable to be ejected.

Section 4 of the Act is as follows:-

"4. There shall be, for the purposes of this Act, the following classes of tenants (name-ly:—

"(1) Tenure-holders, including under-

tenure-holders;

"(2) raiyats, and

"(3) under raigats, that is to say, tenants holding, whether immediately or mediately, under raigats;

and the following classes of raivate

(namely':-

"(a) raigate holding at fixed rates, which expression means raigate holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity,

"(b) occupancy raivate, that is to say, raivate having a right of occupancy in the land

held by them, and

raiyats not having such a right of cosu-

pancy."

Section 4 was merely a section specifying the classes of tenants to which the Act applied: it did not confer upon any tenant a status or ary right, that, was done by Chapters III, IV. V, VI and VII. Sections 3 (3) and 4 did not separately or conjointly create or confer upon any one any status or any right. With reference to (0) and (b) of section 4 the Chief Justice correctly said that Janki Singh was not a raiyat holding at a fixed rate or an occupancy raiyat, and then continued: "Prima facie he was a non-occupancy raiyat." But the Chief Justice did not suggest how or when Janki Singh

BROBA PARASERAM U. KASHIRAM TOTARAM.

had obtained the status and any right of a non-occupancy raigat in the land in ques-The mere fact that Janki Singh bad been for a term a tenant of private land (riract land) of the plaintiff and had not been a raignt holding at fixed rates or an occupancy raigat did not raise any presumption that he had asquired the status or the rights of a non-occupancy raigat. It is obvious from a passage which occurs towards the conclusion of his judgment that the Chief Justice doubted that it had been intended that Article 1 (a) of Schedale III should apply to such a case as this. passage is as follows: -

"I think it is doubtful whether the Legislature intended by the amendments made in 1967 to compel a landlord to sue for ejectment of a tenant of his private land within six months of the termination of the lease held by the tenant, and it may be that the result of holding that a raigat of siruat land is or may be a non-occupancy raigat will be that landlords will be placed in a less favourable position than the framers of the Act intended, but we must take the Act as we find it, and on a consideration of the Act, as it now stands, it appears to me that the only possible conclusion is that Article 1 (a) of Schedule III applies to such a suit as the one now before us."

Their Lordships are of opinion that Article 1 (a) of Schedule III of the Bengal Tenancy Ast, 18:5, does not apply to suite to eject persons, who were not in law non-oscupancy raivate of the land, and consequently does not apply to this suit, and that the suit was brought within time, and they will humbly advise His Majesty that this appeal should be allowed: that the decree of the High Court of the 2 tth July, 1917, should be set aside with sosts; and that the decree of the 7th February 1917 should be restored. Janki Singh must pay the costs of this appeal.

. N. H.

Appeal allowed. Solicitors for the Aprellant .- Mesers, T. L. Wilson & Co.

BOMBAY HIGH COURT. SECOND CIVIL APPEAL No. 153 OF 1921. November 28, 1921.

Present: -Sir Norman Maeleod, Kr., Chief Justice, and Mr. Justice Shah. EKOBA PARASHRAM AND OTHERS-DAFENDANTS-APPELLANTS

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KASHIRAM TOTARAM-PLAINTIPP -BESPONDEST.

Hindu Law-Inheritance-Sons of same father-Sons of same mother-Futher different-Sons, status

Under the Hindu Law of Inheritance sons of the same father are regarded as brothers, a distinction being made between sons by different mothers. But sons of the same mother by a different father, though born of the same womb belong to a different family, and as such are outside the category of the class of heirs under the heading of 'brothers.' [p. 84?. col. [

Therefore, according to the Hindu Law a brother by the same father though by different mother is entitled to succeed in preference to a brother by the same mother but by a different father, as such a

brother has no claim. [p. 342, col. 1.]

Second appeal from the decision of the Assistant Judge, Khandesh, in Appeal No. 586 of 1918, confirming the decree passed by the Second Class Subordinate Judge at Amalner, in Civil Sait No. 643 of 1917.

Mr. Coyares, (with him Mr. F. B. Firkar for Mr. P. V. Ni sure), for the Appellante.

Mr. Patwardhan (with him Mr. D. C. Virkar), for Respondent No. 4.

JUDGMENT.

SHAH, J .- In this appeal we are concerned with the property of Jairam. the son of Ramji by his first wife Sadi. Ramji re married and had a son Totaram by his second wife who also was named Sadi. Totaram is the plaintiff and claims the property of Jairam as his heir. The first wife of Ramji was divorced by him: and she re-married one Parsharam; the had two sons by her second husband. The defendant No. 1 is one of these sons and the other defendants are the sons of the other son. They elaim the property of Jairam as representing the brothers of Jairam born of the same mother. It seems to me clear on these facts that, according to Hindu Law, the sons of Parshram belong to a different gotra altogether, and can have no slaim as brothers to the property of Jairam, in preference to the claim of the plaintiff, who is admittedly the half-brother

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of Jairam. The lower Courts have rightly disallowed their contention. Before us a feeble attempt has been made to suggest that the word * * (sodara) used in the Mitakehara is indicative of the brothers born of the same mother, though rot the same father, I do not think that in the Mitakshara, Chapter II, section IV, paragraphs 5 and 6 (Stoken' Hindu Law Borks, page 445) where the subject of the brother's right to inheritance is dealt with, any thing beyond the difference between brothers of the whole blood and brothers of the half blood is indicated. The brothers there referred to are all sons of the same father The contention of the appellants seems to me to be opposed to the basis principles of Hindu Law as to inheritance, and there is no provision in the Mitaksbara or elsewhere for treating the sons born of the same mother after ber re marriage being treated as brothers born of the same womb for the purpose of inheritance so as to be included in the meaning of the word * * (bhratarah) used in the texts. For the purpose of inheritance, sons of the same father are brothers and there is a distinction made between sons by different mothers. But the sons of the same mother by a different father though born of the same womb belong to a different family and as such are entirely onteide the eategory of the elass of heirs under the beading of 'brothers'. It is not so much the meaning of the word * * (sodara) as the context, coupled with the basic principles of Hindu Law, that is against the defendants' contention. I have no hesitation whatever in holding that the view taken by the lower Courts is correct. The appeal must, therefore, be dismissed with costs.

Macleon, C. J .- I agree.

W. C. A.

Appeal dismissed.

APPEAL FROM ONIGINAL ORDER NO. 47 OF

June 15, 1920.

Present: - Sir Asurosh Morkerice, Kr., Asting Chief Justice, and Justice Sir Errest Fietsher, Kr.

HURMUKHROY RAM CHUNDER

ver sus

THE JAPAN COTTO V TRAD NG Co., LD.
-RESPONDENTS.

Arbitration-Jurisdiction-Award based on grounds some of which not justifiable, effect of.

Where the sil of arbitrators is invoked on grounds some of which do, while the others do not, justify the exercise of their jurisdiction and it cannot be held that the axarl proceeds solely on those grounds which entitle the arbitrators to exercise their jurisdiction, the award is null and void on the prin iple that if the bad is not separable from the good, the whole is bad [p. 347, cols 1 & 2.]

Appeal against an order of Mr. Justice Greaves, dated the 8th March 192).

Sir A. Chaudhury and Mr. M. N. Bose, for the Appellants.

Mr. A. N. Chaudhury, for the Respondents.

JUDGMENT.

from a judgment of Mr Justice Greaves, in which he has held, on an application by the respondents, that the award made against them by the Bergal Chamber of Commerce Arbitration Tribunal on the 18th July 1919, at the instance of the appellant, is rull and void. The contract between the parties was under on the 1st August 1918 for the sale of '19 bales of theeting No. 3841, 36 inches by 38 yards at Re. 1912 0 per piece; shipment November and December 1918, delivery within 60 days from the date of arrival, payment cash, 2 months' late shipment accepted."

The contract contained an arbitration clause in these terms: "Any dispute as to damage, difference, inferiority, short quantity or measure or defect or amount of allowance to be referred, at seller's option, to the Bengal Chamber of Commerce or other Arbitration Tribunal as specified thereunder." The question of the true scope of this clause came up for someideration by this Court in the case of Chandmull Goneshmull v. Nirron

BADHA BAN U, KRUSHI BAN.

Munkwa Kabushiki Kaisha (1). We were then disposed to hold that Mr. Justice Greaves had placed an unduly narrow construction upon the arbitration clause, especially as to the meaning of the words "difference" and "inferiority." In that case, however, it transpired that there had been no dispute between the parties euch as would entitle one of them to invoke the aid of the arbitration slause. In the care before us, the buyer appellant had the matter referred to arbitration and his grounds of complaint were stated in these terms : " That the goods are not in terms of the contrast and are not covered thereby. All these goods and similar goods were originally sold by the importing firm to Sakdeo Ramprosad (their biniage' firm); after such sale, how can the importing firm sell these goods to other parties, treating such goods as the property of the importing firm ? Correct shipments are not proved and it is not proved that the quantity of goods sold here, had been purchased and provided for in Japan, others are in the statement bereunder." It is plain that some of these grounds of complaint do fall within the scope of the arbitration clause; but it is equally clear that the other grounds are beyond the scope of the arbitration clause. Consequently, the true position is that the appellant invoked the aid of the arbitrators on grounds some of which did, while the others did not, justify the exersise of their jarisdiction. When the matter went before the arbitrators, they delivered an award, which set out the grounds of complaint (as mentioned above) and then proseeded to formulate the desision: "We have carefully examined all evidence put before us and a vard sancelment of contract. Mesers. the Japan Uotton Trading Co., Ltd., sellers, shall pay to Mesers. Harmakhroy Ram Ohunder, bayers, the costs of this arbitration amounting to Rs. 125" It will be observed . that the award does not state either the fasts found by the arbitrators or the grounds for their decision. It is, consequently, impossible for us to hold that the award proceeded solely on those grounds which entitled the arbitrators to exercise their jurisdiction under the arbitration clause, and not on any of the grounds which did not afford a basis

the feet that the complaints, as summarised by the appellant, are all set out as a preface to the award, indicates, prima facie, that the award is based on all the grounds. In these circumstances, when we cannot hold with certainty that the arbitrators acted exclusively on grounds within their jurisdiction, we must apply the principle that if the bad is not separable from the good, the whole is bad, and pronounce the award null and void: Skipworth v. Skipworth (2), Storke v. De meth (3), Buccleuch v. Metropolitan Board of Works (4), Thorp v. Cole (5).

The result is, that the decree made by Mr. Justice Greaves is affirmed and this appeal

dismissed with costs.

FLETCHER, J.—I agree.

J. P.

Appeal dismissed.

(2) (1843) 9 Beav. 135; 50 E. R. 294. (3) (1738) Willes 66; 12 E. B. 1059.

(4) (1870) 5 Ex. 22: affirmed on Appeal (1871) 5 H. L. 418: 41 L. J. Ex. 187; 27 L. T. I.

(5) (1835) 2 C. M. & R. 867; 4 Dowl. 457; 5 L. J. (N. 8.) Ex. 24; 5 Tyr, 1047, 41 R. R. 738; 150 E R. 158.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1125 OF 1918.

December 6, 1921.

Present:—Mr. Justice Obevis and

Mr. Justice Campbell.

RADHA RAM AND OTHERS—PLAIRTIPES—

APPELLANTS

DETEUS

MHUSHI RAM AND ANOTHER—
DEPENDANTS—RESPONDENTS.

Hindu Law - Widow - Alienation - Accessity - Maintenance-Reversioners when bound.

Where a Hindu widow, knowing that she has not sufficient income to maintain herself, so improves the estate, by selling the land, as to provide sufficient for her own maintenance the arrangement is not merely a prudent arrangement but a necessary one, and is binding on her husband's reversioners, [p. 344, col. 2.]

Second appeal from a decree of the District Judge, Amritsar, dated the 21st January 1918, affirming that of the Subordi-

RADHA RAM C. KHUSHI BAM.

nate Judge, Second Class, Amritsar, dated the 13th August 1917.

Bakhshi Tek Chand, for the Appellants.

Dr. Gokal Chand Narang and Lala Bakhshi

Ram, for the Respondents.

JUDGMENT .- The plaintiffs in this case are collaterals of Sukbu Mal whose widow, Musammat Jas Kaur, has sold the land in suit for Ka. 2,000. The plaintiffs ask for a declaratory decree to protect their reversionary rights alleging that the sale was not for consideration and necessity. The land was sold on the 8th May 1915. The saledeed mentions that R . 465 had been received in advance and that the remaining Rs. 1,535 were to stay in deposit with the vendee to be taken later on for purebasing a house. As regards consideration there is the finding of the District Judge that receipt of Re. 465 is proved. As regards the remaining Rs. 1,535 there is really no dispute, as we find that on the 9th July 1915 Musammat Jas Kaur bought a house from one Nathu for Rs 2,300. She paid him Ra. 1,600 cash and, as she had no more money with her, she mortgaged the same house with possession on the same day to Nathu Mal for Ra. 700. Later on, on the 17th November 19 5, she bought another house from one Doanwant Singh for Rs. 1,-00, but instead of paying him in each she gave him the equity of redemption in the house which she had bought from and subsequently mortgaged to Nathu. This house which she bought from Dhanwant Singh she lets out to tenants. The lower Courts have dismissed the plaintiff's elaim holding that the alienation was for necessity. The plaintiffs have lodged a second appeal to this Court urging that a widow cannot alienate in order to provide for future maintenance or to improve the estate. Bakbshi Tek Chand argues that, before it can be held that this alienation was for necessity, it should be established by the defendants that the widow had not soffisient means to maintain herself. He points out that she owned a shop from which, according to the judgment of learned District Judge, she was realising a rent of Rs. 6 per month. He also points to the evidence of certain witnesses which is to the effect that Musam. mat Jas Kaur's husband left property worth Re. 20,000 or Rs. 30,000 and he urges that possibly she may have other land besides that now alienated or other means of income,

It has not, however, so far as we can diseaver, been stated or even suggested anywhere throughout the case that she has any property or means of income apart from the land now in suit and the shop above mentioned. Her husband died many years ago. The yearly rent of the land was only Rs. 33 while the yearly Government revenue with cesses was Rs. 25 15 0 so that there was only an annual income of Re. 12 from the land. This, added to the income of Ra 6 a month from rent of shor, gave the widow an income only of Rs. 7 s month. This was a miserably poor sum on which to maintain herself and we think the lower Courts are right in holding that the widow was forced to take some steps to provide herself with suitable livelihood. We cannot regard this merely as a case of alienating for future maintenance. We regard it as a case of a widow being forced to alienate by the fact of her income being insufficient to maintain her. It seems to us absurd to expect that a widow, knowing that she has not sufficient income to maintain herself, should be obliged first to ran into debt and then to sell the land in order to discharge the debt with interest added. If by first selling the land she ean so improve the estate as to provide sufficient for her own maintenance we regard this not merely as a prudent arrangement but also as a necessary arrangement. Then it is nrged that the widow might have sold half of the land and that it was not necessary to sell the whole. But the widow seems to have done the best she could for herself and even now she gets apparently only Rs. 6 a month from rent of shop and about Ra. 4.80 a month from the rent of the house which she has purchas. ed. We do not consider that this is at all an excessive sum on which to maintain herself.

We uphold the decision of the lower Courts and dismiss the appeal with costs,

J. P.

Appeal dismissed.

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CALCUTTA HIGH COURT.

APPEAL PROM OBIGINAL DECREE No. 153 OF
1919.

June 14, 1921.

Present: - Justice Sir Acutoch Mookerjee, Kr., and Mr. Justice Buckland. BEPIN KRISHNA RAY AND OTHERS— DEPENDANT No. 8-APPELLANTS

versus

JOGESHWAR HAY AND OTHERS-

Specific Relief Act (I of 1877), s. 31—Suit for rectification of written instrument—Plaintiff, what to prove—Mutual mistake—Mistake in mortgage-deed reproduced in decree passed on mortgage—Court, power of, to rectify decree—Notice—Knowledge—Constructive notice—Notice by title papers in one transaction, whether notice in independent transaction—Decision of Court, basis of—Lis pendens—Misdescription of property involved in litigation, effect of—Person having knowledge or notice of true state of things, how affected.

Courts of Equity do not rectify contracts, they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. [p 349, col. 2]

A plaintiff who seeks the assistance of a Court under section 31 of the Specific Relief Act for the rectification of a written instrument must clearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing this did not express or give effect to the agreement, it being immaterial by whom the actual oversight or error was made which caused the expression to be wrong. [p. 349, col. 2; p. 351, col. 2.]

It may or may not be that a mutual mistake of the agents of the parties is always necessarily a mistake of the parties, but undbubtedly this is the case where the error is committed by a writer who acted as common agent of both parties in drafting the instrument [p. 35, col. 1.]

A decision of a Court should rest, not upon suspicion but upon legal grounds established by legal testimony. [p. 262, col. 1.]

The conception of notice was introduced into law and the rules concerning it were established from considerations of policy and expediency based upon the common experience of mankind [p. 852, col 2.]

Notice, even when actual is not necessarily equivalent to knowledge, but the same effects must be attributed to it which would naturally flow from knowledge [p. 352, col. 2]

Whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice and regulate the mode of its being given and received there is no longer

any need of invoking the legal conception of notice, the rules concerning it no longer apply, the very fact for which it is intended as a substitute has been more accurately accomplished in another manner.

[p. 35?, col. 2.]

Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction, in which the instruments containing the recitals are not necessary to his title but he is charged constructively with notice, merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link tonsequently, when one is purchasing a particular pice of real estate, and his title-deeds recite a charge upon, or equitable interest in another piece in favour of a third party, such recitals would not affect him with notice of such charge or interest in the event of his subsequent purchase from the holder of the legal title to the other property. [p. 3 in, col 1.]

If there is a mutual mistake in a mortgage in the description of property and the same mistake is reproduced in the decree passed in a suit upon the mortgage, equity may go back to the original transaction and re-form both the mortgage and the decree so as to make them conform to the intention of the parties concerned [p. 855, col. 2.]

In the case of a mortgage suit the lis pendens does not terminate till the security has been realised for the satisfaction of the judgment-debt. [p. 3:6, col. 1.]

The principle that misdescription of property involved in a litigation is sufficient to render the doctrine of lis pendens inapplicable cannot be invoked by a person who has either knowledge or notice of the true state of things. [p. 356, col. 2.]

Appeal from an original decree against the decree of the Additional Subordinate Judge, Hooghly, dated the 3rd March 1919.

Babus Dwarka Nath Chuckerbutty and Kali Kinkar Chuckerbutty, for the Appellant.

Babus Ram Ohunder Mazumdar, Rupendra Kumar Mitter and Menmohan Bose, for the Respondents.

JUDGMENT,

Mooseries, J.—The subject matter of the litigation which has culminated in this appeal is a share of an estate which bore Tarzi No. 93 on the revenue roll of the Collector of Hughli about the middle of the last century and was held by two proprietors, Ramsundar Bose and Harachandra Bose. The amount of revenue originally payable was fixed at Rs. 2,998 1 10; this was subsequently reduced to Rs. 2,971-1-11

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when part of the estate was acquired for public purposes under the Land Acquisition Act. On the 29th September 1864, upon an application made under section 10 of Ast XI, 1859, the share of Harabardra B sa which amounted to 8 as. 16 gds. of the entire estate (treated as 16 as.) was formed into a separate account and was described in the books of the Collector as Tazzi No. 93A with proportionate amount of revenue payable fixed at R. 1,548 15.5. Thenseforward Tazzi No. 93 became what is termed the residuary share and included only a 7 as. 4 gds. share of the original estate which was vested in Ramsundar Bose. To put the matter briefly, before the separate account had been opened under section 10 of the Revenue Sale Law the expression Tauzi No. 93 would be the fitting description of the entire estate, but since the opening of the separate account was sanctioned by the Collector, the term Tanzi No. 93 could be appropriately used to specify only the residuary share 7 as 4 gds. of Ramsundar Bose, while the term Tatzi No. 93A could be properly used to designate only the separated share 8 as. 16 gds. of Harachandra Bose. It is necessary to mention at this stage that Harashandra Bose left foor sons, Kailas Chandra, Makhan. lal, Benilal and Brajalal, each of whom inherited one-fourth of his properties, that is, each took a 2 as. 4 gds. share out of the 8 as. 16 gds. share which belonged to their father. It also transpires that these four brothers acquired from the represent. atives of Ramenudar Bose, I an. 13 gds. 1 ka. 1 kr. share (out of the 7 as. 4 gde. share), namely, 1 anna. 1 gd. 1 ks. 1 kr. share by a conveyance dated 19 h September 1862, an 8 gds. share by another conveyance dated 9th September 1873, and a 4 gds. share at an execution sale. Each of the four sons of Harachandra Bose thus acquired, in addition to his ancestral share, 2 as. 4 gds. in Tauzi No. 93A, one fourth of 1 anna 13 gds. 1 ks. 1 kr. share, that is, an 8 gds. 1 ka, 1 kr. share in Tauzi No. 93. The shares thus vested in Benilal Bose (the third son of Harachandra Bore) in the two Taczis mentioned, passed on his death to his son Ram. chardra Bose, the predecessor-in-interest of the first seven defendants in the present itigation. We row some to three tracsfers elieved by Remuliandra Bose, which are

of vital importance in the determination of the questions in controversy in this suit.

Ou the 7th February 1901, Ramohandra Bose executed in fayour of Jazatiswar Ray. the predesassor in interest of the plaintiffs in the present lingation, a mortgage-bond to secure a loan of Ra 5,999; the property hypotherated was described as his own share of 2 as. 4 ada, which his father had possessed in "T.z: No. 93." It will be observed that, although the share inherited by the mortgagor from his father was originally included in Tacz: No. 93 (which comprised the whole estate), at the date of the mortgage that Taczi had been broken up into two fragments, namely. Tauzi No. 93A (which was the separate erede larteerna ent beholeni bna toncoca of the mortgagor) and Tauzi No. 93 (the residuary estate which insluded only the share of Ramehandra Bose). Consequently, if what was intended to be morrgaged was the ancestral 2 as. 4 gds. share of the mortgagor, the description that it was a share of "Tanzi No. 13" (which, at the date of the transaction, had not the same connotation as it had prior to the opening of the separate assount) might well lead to confusion: -indeed, as will presently appear, this has been the root of the present litigation.

The next dosument executed by Ram. chandra Bose which deserves attention is a conveyance dated the 11th April 1911, in favour of Bipin Krishna Ray, the eighth defeudant in the present litigation. Tais deed of absolute sale recites in full the history of the estate No. 93 and explains how the separate account Tabzi No. 93A was carved thereout and the residuary es. tate Tanzi No. 93 was brought into exist. ence. The document not only sets out the enecessive steps whereby the vendor had acquired an in erest in both the Tauzis,in the former by right of inheritance and in the latter by right of purchase, -but further mentions that on the 20th April 1858, a paini settlement was taken by Benilal Bose (one of the representatives of Harashandra Bose, the bolder of the separate account Tauz: No. : 34) in respect of 1 anna 1 gd. 1 ka. 1 kr. share out of the 7 as. 4 gds. shere which constituted the residuary estate; this lease, though taken in the name of Benilal Bose, was appaBEPIN ERIBHNA RAY D. JOGESHWAR RAY.

rently for the benefit of himself and his three brothers. The deed finally resites two insumbraness created by the vendor, namely first, a simple mortgage to Jagadiswar Kay of the 2 as 4 gds. share in. berited by him from his father and somprised in Tarzi No. 93A, and, secondly, a eand tional mortgage dated 14th November 1909 in favour of J. F. Danean of Calcatta, with respect to an 8 gds. 1 ks. 1 kr. share of his Zamirdari interest and 5 gds. I ks. I kr. share of his pains interest; these, as we have seen, were comprised in the residency estate Tauzi No. 93. conveyance, after these recitals, proseeds finally to transfer to the purchaser, for a consideration of Rs. 1,000, the Zamindari right in 8 gds. 1 ks. 1 kr. share of the original Tauzi No. 97, deducting the 2 as. 4 gds. share out of the 8 as, 16 gds. share of Tauzi No. 93A, and the patri right in the 5 gds. 1 ks. 1 kr. share, together with a 2 as. 17 gds. 2 ks. 2 kr. share in certain resumed Chankidari Chakran (service) lands. It is plain from the elaborate resitals in this document that the vendor did not keep back from the purchaser any relevant information relating to the history of the title to the estate conveyed by him, and the purchaser was apprised how the original Tanzi No. 53 had been broken up into separate assount, Tauzi No. 93A, (which was subject to the mortgage in favour of Jagadiswar Ray) and the residuary estate Tanzi No. 93 which was transferred in part to the purchaser, subject to the pathi lease in favour of Benilal Bose and the mortgage in favour of Daugan.

The third document executed by Ramchandra Bose which requires examination
is a conveyance dated 19th September
1911, in favour of Bipin Krishna Ray, the
eighth defendant in this suit and the
transferes under the conveyance dated 11th
April 1911, whose provisions we have just
analysed. This second conveyance purported to transfer the 2 as. 4 gds. share
inherited by the vendor from his father
and included in the separate account recorded as Tauzi No. 93A comprising the
8 as. 16 gds. share originally held by
Harachandra Bose (the grandfather of the
vendor) The consideration was stated to
be Rs. 5,000 and the vendor declared that

he had not ensumbered the subject matter of the sale by mortgage or otherwise. This is remarkable in view of the statement in the previous conveyance of the 11th April 1911, that this ancestral share of 2 as. 4 gds. had been mortgaged with Jagadiswar Ray. We shall now proceed to describe the succession of events which have brought the contesting parties into Court.

On the 13th August 1909, the executors to the estate of Jagodiswar Ray (who had taken the mortgage of the 7th February 19.3), instituted a suit against the mortgagor Ramonandra Bose to enforce the security. The original mortgage bond was filed along with the plaint and in a schedule thereto the properties bypotheeated were described as appertaining to lot Srirampore "bearing Tauzi No. 93, of the 16 as. share thereof defendant's own share is 2 as. 4 gds. and the proportionate annual revenue Rs. 412 for the as. 4 gds. share is payable into the Collectorate," as the annual revenue of the said mahal is Rs. 2,972-1-10. payable into the Collectorate of Hughli. The snit was not defended, and on the 16th December 1509, the usual mortgage. decree was made, directing the sale of the mortgage properties; the description sopied from the mortgage deed and incerted in the schedule to the plaint was re-produced in the schedule to the decree. The decree. holders applied in due course for execution of the mortgage decree, the sale proclamation was issued and the bid of Rs 5.000 offered by the desree holders assepted on the 18th September 1911. At that stage, the decree-holders appear to have discovered that the property sold had been described in the sale proelamation as Tauzi No. 93 and they seem to have apprehended that this might lead to future dispute as to what had actually been sold. They did not accordingly deposit the poundage fee and applied to the Court to re sell the mortgage property after a fresh sale proclamation bad been duly pablished. The petition embodied the following prayer:

Harachandra Bose (the grandfather of the "Be it declared that the property which vendor) The consideration was stated to had been mortgaged by the judgment. be Bs. 5,000 and the vendor declared that debtor was a 2 as. 4 gae, share of Tarsi.

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No. 93 of the Collectorate of this District and the judgment-debtor having opened a seperate account, the said 2 as. 4 gds. share is now included within Tauzi No. 93 A. For this, the above 2 as. 4 gds. shase of Tanzi No. 93 A belonging to the judgment debtor is liable to be sold by austion for the mortgage debt. The deeree. holders pray that the sale proclamation to that effect may be published." the 27th Ostober 1911 the judgment. debtor ledged his objection against the issue of a fresh sale proslamation in an amended form and urged that as Tanzi No. 93A had been formed, not after but before the mortgage, the proposed amend. ment would be contrary to the terms of the mortgage-decree which was in exact conformity with the mortgage-deed, whereby the mortgagor had hypotnessted, not his interest in Tanzi No. 93 A but only such interest as he possessed at the time of the transaction in the residuary estate Tauzi No. 93. On the 3rd February 1912 the matter same up for consideration before the Execution Court. Meanwhile, the mortgagor had, as we have already seen, executed in favour of Bipin Krishna Ray the conveyance of 19th September 191: which purported to transfer to him the 2 as. 4 gds. share of the vendor in Tanzi No. 93A deseribed as free from eneumbrances. Bapin Krishna Ray accordingly intervened in the execution proceedings; he contended that his position could not be prejudised by a summary order for amendment of the decree and the sale proclamation, and claimed the protection accorded to a bonz file purchaser for value without notice. The Execution Court held that the remedy of the decree holders was to obtain a rectification of the mortgage instrument and of the mortgagedeeree and that an amended sale proclamation could not be issued until such rectifisation had been made. The result was on the 3rd February 1912 the Subordinate Judge dismissed the application for sale of 2 as. 4 gds. share in Tauzi No. 93 A on the basis of an amend. ed sale proclamation. On the 27th Feb. ruary 1914 the executors to the estate of the mortgagee instituted the present suit for rectification of the mortgage dated 7th February 1903, and for inci-

dental reliefs. The first seven defendants were the representatives of the mortgagor, Ramohandra Bose, who had died in the interval in the early part of the year 1913, and the eighth defendant was Bepin Krishna Ray who had taken a conveyance from the mortgagor on the 1th September, 1911. The representatives of the mortgagor did not enter appearance and the claim was contested by the eighth defendant alone. The nature of the objections raised by him are indicated in the isages which were framed in the following terms:

I. Is the suit maintainable in its present form and have the plaintiffs any cause of action for the suit?

2, is the suit within time?

3. Is the suit bad for misjoinder of parties and esuses of action as well as non-joinder of necessary parts?

4 Are the plaintiffs estopped from assert.

ing any lian on Taozi No. 93A?

5. Was the purchase by defendant No. 8 bonz file and for valuable consideration and are the plaintiffs estapped from questioning the validity of his purchase?

6. Was the mortgage of the 24th Magh 1309 legally executed and for valuable consideration and was Tauzi No 93A mortgaged or intended to be mortgaged by the said deed, and was the defendant No. 8 aware of the said mortgage?

7. Has the plaintiffs' lien been merged in the mortgage-deed and has the lien been extinguished by the sale in execution of

that decree?

8. Can the plaintiffs get a decree for rectification as prayed for ?

9. What relief, if any, are the plaintiffs

entitled to P

The Subordinate Judge who tried the case in the first instance dismissed the suit as barred by limitation and did not express an opinion upon the merits. Upon appeal to this Court, Fletcher and Huda, JJ., held that as the question of limitation was not apparent on the face of the record, the case should go to trial on all the issues that had been framed in the suit between the parties. The appeal was accordingly allowed and the case was remanded for reconsideration. The Subcrdinate Judge has now held that the 2 as, 4 gds. share of Ramehandra Bose which at the date of the mortgage

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transaction was comprised in Tauzi No. 93A was really intended to be mort-gaged; and that the contesting defendant was not a bona fide purchaser of that share for value without notice. In this view, the Subordinate Judge has decreed the claim in the following terms:—

"It is declared that the 2 as. 4 gds. share in the Mouzas Nij Serampur, Gangarambati and Habra in lot Serampur comprised in Tauzi No. 934 of the Hughli Collectorate owned by the deseased Ramshandra Bose was charged with the principal and interest on the mortgage-bond dated 24th Magh 1309 and that the description of the propthe bond in WAR and the property really intended to be mortgaged by it was the said share in Tauzi No. 93 A: the mortgage bond and the decree in Suit No. 103 of 1909 be rectified assordingly."

The contesting defendant has on the present appeal assailed the decision of the Subordinate Judge as erroneous both on the facts and the law. On his behalf, we have been pressed to hold that there is no satisfactory evidence to show that what was intended to be hypothecated by the mortgagor and to be assepted as security by the mortgages was the 2 as. 4 gds. share held by the borrower Ramehandra Bore in the separate account Tauxi No. 93A. It has further been urged in support of the appeal that, even if the alleged contract be established, the mortgage instrument cannot be restified at this stage, after the security had merged in the decree, and the property had passed into the hands of a stranger who elaimed to hold bong fide purchaser for value without notice. The principles to be borne in mind in the determination of the questions thus raised are set out in section 31 of the Specific Relief Act:

When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing dues not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument restified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion restify the

instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value."

The first point for consideration is, whether, through a mutual mistake of the parties, the mortgage instrument in this case does not truly express their intention; in other words, the plaintiffs who seek the assistance of the Court for the restification of the written instrument must elearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing, this did not express or give effect to the agreement. As James, V. O., tersely expressed the sabstance of the matter in Mackensie v. Coulson (1) Courts of Equity do not restify contracts, they may and do restify instruments purporting to have been made in pursuance of the terms of contracts." To the same effect are the observations of Ohelmsford, L. O., in Fowler v. Fowler (2): "The power which the Court possesses of re-forming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the elearest and most satisfactory description, Lord Thurlow's language is very strong on this subject; he says, the evidence which goss to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence; Shelburne v. Inchiquin (3). And this expression of Lord Thurlow is mentioned by Lord Eldon in Townshend (Marquis) v, Stangroom (4) without disapprobation. If, however, Lord Thurlow used the word 'irrefragable' in its ordinary meaning, to describe evidence which cannot be refuted

^{(1) (1889) 8} Eq. 963.

^{(2) (1859) 4} De G. & J. 250; 45 E. R. 97; 124 R R.

^{(3: (1784) 1} Bro. C. C. 388 at p 340; 28 E. R. 1166. (4 (1801) 6 Ves. 368 at p. 384; 31 E. R. 1076; 5 R. B. 312.

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or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is olear that a person who seeks to restify a deed upon the ground of mistake must be required to establish in the elearest and most satisfactory meoner, that the alleged intention to which he desires it to be made conformable continued consucrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and restifying it on the ground of mistake. In the latter case, you can only ast upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written argee. ment." The true position than is, that in every case where rectification is sought, it must clearly and satisfactorily appear that the precise terms of the contract been orally agreed upon and that the writing afterwards signed failed to be, as it was intended, an execution of such previous agreement, but, on the contrary, expressed a different contract. Tested from this point of view, the case for the plaintiffs is abundantly made out. In the first place, there is reliable oral evidence of the negotiations antecadent to the execution of the mortgage instrument, which shows that what was intended to be offered accepted as scenrity was the 2 as. 4 gds. ancestral share of the mortgagor in the original estate Tauzi No. 93 which at the time of the mortgage was part of the separate account Tauzi No. 934; oral evidence was plainly admissible for this purpose Balkishen Das v. W. F. Legge (5), Jiwraj Singhii v. Norwich Assurance Co. (6). In the second place, we have the admission mortgagor in the **сопунуваен** of the executed by him on the 11th April 1911 that he had mortgaged to Jagadiswar Roy

(5) 22 A. 149 (P. C.); 4 C. W. N. 153; 2 Bom. L. R. 523 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (... s.) 1:30. (3) 6 Bom. L. R. 853.

the 2 as. 4 gds. share obtained by him from his father in Tauzi No. 93A. In the third place, the surrounding eireum stances point to the same conclusion. the date of the mortgage, the mortgagor did not possess a 2 as 4 gds, share in what was then Tanzi No. 93, that is, the residuary estate To hold that, notwithstanding this circumstance, he professed to hypothecate a share in excess of what he owned in fact, would be to attribute to him a design to d-fraud the mortgagee; there is no indication that he harboured such intention; on the other hand, the subsequent admission contained in the conveyance of the 11th April 1911 militates against a possible theory of fraud. Consequently, if we look at the surrounding eirsum tanses existing when the contract was entered into, the situation of the parties, the subject-matter of the contrast, the provisions and expreseions of the instrument, and if, further, we call in aid the acts done under the instrument, and contemporaneous writings made between the parties near or subsequent to the time when the deed was executed, we cannot but come to the conclusion that the evidence is clear and convincing that the mortgage instrument does not correctly describe the property which the mortgagor and mortgagee agreed should be given and accepted as security. Here then is an instance, not of mistake as to the identity of the property itself, but of a misdescription of it in the written instrument. This is precisely the class of cases where re-formation is decreed, provided the mis take was mutual: Walden v. Skinner (7), Adams v. Handerson (8), and examples are by no means rare where correction has been made in the description of the premises in deeds, mortgages, conveyances, particularly mistakes in the number of the township, section, lot, block, boundary line, or street. That the mistake was mutual in this case eannot we think be seriously disputed. Both parties, as is amply clear on the evidence, had the common intention that the 2 as. 4 gis. shere of the mortgagor inherited by him from his father should be hypotheested. That share, at the time of the transaction,

^{(7) (1880) 1}G1 U S. 577; 25 Law. Ed 983. (8) (1897, 168 U. S. 573; 42 Law, Ed. 584,

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was included in Tarzi No. 93A and not in Tarzi No. S3. The writer of the deed, bowever, described it as included in Tatzi No. 93. There is no direct evidence to show how this error was brought about, nor is it recessary to indulge in epeculation on that point. The only question is, whether the mistake was mutual, that is, a mistake reciprocal and common to both parties; in other words, whether each alike laboured under the same misconcep. tion in respect to the terms of the written instrument. To put the matter consider, was there a common intention different from the expressed intention and a common mistaken supposition that it was rightly expressed. The answer must be in the affirmative; for thie, it is not necessary to hold that a mutual mistake of the agents of the parties is always necessarily a mistake of the parties; but undoubtedly it would be in the case where the error was committed by a writer who acted as common agent of both parties in drafting the instrument. The essence of the matter is that, mutuality of mistake might arise from the fact that the mistake was made by a writer who acted as mutual agent of both parties in reducing the contract to the form of a written instrument. Where there is unilateral mistake, restification is refused on the ground that, if the Court were to re-form the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing when so altered would be just as far from expressing the agreement of the parties as it was before, and the Court would have been engaged in what would be a singular task for a Court of Equity to undertake, namely, doing right to one party at the expense of a precisely equal arong to the other. such consideration obviously arises in cases of the type now before us, for it cannot be arged here that in granting relief to the plaintiff on the ground of his mistake, the Court would be imposing upon the other party the erroneous conception of his opponent. It may further be added that if the theory be adopted that the mistake was brought about deliberately by

the mortgagor, his conduct might be deemed fraudulent, so that on establishment of fraud the mortgagee might claim restification mistake or no mistake. Consequently, where the defendant is shown to have been aware not only that the instrument did not express the real agreement but also that the plaintiff was ignorant of the disererancy between the instrument and the agreement, the case is clearly one for re-formation ! Olark v. G. dwood (9), Lovery v. Smith (10), Corley v. : t. ford (Lors) (11), Tucker v. Bennett (12), there is thus no except from the consinsion that the eireum. stances of the case before us attract the operation of the rule that, in order to justify restification there must be proof of a common intention different from the expressed intention and a common mistak n supposition that the intention is rightly expressed in the instrument; it matters not by whom the actual oversight or error was made which caused the expression to be wrong.

We have next to consider, whether the Court should refuse to rectify the mortgage instrument on the ground that restification will prejudice the acquired by a third person in good faith and for value. The Subordinate Judge bas answered this question against the eighth defendant. In his view, the purchase of the mortgage property by the contesting defendant was made neither in good faith nor for value. The evidence as to the pay. ment of consideration has been placed before us and the judgment of the Subordinate Judge bas been criticised on the ground that he has rejected postive testimony on mere suspicion, a course emphatisally disapproved by the Judicial Committee on more than one ossasion; as ob erved by Sir Lawrence Jenkine in Mina Kumari Bibi v. Bijcy Bingh (13)

^{(9) (1877, 7} Ch. D. 9; 47 L. J. Ch. 116; 37 L. T. 614; 26 W. R 90.

^{(.0) (1880) 15} Ch. D. 655; 49 L. J. Ch. 809; 43 L. T. 240; 28 W. R. 479.

^{(11) (1557) 1} De G. & J. 238; 26 L. J. Ch. 865; 3 Jur (N. s.) 1275; 5 W. R. 646; 44 E. R. 714; 118 R. R.

^{(12) (1888) 88} Oh. D. 1; :7 L. J. Ch. 507; 58 L. T. 650.

^{(13) 40} Ind. Cas. 242; 1 P. L. W. 435; 5 L. W. 711; 82 M. L. J. 4 5; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 478; 44 C. 662; 44 I. A. 73 (P. C.).

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and by Lord Shaw in Muhammad Mahbub Ali Khan v. Bharat Indu (14), the decision of the Court should rest, not upon suspicion but upon legal grounds established by legal testimony; this follows the earlier dicta of Lord Westbury in Steemanchunder Dey v. Gopaulchunder Chuc erbutty (15) and Lord Hobbouse in Uman Parshad v. Gandharp Singh (16). There is sonsiderable force in this contention. The evidence of payment of consideration by cheque on the Chartered Bank cannot be brushed aside, and there is no solid foundation laid in the evidence to support the hypothesis that the purchaser received back the money from the vendor. If that theory had been satisfactorily made out, there would be no real transfer at all; the transaction could then have been branded as fictitious, brought about by conspiracy between the vendor and the purchaser with a view to throw an effective obstacle in the way of the mortgagee. But the evidence does not prove conclusively that the sale was colourable, although the genuineness of the transfer is undoubt. edly open to grave suspicion. It is need. less, bowever, to diseass further, whether the transfer was for value, because there is no room for serious controversy that the purchase cannot be deemed to have been made in good faith. There is no satisfactory evidence that the eighth defend ant made the usual enquiries at the time of his alleged purshase. We have, further, the significant fact that the conveyence which he had taken five months earlier on the April 1911 actually contained a resital that this ancestral share of Ramaheen mortgaged to chandra Bose had Jagadiewar Ray. Direct evidence is not available to prove that he remembered this recital when he took the second conveyance on the 19th September 1911. If there had been such evidence, the proof of knowledge would have been at least as effective as notice and would thus have been

(14) 53 Ind. Cas. 54; (1919) M. W. N. 507; 23 C. W. N. 321 (P. C. . (15) 7 W. R. 10 (P. C.); 11 M. I. A. 29; 2 Sar. P. O. J. 215; 1 Suth. P. C. J. 651; 20 E R. 11. (16) 15 C. 20 (P. C.); 14 I. A. 127; 11 Ind Jur. 474: 5 Sar. P. C. J. 71; Rafique & Jackson's P. C. No. 98; 7 Ind. Dec. (N. e.) 599.

completely destructive of the plea of purchase in good faith. The conception of notice was introduced into law and the rules concerning it were established, from considerations of policy and expediency based upon the common experience of mankind. Notice, even when actual, is not necessarily equivalent to knowledge; but the same effects must be attributed to it which would naturally flow from knowledge. It is treated as a representative of, or substitute for, actual knowledge, and is, therefore, in its essential nature inferior to knowledge. It necessarily follows that whenever a party has obtained a full knowledge, although not in assordance with the rules which define the nature of notice and regulate the mode of its being given and received, there is no longer any need of invoking the legal conception of notice; the rules someerning it no loger apply; the very fact for which it is intended as a substitute has been more assurately assump. lished in another manner. To som up in one statement, if the party has in any way obtained the full knowledge, those same results must necessarily and even in a higher degree, be attributed to it—the very substance itself - which are, from motives of general policy, attributed to notice as its representative and substitute. But it is not necessary in the present case to establish that the sontesting defendant had actual knowledge of the existence of the mortgage, for it is plain that the resital in the conveyance accepted by him on the lith April 1911 did in law constitute constructive notice. I am not unmindful that the conveyance of the 11th April 1911 related to a share of Tauzi No. 93 whereas the convey. ance of the 19th September 1911 was in respect of a share of Tazzi No. 93A two Tauzis, however, were not essentially distinet properties within the meaning of the well known principle enunciated by Lord Redesdale in Hamilton v. Royse (17) and quoted with approval by Smith, M. R., in Tressilian v. Oaniffe (18): "If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other

^{(17) (1804) 2} Sch. & Lef 315 (18) (1855) 4 Ir. Ch. R. 399.

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lands to which an apparent title is made, independent of that deed; the former notice of the deed will not of itself affect him in the second transaction; for he was not bound to earry in his recollection those parts of a deed which had no relation to the particular about, purchase he was then to take notice of more of the deed than affected his then purchase." The principle in essence is that notice purchaser by his title papers in one transastion will not be notice to him in an independ. ent subsequent transaction, in which the instruments containing the recitals are not nesessary to his title; but that he is charged constructively with notice, merely of that which affects the purchase of the property in the shain of title of which the paper forms a necessary link. Consequently, where one is purchasing a particular piece of real estate, and his title-deeds recite a charge upon, or equitable interest in, another piece in favour of a third party, such resitals would not affect him with notice of such charge or interest, in the event of subsequent purchase from the holder of the legal title to the other property. He is not presumed to carry the knowledge thus imputed to him in the first transaction in his memory until the second purchase has been effected. The reason and limits of this rule were lusidly put by Rogers, J, in Boggs v. Varner (19), when he was asked to receive in evidence recitals in the title papers to a different piece of property from that in suit with a view to sharge a purchaser with notice of any antecedent unregistered instru ment or an equitable interest : "The evidense would lead to dangerous consequences, for it is impossible for any one to recollest the regials in deeds under which he may elaim. Let this be held to be admissible and competent to affect a subsequent purchaser with notice, it would follow that no man can safely purchase until a most careful examination and inspection of every deed to which he may be a party and under which he claims," The case before us is obviouly distinguishable and is not affected by these considerations. Under the Revenue Sale Law, notwithstanding that a separate account has been forened, the separate account and

the residuary estate continue ultimately liable to the Sta e for the entire revenue, and in certain specified contingencies the entire estate is liable to be exposed for sale by the Revenue Authorities for the realisation of arrears. Consequently, in order to trace the history of either fragment of the estate, an examination of the antecedent dealings. in respect of both would be undertaken by the prudent investor. Thus, oridinary eireumstances, under KOOW. ledge acquired "in course of transactions with regard to either fragment of the estate may well be deemed as asquired in source of transactions with regard to the same property" or "in the investigation of the same chain of title. " The conclusion thus appears inevitable that the contesting defendant is not entitled to the protection extended to a pushaser in good faith and for value.

Finally, it has been urged, as a last resort on behalf of the contesting defendant, that even though it should be elearly established that through the mutual mistake of the parties to the mortgage contract, the instrument in writing did not truly express their real intention, the Court sannot, at any rate the Court should not, in its discretion, restify the mortgage-deed, inasmuch as a decree has already been made thereon by a competent Court. Such decree, it has been argued, has extinguished the mortgage-security, and reformation at this stage would in essense be restification of the decree of one Court by another, contrary to well established principles. In support of this agrament, reference has been made to the decisions of the Judicial Committee in Het Ram v. Shadi Ram (20) and Matru Mal v. Durg: Kunwar (21), and of this Court in adho Misser v. Golab Singh (21), Jogeswar Atha v. Ganga Bishnu (23), Chand Mea v. Asima Banu (24), Shonda Singh v. Dowlat Boy (25) and Kusadhai v. Braia

(20) 45 Ind. Cas. 718; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T 9; 28 C. L. J. 188; (19:8, M. W. N. 518; "O Bom. L. R. 793; 22 O. V. N. 10:3; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 72; 45 I. A. 130 P. C.).

(21) 55 Ind. Cas. 969; (1920) M. W. N. 338; 18 A. L. I. 346; 35 M. L. J. 419; 11 L. W. 529; 4 U. P. L. R. (P. C., 75; 22 Bom. L. R. 553; 32 O. L. J. 121; 42 A. 334; 47 I. A. 71; 27 M. L. T. 319; 25 C. W. N. 397 (P. O.).

(22) 3 C. W. N. 875.

(28) 8 C. W. N. 478.

(24) 10 C. W. N. 1024; 3 C. L. J. 43n. (25) 14 Ind. Cas. 93; 15 C. L. J. 675; 17 C. W. N.

^{(19) (1849) 6} Wa. & Sor. 478.

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Mohan (26). Not one of these desisions, it has been conceded, is directly in point, and the which evente led up litigation in each of these cases bear no analogy to those antecedent to the present suit; but an attempt has been made to invoke the aid of the general principles which, it is said, may fairly be extracted from the cases mentioned. In Het Ram v. Shadi Ram (20) Viscount Haldane observed that the effect of a decree made under section 89 of the Transfer of Property Act for the of mortgage property is to substitute the right of sale thereby conferred upon the mortgagee for his rights under the mortgage which are thereupon extinguished. This principle which was also recognised in Matru Mal v. Durga Kunwar (21) olearly does not touch the question before us, namely, the competence of a Court to direct restification of a mortgage instrument when the elements specified in section 31 of the Specific Relief Act have been established. No doubt, when such restification has been made by order of Court, what the effect thereof may be on the deeree previously made is a question which we shall presently have to sonsider. In Sadho Misser v. Gulab Singh (22) it was ruled that the only ways in which a decree may be set aside by a party thereto are by appeal, by proceedings under section 108, Civil Pro esdure Code (1882), and similar sections, and by application for review; if the deeree is not tainted by fraud, no suit lies to set it aside. In that case, an amendment had been made in the pleadings without notice to a party who had not entered appearance in the suit, and a decree was ultimately made in accord. ance with the amended pleading. The absent defendant thereupon instituted a suit to set aside the decree on the ground that as he had not been served with notice of the applition for amendment of the plaint, he was not bound by the deeree and was entitled to treat it as not affecting his rights. Trevelyan and Beverley, JJ., held that as no attempt had been made to set aside the decree as provided by law, the suit could not be maintained. In Jogeswar Atha v. Ganga Bishnu (23) it was held that a suit lies in a Civil Court to restify a mistake in a decree. It appears that in a previous mortgage suit, a property

which was correctly described in the plaint as property No. 4 was by mistake described as property No. 3 in the written statement. This property was ultimately released as to be foreelosed, but was liable described as property No. 3 in the judg. ment, and the error was reproduced in the decree. A suit was thereupon instituted for restification of the error. The Subordinate Judge dismissed the suit. On appeal to this Court Mitra, J., was pressed to follow the rule recognised in Ainsworth v. Wilding (27) and to hold that the suit could be maintained for rectification of the error. This contention was overruled. On appeal under the Letters Patent, Maelean, C. J., (Pargiter, J., concurring) reversed this decision and held that the suit lay to restify the mistake in the decree. The Chief Justice pointed out that the suit was of a civil nature within the meaning of section 11, Civil Procedure Code (1882) and was cognizable by a Civil Court, as there was no enastment in force to bar the suit, In Chand Mea v. Asima Banu (24) Ghose and Pargiver, JJ., referred to the decisions in Sadho Misser v. Gulab Singh (22) and Jogeswar Atha v. Ganga Bishnu (23), and held that it could not be broadly laid down that any error in a decree may be challenged by a separate suit. There a deeree for ejectment had been made in a suit for rent, though there was no prayer for ejectment in the plaint. The defendant applied for review of judgment, but was unsuccessful. He then instituted a suit to set aside the deeree, The Court held that, in these eireumstances, a separate suit was not maintainable to set aside a decree not tainted by fraud, obtained in the presence of both parties and apparently conclusive between them. In Bhonda Singh v. Dowlat Roy (25). Brett and Carnduff, JJ., referred to the earlier cases just analysed and held that a suit was not maintainable in a Civil Court for amending the judgment and deeree previously passed in a suit between the same parties by another Civil Court of competent jurisdiction, on the ground that a mistake had been made by the Judge in his judgment It was observed that as the and desree. Court had jurisdiction and authority to make the decree actually passed, another suit could not be instituted to set aside or modify that

(27) (1896) 1 Ch. 673; 65 L. J. Ch. 432; 74 L. T. 193; 44 W. R. 540.

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decree on the ground that the Judge had committed an error; in support of this view, reference was made to the remarks of the Judicial Committee in Srs Gopal v. Pirthi Singh (28). In Kuso that ٧. Mohan (26) Jenkine, C. J., held that though a decree can be set aside by suit on proof of fraud of the required character, a suit does not lie to set seide a decree in a previous suit on the ground that the Judge in passing that decree had made a mistake. The decision in Jojeswar Atha v. Ganga Bishnu (23) was distinguished : it was also explained that the case of Ainsworth v. Willing (27) was an instance of a consent decree and consequently belong to the class of decisions typified by Hudlersfield Banking Co. v. Lister (29) and Wilding v. Saunderson (30). These saces show that an order made in an action by consent and based upon and intended to earry out an agreement come to between the parties, can be set aside on any ground (sush as mistake) on which an agreement in the terms of the order could be set aside. But these cases do not show that a decree after contest can be set aside or rectified in a fresh suit on the ground that the Judge was mistaken though his desree accurately expressed his intention: Presion Banking Oo, v. Allsup (31), Jenkins, C. J., added that if the alleged mistake of a Judge is to furnish a disappointed litigant with a fresh starting point for keeping his opponent in Court, then his misfortune would be gravely increased to the public detriment. These principles are elearly inapplicable to eases of the type now before us. Here the question of fundamental importance, stripped of all technicalities, is, whether the mutual mistake of the parties to the mortgage transaction manifested in the mortgage deed, which has extended into judicial proceedings, automatically as it were, without mistake on the part of the Judge, is still espable of rectification. On principle, the answer should elearly be in

the affirmative, for, as Neville, J., observed in Thompson v. Bickman (32), to grant relief by way of restification where the error has erept into one document and refuse it where it is embidied in two, is inconsistent with equitable principles, for equity regards the substance rather than the form of a transas. tion. There is no substantial reason for instance, why we should not hold that where the same mutual mistake has been repeated in each one of a chain of conveyances, under such eirenmetances as to entitle any one of the purchasers to a reformation as against his immediate vendor, equity may work back through all, and entitle the last purchaser to a reformation against the original grantor. Similarly, it may be held as a general rule that if there is a mutual mistake in a mortgage in the description of property and the same mistake is reproduced in the decree, equity may go back to the original transaction and re-form both the mortgage and the decree so as to make them conform to the intention of the parties concerned; and this view was actually adopted in Balaprasad v. Kanoo (33). We do not overlook, however, that if the desree has been exesuted and title has passed to a purchaser, fresh considerations may arise and questions of some nicety which require examination from a new standpoint may prerent themselves solution. It may be contended, for instance, in such a case where the purchaser did not intend to buy land other than that described erroneously in the mortgage; that it would not be fair to restify the salecertificate. In such a contingency, comprehensive relief by re-formation of the description running through all the papers in the judicial proceeding may well have to be refused; the proper course for the party aggrieved may be to obtain re-formation of the mortgage and to institute new proceedings for the enforcement of the restified instrument. Cases of this description may give rise to questions of great complexity and have led to a marked divergence of judicial opinion in the Courts

^{(28) 24} A. 429; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118; 8 Sar. P. C. J. 293 (P. C.).

^{(29) (1895) 2} Ch. 278; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 587.

^{(30) (1895) 2} Ch. 584; 77 L. T. 57; 66 L. J. Ch. 584; 45 W. R. 675.

^{(31) (1895) 1} Ch. 141; 64 L, J. Ch. 196; 12 R, 51; 71 L, T, 708; 43 W. B, 231,

^{(32) (1967) 1} Oh. 550 at p. 562; 76 L. J. Oh. 254; 96 L. T. 454; 28 T. L. R. 811.
(38) 14 Ind. Cas. 407; 8 N. L. R. 13.

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of the United States, as is amply indicated by the notes to the decisions in Stevart v. Wilner (34), Dillart v. Jones (35), Fisher v. Villamil (36). It is not necessary, however, for our present purpose to attempt an exhaustive formulation of the prineiples which may have to be invoked when the mutual mistake has been refrom porduced the mortgage-deed the mortgage deeree and thereafter into the certificate granted on the consequent public sale. The case before us is fairly simple; the parties have not yet reached beyond the stage of the mortgage-decree and the commencement of execution proceedings thereor. We are thus not called upon to restify the sale-certificate granted to a purebaser; and it cannot be urged that a decree granting such drastic relief the eale certificate rectification of would invest the purchaser with title to property which was hever advertised, offered for sale, or sold to him, and which might have been purchased by others at a bigber figure, had it been correctly deseribed in the sale proclamation. We are sorrequently of opinion that the mortgageinstrument should be rectified and that on the basis thereof similar restification should be made in the pleadings in the mortgagesuit, in the mortgage deerse and in the proceedings for execution thereof, which a result of the suspended 8.8 order of the 3rd February 1912 and will now stand revived and after amendment will be continued in assordance with law: Ct. Shaikh Kamaruddin Ahmad v. Jawahir Lat (37), Rame:hvar Singh | Maharaja of Darbhanga] v. Honeenvar Singh (:8), As the ecutesting defendant has purchased the mortgage property during the pendency of the exention proceedings, be will be bound thereby, for in the case of a mortgage-suit the lis rendens dose not terminate till the security has been realised for the satisfaction of the judgment-debt: Sur, iram

(34) (1904) 141 Ala. 405; 39 Am. St. Rep. 33.

(35) (1902) 229 Ill. 119; 11 Ann. (as, 802.

(26) (1911) 62 Fla. 472; 29 Ann. Cas. 1003; 13 L.

R. A. (N. s.) 90.

(37) 32 I. A. 102; 27 A. 334; 1 C. L. J. 381; 2 A. L. J. 307; 9 C. W. N. 601; 15 M. L. J. 258; 7 Bom L. R. 432; 8 Sar. P. C. J. 810 (P. C.).

(35) 59 Ind. Cas. 63; 48 I. A. 17; 23 C. L. J. 109; 1 P. L. T. 731; 19 A. L. J. 26; 40 M. L. J. 1; (1921) M. W. N. 21; 25 C. W. N. 357; 13 L W. 546; o P. L. J. 132; 23 Bom. L. B. 721; 30 M. L. T. 189 (P. C.).

Marsari v. Barhanmileo 'e-sad (39), Parsotam Narain v. Chheda L. l. (40), Faiy & Husain Khan v. Munshi Prag Narain (41), Loke Nath Sahu v. Achutananda D. 18 (42). The appellant cannot have any legitimate grievance against the application of the doctrine of lis pendens because the principle of the decision in Loke Nath Sahu v. Achutananda Dass (42), namely, that misdescription of property involved in a litigation is sufficient to render the doctrine of lis pendens inapplicable cannot be invoked by a person who has either knowledge or notice of the true state of things (Bennet on Lis Pendens, pages 154, 159).

The conclusion follows that the decree made by the Subordinate Judge is substantially correct and this appeal must be dismissed with costs.

BUCKLAND, J .- I agree and bave nothing to add.

1: N. & J. P. & N. H.

Appeal dismissed.

(39) 2 C. L. J. 288.

(40) 29 A. 76; 3 A. L. J. 675; A. W. N. (1906) 283. (41) 24 I. A. 102; 29 A. 339; 5 C. L. J. 563; 9 Bom. L. B. 656; 11 C. W. N. 561; 4 A. L. J. 344; 17 M. L. J. 263 (P. C.).

(42) 2 Ind. Cas. 85; 15 C. L. J. 391.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1620 of 1920,

November 29, 1921

Present:—Mr. Justice Kumaraswami

Sastri and Mr. Justice Devadoss.

GUJJU NAGAMMA—PLAINTIFF—

APPELLANT

t: 75148

THE SECRETARY OF STATE FOR INDIA IN COUNTL. REPRESENTED BY THE COLLECTOR OF V. Z & GAPATAM, AND

Salt Act (Mad. IV of 1889), s. 11, scope of-License -Transfer, meaning of-Mortgage, validity of.

Section 11 of the Madras Salt Act, (IV of 1889) applies to transfers by way of mortgage and is not limited to absolute transfers of the entire interest of the licensee.

BEJOY CHAND MOMATAP &. KRISHBA CHANDRA MUKHERJEE.

Second appeal against the decree of the Court of the Temporary Sabordinate Judge, Vizagapatam, in Appeal Suit No. 135 of 1919 (Appeal Suit No. 341 of 1918 on the file of the District Court), preferred against a decree of the Court of the Additional District Munsif, Vizagapatam, in Original Suit No. 253 of 1917.

Mr. Y. Suryan trauana, for the Appellant. Mr. O. Madhvan Nair, Government Pleader, and Mr. B. Satyanarayana, for the Respondente.

JUDGMENT.—We are of opinion that section 11 of the Salt Act applies to transfers by way of mortgage and is not limited to absolute transfers. The word transfer is general, and there is nothing in the section to limit it to absolute transfers of the entire interest of the licensee. The fast that, as between the licensee and his transferces, section 12 protects the interests of a person who may have an interest in or lien upon such license or salt works does not affect the question as to the position between the transferces and the Commissioner.

The rules under the Salt Act framed under section 11 prohibit the licensee, on pain of termination of the lease, from assigning, underletting or parting with possession without the permission of the Commissioner; and the licenses to stain these terms. The whole policy of the Act is to give the Commissioner control as to the person who is to acquire an interest.

We are of opinion that the mortgage of the salt-pan without the leave of the Commissioner is of no effect against him, and that the suit was rightly dismissed so far as he is concerned.

The second appeal fails and is dismissed with costs of the first respondent,

M. C. P. Appeal dismisse ?.

OALOUTTA HIGH COURT.

APPEAL PROM ORIGINAL DECREE

No 31 of 19.9.

Desember 8, 1920.

Present: —Justice Sir N. R. Chatterjee

Present: -Justice Sir N. R. Chatterjes, Kr., and Mr. Justice Newbould.

Maharajadhira: Sik BEJOY

CHAND MOHATAP

BAHADUR-DEFENDANT No. 1-

APPELLANT

versus

KRISHNA CHANDRA MUKHERJEE

RESPOSDEST3.

Chaukidari chakran land—Resumption—Transfer to zemindar—Right of putnidar to hold land subject to payment of additional rent to Zemindar—Putni contract containing no reservation.

Where in a putni contract there is no reservation with regard to the chaukida-i chakran lands, they, in resumption and transfer to the zemindar under the provisions of Act VI B C of 1870, are included in the putni, and the putnidar is entitled to hold them subject to the payment of some rent to the zemindar in addition to the amount payable to the chaukidari fund [p. 359, col. 2.]

Appeal against a decree of the Subordinate Judge, Third Court, Midnapur, dated the 30th September 1918.

Bibus Bepin Behari Ghose and Sarat Kunar Mitter, for the Appellant.

Babus Satcowrip: ti Roy and Perry Mohan Chatteries, for the Raspondents.

JUDGMENT.—This appeal arises out of asuit brought by the plaintiffs, who are the putnidars of Lat Jamitta under the defendant No. 1, for recovery of certain charkidars chakran lands on the ground that the lands are included in their putni.

The lands were transferred on the 1Cth March 1915 to the defendant No. 1 (under the provisions of Act VI of 1270, B. C.) who, it appears, settled the same with the other defendants and kabuliyats were taken from some of them after the institution of the suit. The defense was that the plaintiffs were not entitled to these lands and that, at any rate, they were bound to take fresh settlement and pay additional rent for the lands.

The Court below has held that the lands were included in the putni, and that the plaintiffs were entitled to get precession of the lands without payment of any additional rept. In the result, the suit was desceed, the

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defendants being ordered to pay means profirts for a period of three years prior to the suit.

The defendant No. 1 has appealed to this Court.

The first question for consideration is, whether, under the terms of the contract between the partier, the plaintiffs are entitled to these chaukidari chakran lands.

The putni katuliyat has been placed before re. It appears therefrom that Lot Jamitta consisting of 16 Monzas was let out in putni, and that there was no reservation with regard to chaukidari chakran lands.

It is contended, however, on behalf of the appellant that it is not stated in the kabuliyas that all the lands of the Mouzah were let out in putni. But, as mentioned above, it is stated that the 16 Morzas of Lot Jamitta were granted in putni. It surely means that the whole of the Zemindar's interest in the Lot was granted in putni with the exceptions mentioned in the doomment, and the only exceptions in the document, were with regard to "tank excavations and the rent of the lands, which had by any sanad been granted by the Zemindar to other persons and with regard to gardens, Havelis and lands which were held by the estate in khas possession in the Lot." It appears, therefore, that all the lards in the Manzas of the Lot, excepting those specially mentioned, passed to the putnidar and included the chaukidari charan lande.

The learned Subordinate Judge was wrong in relying upon a passage in the kabuliy t, namely, "I shall every year separately pay the sum demanded after resumption at the Sadar of the chakran lands of the Thana Zıllab" of the under the Tabeil that chaukidari chahran holding were included in the putni. That pareage evidently refers to I hanadari lands and has nothing to do with the chaukidari chakran lands. The only matter referred to in respect of the chaukidari chakran lands is contained in the passage which runs as follows: "I shall appoint and dismiss the chaukidars and other persons employed on Police duties in your Bakehi Department whenever any such person has to be appointed or dismissed and the Sarcar shall have no concern with the matter," That shows that the rutnidar was iter glt of nominating and dismissing the che due and that there was no

reservation of the chaukidari chakran lands in the contract creating the putni, and baving regard to all the terms of the lease, we agree with the learned Subordinate Judge in holding that the chaukidari chakran lands were included in the putni.

The next question is, whether the plaintiffs, the putnidars, are entitled to have the lands only on payment of the assessment payable to the chaukidari fund, or are liable to pay some additional rent on account of the land to the Zemindar. The question no doubt should be decided having regard to the terms of the contract in each case. In the present case the contract does not deal with the question

The question has been raised and dealt with in a large number of eases. In the earliest reported case on the roint vis., Hori Naroin Mosumdar v. Mukund Lal Mundal 1), it was held that the putnidar was bound to pay to the Zemindar such rent for these lands as correspondent to the proportion between the gross collections and the putas rent formerly payable by him. It was so held on the ground that the contract between the parties that is the putni lease did not contain any stipulation as to the rent payable for the chakran lands to the Zamindar. Although, as stated above, the question is one which must be determined upon the contract between the parties, the Courts have acted upon the prirciple laid down in the case of Hari Naroin Mozumdar v. Mukud Lal Mundal (1) except so far as we can see in two cases vis., one—the case of Kass Newas Khoda v. Ram Jadu Dey (2) and another upreported case which will be referred to later. In the first case the putnidar was held entitled to possession of the chakran lands without payment of any additional rent. The judg. ment of the learned Judges who decided the case, however, preceded opon different grounds. Mr. Justice Rampini was of opinion that the case of Hari Norain Mozumdar v. Mundal (1) did not lay Mukund Lal down any general principle, that the Zeminder in that ease was in the enjoyment of the services of the chaukidari and that it was admitted that by the assessment of the chaukidars lands the hustbood of the putni

^{(1) 4} C. W. N. 814. (2) 34 C. 109; 5 C. L. J. 83; 11 C. W. N. 201.

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had increased. Mookerjee, J., observed: " If there were materials on the record sorres. ponding to what were furnished by the parties in the case of Hari Narain Mozumdar v. Mukund Lal Mundal (1), it might have been necessary to consider whether the putnidars were bound to pay the Zemindar any additional rentfor these lands," and that "the principle which determines whether additional rent is payable or not was indicated in the ease of Hari Das Goswami v. Nistarini Gupta (3). The decision of the question must ultimately depend upon the mode in which the rent was assessed at the inception of the putni. If at the time of such assessment, the profits of all the land including chakran lands were fully taken into assount, the Zemindar would clearly have no right to elaim any rent in addition to the putni rent." Mookerjee, J., in a later case held that if there is no indication in the contract between the parties that at the time of inception of the grant, the putni rent was assessed on the basis of the asset's of all the lands situated within the ambit of the putni inclusive of the chaukidari chakran lands, the putnidar should be made liable to pay some additional rept to the Zemindar on account of these lands. See Khondkar Mehdi Horsein v. Umes Chandra (4).]

A similar view was taken in Gopendra Chandra Mitter v. Taraprassana Muker ee (5) and Rakhal Das v. Madab Chandra (6).

It may no doubt be said that where the putnidar is in enjoyment of the service of the chaukidar, he alone should get the benefit of the lands when they are enfranchised because he alone loses the services. But it is pointed out by their Lordships of the Judicial Committee in Ranjit Singh Bahadur v. Maharaj Bahadur Singh (7) that at the time when the putnigrants (in that case were made, the resumption of the chaukidari chakran lands was

not even contemplated. In the present case the putni was created so far back as 1846. Under the circumstances, and in the absence of anything in the contract or any evidence to show that these chaukidars lands were taken into consideration, we are unable to hold that the putni rent was assessed after taking these lands into account.

The unreported case referred to above (Second Appeal No. 1500 of 1914) [Nalinakhya Basu v. Bijoy Chand Mahatap (2)] was desided by Fletcher and Teunon, JJ. The learned Judges held that the putnidar was entitled to the chaukidari lands without payment of any additional rent to the Zemindar. The learned Judges were of opinion that the eases on the point could not throw any light because the terms of the contract were not stated in the reports. The judgment proceeded upon the ground that the rent in the case was fixed and could not be altered. But that is so in almost every case of the putni; and although, as we have already stated, the question is to be decided upon the contract between the parties, the cases referred to by us lay down the principle, namely, that where there is nothing to show that chaukidari chakran lands were taken into account in assessing the putni rent, the putnidar must pay some additional rent for the lands. So far as that question is concerned, all the reported cases with the exception of the case of Kasi Newas Khoda v. Ram Jadu Dey (2), ere in favour of the contention of the appellant. Even in that case, as pointed out above, Mookerjee, J., does not differ from the view taken in Hari Narain Masumdar's case (1).

We do not feel pressed with the unreported judgment of Fletcher and Teunon, JJ., because there have been subsequent decisions of this Court, [see Radha Charan Chandra v. Rannit Singh (9), Khondkar Mehdi Hossein v. Umesh Chandra (4)], which have taken a view similar to that taken in a series of eases commencing with Hari Narain Mosumdar's cass (1).

Having regard to the weight of authority on the point, we hold that the Zemindar is entitled to some rent in addition to the amount payable to the chaukidari fund.

As to the amount of such additional rent, different views have been taken in different cases. In some cases it has been assessed

(8) 5 C. L. J. 30.

^{(8) 40} Ind. Cas. 895,

^{(9) 46} Ind. Oas. 187, 27 O. L. J. 592,

^{(4) 41} Ind. Cas. 964; 45 C. 685; 27 C. L. J. 494. (5) 7 Ind. Cas. 790; 37 C. 598; 14 C. W. N. 1049.

^{(6) 8} Ind. Cas. 828; 13 O. L. J. 109; 15 O. W. N. 61.

^{(7) 48} Ind. Cas. 262; 46 C. 173; 29 C. L. J. 193; 16 A. L. J. 96; 35 M. L. J. 723; 23 C. W. N. 198; 25 M. L. T. 8; 1 U. P. L. R. (P. C.) 23; 21 Bom, L. R.

^{508; 10} L. W. 83; 45 I. A. 162 (P. C.).

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after taking into the consideration the hustbool of the mahal, in some others the assets have been divided half and half. In the case which came up before Fletcher and Tennon, JJ., to which the defendant No. I was a party, one third of the assets of the chaudiars land was given to the Zamindar, and twothirds to the putnidar by the learned District indge. In this case there are no materials on the record on the point. The putnidar should be allowed something on account of collection charger, and in order to avoid further orquiry we think the putnidar might be given two thirds and the Zemindar one third, of the amount at which the lands were assessed by the Collector.

The result is that the plaintiffs are entitled to get khas presession of the chaukidari chakran lands in dispute on payment to the defendant No. I the amount of Rs. 60, annas 5, pies 3 (Rupees sixty, annas five and pies three) payable to the chaukidari fund plus Rs. 20, anna 1, pies 9 (Rapees twenty, anna one and pies nine) as additional rent on assent of these lands to the defendant ro. 1.

As regards mesne profits, the plaintiffs will be entitled to mesne profits at the rate of Rs. 40, annas 3, pies 6 (Rupees forty, annas three and pies six) per annum from the 10th. March 1915 up to the date when they get delivery of possession of the lands. disposes of one portion of the cross-objection. The other part relates to the 8 bighas odd of chau idari lands which have been left out because we understand these lands were not entered in the deed of transfer in favour of the defendant No. 1. It is stated before us that the omission in the deed of transfer has subsequently been restified on the 10th January 19.9 and that the plots Nos. 6 and 7 Schedule (G4) have now been included in the deed of trapefer. It is contended that we should take cogaizance of the facts which have happened since the institution of the suit and give a decree to the plaintiffs in respect of these lands also.

The alleged rectification of the deed of transfer, however, is said to have been made subsequent to the decision of the lower Court and the learned Pleader for the appellant is not in a position to say whether the statements are correct. Under the ciraumstances, we do not think we should deal with these 8 bighas of land. But if what is stated half of the respondent is correct, pro-

bably there will be no difficulty in the plaint.

iffe' getting settle neat of those lands on the
basis of this judgment from the defendant
No. 1.

Each party to bear his own costs in both the Courts.

H. N.

Decree varied.

UPPER BURMA JUDICIAL COMMIS-S.ONER'S COURT. SECOND CIVIL APPEAR No. 254 OF 1921. October 7, 1921. Present:—Mr. Saunders, J. C.

versus

MAUNG PO DIN-APPELLANT

MAUNG PO NYE N-RESPINDENC.

Mortgage by delivery of possession -Delivery, proof of-Redemption-Transfer of Property Act (IV of 1841), s 53-Mortgage for less than Rs. 100-Deed, registration of-Deed unregistered-Secondary evidence, admissibility of-Stamp Act (II of 1899)-Unsigned instruments, value of.

Where a mortgage is effected by delivery of possession, such delivery of possession, if proved, constitutes a valid mortgage, but before such mortgage can be redeemed, its terms must be proved.

[p. 36], col 2.]

If a mortgage is effected by means of a document, it requires registration under section 59 of the Transfer of Property Act although the sum secured is less than Rs 100, but where the document is not registered, secondary evidence of its contents is admissible, but oral evidence of its terms as it has been reduced to writing is not evidence of its contents, [p. 361, col. 2]

Unsigned Burmese instruments made since the 1st July 1839 when the Stamp Act of 1894 came into force, cannot be treated as executed for the purposes of the Stamp Law. [p. 361, col. 1.]

Mr. A. C. Mukerjee, for the Appel-

Mr. N. M. Muker, ce, for the Raspond.

that he had mortgaged a piece of land to the defendant for Re. 60 in Keeon 1280 B. E, corresponding with April May 1918. The defendant refused to allow redemption. The defendant decied the mortgage. The First Court dismissed the sait, barou appeal it was decreed by the lover Appellate Court, and the defendant now countries to this Court in association and appeal and the Court in association and the sait.

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of the Upper Barma Civil Courts Regulation. Toe plaint stated that the land was mortgaged by a doenment which was in the defendant's possession, and it asked that the defendant should be required to produse The written statement this dosument. denied the existence of any such document. The plaintiff went into the box and swore that the terms of the mortgage were recorded on a palm leaf which was not signed. The Judge of the lower Appellate Court refers to the dosument as a parabaik, but all the witnesses who mentioned it say it was a palm leaf. Three witnesses of the plaintiff say that there was a palm leaf doonment. They were not asked if it was signed but spoke of its being excented. The Judge of the lower Appellate Court assumed that it was not signed, and, in view of the plaintiff's evidence and the fact that documents written on palm leaves do not lend themselves easily to signature, and are not as a matter of fast ordinarily signed, I do not think this was an improper or unfair assumption. It was held in the case of Mi Ta v. Naga Bein (1) that a document which was not signed by the parties might still be exesuted; but the document there in question was written in the year 1256 B. E., (1894-95) when the Stamp Act of 1879 was in force, and the Judge stated expressly that he was not called upon to decide whether a similar instrument excented since the S:amp Act of 1c99 came into force was or was not liable to stamp duty. But, as was pointed out in the case of Chet Po, In re (2), the Indian Stamp Act, 1899, expressly defines the words 'executed' and 'execution" as meaning "signed" and 'signature," section 2 (12); and I have no doubt, therefore, that, as was held in that ease, unsigned Barmess instruments made sines the Indian Stamp Act, 1:99, same into force, that is, since the let July 1899, cannot be treated as executed for the purposes of the Stamp Law. I think, therefore, that the Judge of the lower Appellate Court was justified in holding that the document was admissible in evidence and was not excluded by fast that it was not stamped. The Judge of the lower Appellate Court, however, was elearly wrong in saying that registra-

tion was not required by section 59 of the Transfer of Property Act. Section 59 of the Transfer of Property Act describes the manner in which a mortgage of immove. able property can be effected, and lays down that where the sum seemred is less than Rs. 100 the mortgage must be effected either by a registered instrument, signed and attested in the manner preseribed, or by delivery of the property. If, then, the mortgage was effected decument it was necessary that it should be registered. Here, however, the plaintiff alleged that delivery of possession was made to the defendant. No document was, therefore, recessary and such delivery of possession, if proved, would constitute a valid mortgage. The plaintiff had, however, to prove the terms of his mortgage before be could recover, and here the provisions of section 91 of the Evidence Act require to be enneidered. The terms of a contract can only be proved, where they have been reduced to the form of a document, by the production of the document, or by secondary evidence of its contents in cases in which secondary evidence is admissible. Secondary evidence was no doubt admissible here in view of the fast that the plaint alleged that the document was with defendant and the defendant failed ta produce it. and indeed denied ita existence. The unregistered dosument having been drawn up after the introduction of the Registration Act did not reregistration to be admissible in evidence, as it would have required it if it had been drawn up while the Registra. tion Regulation contained the law applicable in the matter in Upper Burma. Although, therefore, the dosument did not ereate any mortgage, even though the mortgage was effected by delivery of posses. sion, yet its terms could only be proved by the document itself, or by secondary evidence of its contents. Both the Courts below appear to have treated the evidence of the plaintiff's witnesses as secondary evidence, but it appears to me that it is nothing of the sort. It was pointed out in the case of Mi Le Byu v. Mi Shwe Mya that Secondary evidense document is evidence of its contents, and

⁽¹⁾ U. B. R. (1907-09), II, Execution - Signing, p. 5, (2) \$22 Ind. Cas. 75; 7 L. B. R. 77; 7 Bur. L. T. 48.

⁽⁸⁾ U. B. R. (1907-09), II, Evidence, p. 13,

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that oral evidence as to the terms of a mertgage which have been reduced to writing is not evidence of the contents of the document. There is not a particle of evidence from the beginning to the end of the plaintiff's case that the terms recorded in the document were the terms of the maitgage as atsted by the witnesses. The plaintiff says: "I mortgaged the land for Rs. 60. A dosument was then executed when I mortgaged it. I did so for 30 backets of piddy valued at Rs. 30 and a brown salf also valued at Rs. 30" His witness, Manng Hmon, writer of the doenment, says that the plaintiff mortgaged the land for 30 baskets of paddy valued at Rs. 30 and a brown calf valued at Rs 30. A document was then executed. Maung Paw San says the same, and so does Manng San Paw. There is in fast nothing on the record from which it is possible to infer that any of the witnesses read the document or knew its contents except the writer, and he was not questioned as to what he worte. There was, therefore, no evidence of the mortgage and the plaintiff's suit was bound to fail. The evidence of possession does not help the plaintiff. The evidence is that the plaintiff cleared the land eight or ten years before the suit. and that the defendant eleared it when he came into possession three years before the suit. The map no doubt supports the plaint. iff, but it is not sufficient, in the absence of other evidence, to justify a decree. The appeal must, therefore, be allowed and the plaintiff's suit must be dismissed with costs throughout.

W. C. A. & J. P.

Arpeal allowed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 1962 of 1917.
November 9, 1921.

Present: -Mr. Justice Abdul Racof and Mr. Justice Martineau.

NAMA : MAL-DEFENDANT-VENDEE
- APPELLANT

tersus

HAR BHAGWAN—PLAINTIFF AND
Musammat GUR DEVI—VENDOR-DEFENDANT
—RESPONDENTS.

Hindu Law - Widow - Alienation - Necessity - Future maintenance.

A widow is not always bound to sell exactly for the amount for which there is legal necessity.[p. 365, col. 1]

Lala Chatranarayan v. Uba Kanwari, 'B. L. R. 20', Felaram Roy v. Bagalanand, 6 Ind. Cas. 207, 14 C. W. N. 8.5, relied upon.

A Court must see in each case of an alienation by a widow whether having regard to the circumstances the alienation is a proper one. [p 365, col. 1.]

The rule that a widow is not justified in alienating her husband's estate for future maintenance is not an inflexible one. What is to be seen is whether in the particular case the widow has dealt fairly towards the expectant heir. [p. 365, col. .]

Motisingh v Sobhomal, 30 Ind. Cas. 968; 9 S. L.

R. 69, relied upon.

Where, in order to save the property from being sold by auction at an under-value, the widow sells it privately and pays off the decretal amount and some other debts and manages to save a part of the consideration for her future maintenance, the transaction must be upheld as an act of good management and prudence [p. 364, col. 2.]

Gurdit Singh v. Mehr Singh, 67 P. R. 1884; Nihal

Singh v. Rajon, 11 P. R. 1886, distinguished.

Where the bulk of the consideration for a sale is for legal necessity, the sale ought to be upheld. [p. 365, col. 1.]

Thalagara Ramanne v. Halagare Gangayya, 26 Ind. Cas. 178; 27 M. L. J. 132; Kannu Chetty v. Amirthammal, 28 Ind. Cas. 418; 1 L. W. 877; Padumsingh v. Badrabai, 57 Ind. Cas. 675, relied upon.

Second appeal from a decree of the District Judge, Amritsar, dated the 25th April 1917, reversing that of the Subordinate Judge, First Class, Amritsar, dated the 19th April 1915.

Bakhshi Tek Chand, for the Appellant.

Lala Jagan Nath, for the Plaintiff Respondent and Lala Mehr Chand Mahajan, for Respondent No. 1.

JUDGMENT.—This was a suit for a declaration that defendant No. 1 had no right to sell a house situate at Katra Faizullah in the Amritear City, and that the

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rights of the plaintiff. The following facts will explain the nature of the dispute be-

tween the parties :-

Ganesh Das and Gulab Mal were brothers. Ganesh Das died leaving Musammat Gardevi, the defendant No. 1, as his widow. He also left two minor sons, Chhajju Ram and Aror Chand, and three daughters one of whom was Parmeshri. Ganesh Das died in 1901. His two minor sons died after bim, one in 1900 and the other in 1907. He had only a house and no other immoveable property and to this his some succeeded and as they were minors Musammat Gar Devi, their mother, took possession of it. Ganesh Das had mortgaged this house to one Taskar Suigh by a deed dated the 1sta December 1892 for Rs. 150, the term for which the mortgage was made being two years. When he died in 1901 the house was still unredeemed. The house fell vistim to the earthquake of 1905 and fell down. Musammat Gor Devi bad to re-build it. On the 1st February 1909 Thakar Singh sued for sale on his mortgage and on the 28th February obtained a decree for Rs. 556-6-2 and in default of payment for sale of the house. On the 3rd August 1912 an application for excention of this decree was made. An order of attachment was made on the 2nd Ostober 1912; a warrant for anotion-sale was issued on the 16th November 1912 and the 21st of December 1912 was fixed for the anction sale. The sale could not take place on the date fixed and a fresh warrant was issued on 6th January 1913 fixing the 10th of February 1913 for the sale to be carried ont. On this last mentioned date bids were made and the highest bid of Rs, 1,100 was made by one Tara Singh in whose favour the rale was concluded. The auction purchaser, however, failed to deposit the 1th of the price and on the 12th of February 1918 the bailiff made a report that the requisite amount had not been deposited. A fresh warrant had to be issued on the 14th July 1913. In the meantime, Har Bhagwan, plaintiff, son of Gulah Mal, brother of Ganesh Das had put in an application objecting to the stashment of the house. On this applieation the sale was postponed by an order dated the 14th February 1913. Eventually, however, the objections of the plaintiff were disallowed and his application was dismissed. He took no further action. The lady apparently had no means to pay off the decree. By the warrant of the 14th July 1913 the 21st of August was fixed for the austion sale to take place. but as, in the meantime, the sale deed in question dated the 12th August 19:2 bad been executed the auction sale did not take place. It is not slear from the record whether this private sale wie . ffee ed with the permission of the Unir or me, bu it acpears that on the 15th Aninst . 13 a receipt for the decretal amonat (R. 55 6 a) was filed in theart by the so at the The consideration for the deeree holder. sale was R. 1,94 , the pri: espal item of the consideration being the amount of the decree, namely, Rs. 556 6.3. The detail of the consideration is given in the sale deed as follows :-

Re. A. P. 1. Received for deed expenses 35 0 0 2. Paid before the Sab-Registrar to Bhai Salamat Singh, decreeholder 556 6 3 3. Mulkh Raj, a creditor 285 11 0 4. Dholu Mal, another creditor 266 14 3 5. Vendor herself for maintenance and custom ary contributions on the marriages, etc. of her daughters' children 800 0 0
1. Received for deed expenses 35 0 0 2. Paid before the Sab-Registrar to Bhai Salamat Singh, decree holder 556 6 3 3. Mulkh Raj, a creditor 285 11 0 4. Dholu Mal, another creditor 266 14 3
1. Received for deed ex- penses 35 0 0 2. Paid before the Sab-Re- gistrar to Bhai Sala- mat Singh, decree- holder 556 6 3
1. Received for deed ex- penses 35 0 0 2. Paid before the Sab-Re- gistrar to Bhai Sala- mat Singh, decree.
1. Received for deed ex-
Re. A. P.

It is this sale with respect to which the declaration was claimed: the principal ground for the suit being that it was without consideration and necessity. Naman Mal, vendee, raised various defences as to the right of the plaintiff to maintain the suit; the principal defence, however, being that the cale in question was for consideration and necessity. The Court of

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first instance found that both consideration and necessity had been established and dismissed the suit.

On appeal by the plaintiff the lower Appellate Court agreed with the First Court as to items Nos. (1), (2: and (3), but disagreed as to items Nos. (4) and (5). These last items are described in the judgment of the lower Appellate Court as items (d) and (e). According to the evidence and the finding of the Court of first instance the item of Rs. 256-14-3 was actually paid to Dholu Mal, the ereditor, before the Sub-Registrar. District Jadge Apparently, the learned accepts the finding as to the actual payment but he holds that as the money had been borrowed for the purpose of making a sustomary gift on the occasion of Bansi Dhar's Chak eeremony it cannot be held to have been taken for necessity. As regards the item No. 5 (Rs. 800.00) the learned District Judge has held that as, apparently, Rs. 800 had been borrowed for future maintenance and for future expenses to be incorred on the marriages of Musammat Gurdevi's daughter's children it cannot be held to have been borrowed for a legitimate purpose. He has accordingly disallowed these items and has given a decree to the plaintiff entitling him to take possession after the death of the widow on payment of Rs. 842 1.3.

Against this decree the defendant vendee has preferred this appeal and it has been contended on his behalf that the sale in question was not voluntarily executed by the widow and that she was compelled by circumstances to effect the sale in order to save the property from being sold at austion for an inadequate price, and that, therefore, the order ay rule relating to necessity cannot strictly be applied to the present case. On the facts found by the Courts below. Musammat Gurdevi was peculiarly situated, The following facts will disclose her position:—

As already stated, Ganesh L'as bad left only one immoveable property on his death, namely, the house in dispute. It is, however, contended on behalf of the plaintiff that in addition to the house he had also left certain bonds and debts due to him. It appears that there were three mortgages in his favour for Rs. 532, Rs. 120 and Rs. 320 and in addition to this he had left certain unsecured debts.

All these unscentred debts were assigned to the plaintiff himself by Musammat Gardevi for Ra. 2,000. Out of this only Rs. 200 were paid in each by the plaintiff and as to the balance of Rs. 1,800 he gave a bond promising to make payment by annual instalments of Ra. 150 each. The last instalment was to be paid on the 3rd July 1913. Thus, at the date of the sale in question, this small income had ceased to exist. Out of this Rs. 1.0 received annually by the lady ste admittedly had to pay Rs. 36 per annum as interest on the mortgage-debt. Out of the three mortgages mentioned above two were admittedly redeemed in 1907 before the two sons of Ganesh Das had died. The third band was redeemed in 1909. According to the findings only Rs, 652 were realized under those bonds and there, according to the findings of the lower Appellate Court, were spent in re building the house. Thus, the widow had practically no income to support herself and her daughters and their children. It is not denied, and it is clear from the evidence, that Musammat Gardevi had three daughters and eleven grand-children. large family had to be supported somehow and the lady, under the eirenmstances, had to borrow money. Possibly, the two items which have been disallowed by the learned District Judge sannot strictly be said to have been borrowed for necessity, but it is clear that the sale-deed in question was executed under the circumstances which left no choice for the lady. If she had not executed the sale. deed for Rs. 1,944 the house would have been sold by anction for a much lesser price. It is in evidence that the highest bid made by Tara Singh on the 10th February 19.3 was for Rs. 1,100 only. Under these eiream. stances, if the widow executed the sale in order to pay off the decretal amount and certain debts, she cannot be blamed for having managed to keep some more money in her pocket for her maintenance and for the maintenance of her grand shildren. learned Sabordinate Judge has found that it was an act of good management on her part that she executed the sale-deed to save the property from being sold for an inadequate price. We are in entire agreement with the Court of first instance that it was an act of good management and pradence on the part of the widow to sell the house by a private sale. The debts which the vendee had to MAUNG AN GALE C. MA MIN DUN.

pay were actually due and were in fact paid

by him before the Sub Registrar.

A widow is not always bound to sell exactly for the amount for which there is legal necessity, see Lala Chatranaray n v. Uba Kanwari (1) and Felaram Roy V. We have to see in (2). Bogalanand each case whether, having regard to the eircumstances, the alienation was a proper Hindu Trevelyan's 888 one, 512. The raling Edition. page 2nd laid doen in Gurdit Singh V. Singh (3) and Nihal Singh v. Rajon (4) can bardly apply to the facts of the present ease, as the widow in this case was compelled to sell the house owing to the impending austion-sale. As regards the last item of Rs. 800, it is objected that a good portion of it must have been taken for future maintenance which was not sanctioned by the rules of Hindu Law. In support of this proposition Mayoe's Hindu Law, 7th Edition, paragraph 633, is relied upon, but as held in Motising v. Sob'omal (5) this is not an inflaxible rule. Wrat is to be seen is, whether in the particular case the widow bas dealt fairly towards the expectant heir. In this case the property would have been sold in execution of the decree as the expectant heir kept quiet after his objections had been allowed. It cannot, therefore, be said in this case that by the act of the widow the plaintiff, the expectant heir, has in any way been prejudiced. Even granting that the item (d) was not taken for legal necessity, the bulk of the consideration being for legal necessity, the sale in question ought to be upheld, Thalogara Ramanne v Halagare Gangayya (6) and Kannu Chetty v. Amirthammal (7) respectively and Padumsingh v. Musammat Badrabai (8).

In view of the above findings, we think that the Court of first instance was right in dismissing the suit. We accordingly

(1) 1 B. L. R. 201.

ascept the appeal and, setting aside the judgment and decree of the lawer Appellate Court, restore those of the First Court with sosts.

The erosa objections nessessarily fail and

are disallowed.

Z. K.

Appeal allowed.

SECOND OIVIL APPEAL No. 653 OF 1920.

November 4, 1:21.

Present:—Mr. Brown, A. J. C.

MAUNG AN GALE AND ANOTHER—

APPELLANTS

terius.

MA M N DUN -RESPONDENT.

Civil Procedure Code (Act V of 1909), O. XLI, r. 20-Respondent. addition of -Appellate Court, competency of, to add respondent.

Under the provisions of Order XLI, rule 20 of the Civil Procedure Code, it is competent for an Appellate Court to add respondents to an appeal, even though the time within which an appeal against those persons might have been preferred has expired. [p 565, col. 2.]

Mr. Vosuderan, for the Appellants. Mr. A. O. Mukerjee, for the Respondent.

JUDGMENT. - The respondent, Ma Min Dan, filed a suit against the appellants to redeem a mortgage. She mentioned esrtain other persons in her plaint as persons who might be interested in the equity of redemption, and notice was issued to them as to whether they wished to be made plaintiffs. As a result, four other persons were added as so plaintiffs, although, as the mortgage was alleged to have been made by Ma Min Dan and her husband; and these other persons were the grandshildren of Ma Min Dan and her husband, it is difficult to see what interest they had in the equity of redemption. The suit was dismissed in the Trial Court: Ma Min Dan alone appealed, a result of hor appeal the desree of the Trial Court was set aside, and a

^{(2, 6} Ind. Cas. 207; 14 C. W. N. 835.

^{(3) 67} P. R. 1884.

^{(4) 11} P. R. 18:5.

^{(5) 8}C Ind. Cas. 958; 9 S. L. R. 69.

^{(6) 26} Ind Cas. 178; 27 M. L. J. 132.

^{(7) 26} Ind. Cas. 418; 1 L. W. 877.

^{(8) 57} Ind. Cas. 675,

MAUNG AN GALE U. MA MIN DUN.

decree for redemption passed in favour of all the plaintiffs jointly. The defendants then filed the present appeal, and named as respondent Ma Min Dun only. jestion has been taken that as the other plaintiffs have not been joined as respondents the decree in their favour eannot be set aside, and as it is a joint deeree. it cannot, therefore, be set aside at all. The decree of the lower Appellate Court was undoubtedly a desree in favour of all the plaintiffs jointly. It is suggested on behalf of the present appellants that this was a mere cerical error, and that if it were otherwise, the lower Appellate Court was exercising an extraordinary jurisdiction. I do not think that there is any force in either of these objections. Under the provisions of rale 4 of Order XL1 of the Code of Civil Procedure, the Court has power to pass a decree in favour of all the plaintiffs jointly notwithstanding the fact that only one of them appealed, and I can see nothing either in the judgment or the decree to suggest that the Court was not acting under this power. I am of opinion that, in view of the fact that the decree of the District Court was in favour of all the plaintiffs, the other four plaintiffs should have been made respondents to this appeal. The question then arises whether, under the provisions of rule 20 of Order of the Code of Civil Procedure, XLI this Court should now add the four coplaintiffs as parties. The case of Ma Ein Zi v. Mi Ni (1) has been sited on behalf the respondent Ma Min Dan. that case one Ma Naw Za was shown as the sole respondent in an appeal. After the filing of the appeal it transpired that Ma Naw Za was dead at the time of the filing of the appeal, and application was made to join her legal representatives as parties to the appeal. It was held that there was no proper appeal before the Court and that an amendment of the memorandum of appeal should not be allowed as it would have the effect of depriving the legal representatives of valuable rights which had accrued to them by virtue of the Law of Limitation. But it was not in that case merely a question

seedings stood, there was no respondent before the Court at all, and the provisions of rule 20 were not considered. In the present case Ma Min Dun has been made a respondent to this appeal, and all that required is to add as respondents persons who were parties to the suit but who have not been made parties to the appeal. That is precisely the case which is met by the provisions of rale 20. It was held by a Full Bench of the Allahabad High Court Bindeshri Naik v. Ganga Saran Sahu (2)] that it was competent for an Appellate Court to add respondents to an appeal under the provisions of section 559 of the Code of 1882 (corresponding to rule 20 of Order XLI), even though the time within which an appeal against those persons might have been preferred had expired. The same view of the law was taken by the High Court of Calentta in the same of Grish Oh nder Lihiri V. Sasi Sekhares : r Roy (3) 1 can see nothing in the sule which would limit its applicability to cases where the period of limitation has not expired and the great majority of cases the pariod of limitation for appeals is likely to have expired before the appeal comes on for hearing, the provisions of the rule would ordinarily be nugatory if the limitation applied. Further, as pointed out in the Allahabad case, the provisions of rule 4 of Order XLI allow for the passing of orders in favour of an appel. lant who has not appealed, when that appellant would be debarred from appealing by the law of limitation, and it is simply because the law of limitation does not apply to rule 4 that the four plaintiffs in question in this case are required to be parties to this appeal, I see no reason for not accepting the views of the High Courts of Calcutta and Allahabad as to the interpretation of rule 20, and I hold that this Court has power to add the other four persons as respondents notwithstanding the fact that the period of limitation for the filing of an appeal as against them has expired. (2) 14 A. 154; A. W. N. (1992) 18; 7 Ind. Dec.

of adding a respondent who had been a

party in the lower Courts. As the pro-

⁽N. 8.) 469 (F. B.).

^{(8) 33} C. 329.

^{(1) 31} Ind. Cas. 306; 1 U. B. R. (1913) I, 175.

BHAGWAN DEVI C. BANKA MAL.

And on the merits I am of opinion that this is clearly a case where the powers given by rule 20 should ereised. The present respondent, Ma Min Dan, has been the moving spirit amongst the plaintiffs throughout, and it was she alone who filed an appeal in the lower Appellate Court. Further, it would appear that if the right to redeem exists it exists solely in her alone. It is not clear to me that the other plaintiffs were necessary plaintiffs at all. But a decree has been passed in their favour that deeree sannot be set aside unless they are made parties to this appeal and it would clearly be inequitable that the elaims of the appellants as against Ma Min Dun should be defeated simply because of a formal defeet in the memorandum of appeal in not including these persons as respondents.

I direct that the other four persons who were plaintiffs in the Trial Court, and in whose favour the decree appealed against now stands, be added as respondents to this appeal.

R W. C. A.

Order accordingly.

LAHORE HIGH COURT.

MISCELLANGODS FIRST CIVIL APPEAL

No. 1285 of 1918,

November 24, 1921.

Present:—Mr. Justice Abdul Racof
and Mr. Justice Martineau,

Musammat BHAGWAN DEVI—

APPLICANT—APPELLANT

BANKA MAL-2nd Party-Respondent.

Probate and Administration Act (V of 1881), s. 78

—Administration bond—Death or discharge of surety

—Power of Court to call for fresh sureties.

There is no provision in the Probate and Administration Act as to what is to be done and what the Court can do in the event of the death of a surety or in the event of a surety desiring to be relieved of the burden which he has undertaken. Section 75 o the Act, however, ought not to be read as meaning that the District Judge can once and once

only direct a bond with sureties to be given and that after that has been done he becomes then and there functus officio, and that he has no power in the event of a surety dying or being discharged to call upon the administrator to furnish another surety. The Court of Probate is competent to require a new bond or additional security where the interest of the estate requires it, and especially where some new situation arises, such as the unexpected break down of one or both sureties. [p. 368, col. 1.]

Raj Narain Mookerjee v. Ful Kumari Debi, 29 C. 68; 6 C. W. N. 7; Surendra Nath Pramanik v. Amrita Lal Pal, 51 Ind. Cas. 936; 47 C. 115; 29 C. L. J.

496; 23 C. W. N. 763, relied upon.

Subroya Chetty v. Ragammall, 28 M. 161: 14 M. L. J. 482, Kandhia Lal v. Manki, 1 Ind. Cas 143; 31 A. 56; 6 A. L. J. 19; A. W. N. (1908) 288, dissented from.

Miscellaneous first appeal from the order of the District Judge, Amritsar, dated the 16th January 19.8.

Lala Hukam Chand, for the Appellant. Mr. Jai Gopal Sethi, for the Raspondent.

JUDGMENT.—This is an appeal against an order under the Probate and Administration Act, ordering the appellant, Musammat Bhagwan Devi, to furnish two sureties in Rs. 8,000 each within a period of two months. The following facts will explain the nature of the question to be decided in this case.

Musammat Bhagwan Devi was appointed the administratrix and she was ordered to give a bond for Rs. 8,000 under section 78 of the Act. Subsequently, an application was made by way of a review asking the Court to call upon Musammat Bhagwan Devi to furnish sureties. An order was made to that effect on the 3rd of May 1912 There. upon Ganga Singh and Sadhu Singh executed a bond in the sum of Rs. 8,000 as sureties. On the 1st October 1913 Gauga Singh made an application praying to be discharged from the suretyship. On the 26th of January 1914 the Court made an order of discharge on the application of Ganga Singh in the following words:- "Ganga Singh is present. He is discharged from suretyship. Sadhu Singh's enough." It appears that security is Sadhu Singh continued as a sole surety for a sertain period and then he died. On his death an application was made on the 24th of July 1917 by Banke Mai asking the Court to appoint fresh sureties. In the application, however, one Tek Chand was mentioned as MAUNG TUN B C. MAUEG SHWE THA.

the surety who had died. The application was rejected on the ground that Tok Crand had never been a surety. The District Judge has now made the order against which the

present appeal has been presented.

The ground orged on behalf of the appel. lant. Musummat Bhagwan Devi, before us is that under section '8 of the Act the District Judge had no power to appoint new sureties. The argument is based on the roling Subroya Chetty v. Rogammall (1) where it was held that it was not in the power of a Court to disappointed under charge a surety once section 75 of the Act. This ruling has been followed in Kandhia Lal v. Manki (2). The view taken by the learned Judges of the Madras High Court is opposed to that of the learned Judges of the Calentta High Court expressed in Ra! Narain Mookerjes v. Ful Kumari Debi (3). The learned Judges at page 70* of the report made the following observation :-

"There is no provision in the Ast as to what is to be done or what the Court can do in the event of the death of the surety, or in the event of the surety, pnder such eirsumstances as the present, desiring to be relieved of the burden which he has undertaken. In my opinion, section 78 ought not to be read as meaning that the District Judge can once and once only direct a bond with sareties to be given and that after that has been done he becomes then and there functus officio, and that he has no power in the event of the sarety dying, say the next day, to call upon the Administrator to furnish snother

surety."

We entirely agree with the view taken by the learned Judges of the Calcutta High Court. In a later case Surendra Nath Framansk v. Amrita Lol Fal (4), a similar view was expressed by Mookerjee and Walmsley, JJ. The head note appended to the report of that ease runs thus :-

"The Court of Probate is competent to require a new bond or additional security where the interest of the estate requires it and especially where some new situation

(1) 28 M. 161; 14 M. L. J. 482.

(3) 29 C 68; 6 C W. N. 7.

arises such as an unforeseen increase of assets or the unexpected breakdown of one or both sureties."

The older eases were reviewed in this judgment. In our opinion, this case lays down a very salutary rule. In the present ease, admittedly, the sole surviving surety is dead. According to the two Calcutta rulings it is, therefore, necessary to appoint a new surety or sureties and this is what has been done by the learned District Judge. We, therefore, think that no exception can be taken to the order passed by the learned District Judge.

The only question which arises for coneideration, having regard to the special features of this case, is whether it was necessary to appoint two sureties in this particular ease. As we have already observed, on the discharge of Ganga Singh every body appeared to be satisfied with one surety, namely, Sadhu Singh. There is no reason why the lady should be called upon to furnish two sureties. In our opinion, one surety will be quite enough. We partly accept the appeal and modify the order of the lower Court to this extent. In other respects the appeal is dismissed with costs.

Z, K,

Appeal partly accepted.

UPPER BURMA JUDICIAL COMMIS. SIONER'S COURT. SECOND CIVIL APPEAU No 411 or 1921. December 9, 1921. Fresent :- Mr. Saundere, J. O. MAUNG TUN E-APPELLANT

teraus

MAUNG SHWE THA-RESPONDENT. Provincial Small Cause Courts Act (IX of 1887), Sch II, Art 31-Suit for mesne profits, whether cognizable by Small Cause Court-Second appeal, competency of.

A suit to recover mesne profits is excluded from the jurisdiction of a Small Cause Court, and a second appeal lies from a decision in such suit, even though the value of the subject matter is less than Rs. 200, [p. 370, col. 2.]

^{(2; 1} Ind Cas. 143; 31 A. 53; 6 A. L. J. 19; A. W. N. (1908), 288.

^{(4) 5&#}x27; Ind. Cas. 936; 47 C. 115; 29 C. L. J. 496; 23 C. W. N 763.

^{*}Page of 19 C .- [Ed]

MAUNG TON E U. MAUNG SAWE THA.

Mr. A. G. Mukerice, for the Appellant. Mr. J. N. Basu, for the Respondent.

JUDGMENT,-The plaintiff sued defendant; for mesne profits valued Rs. 300. The first defendant was the plaintiff's vendor and was sued upon a secvenant in the contract of sale guaranteeing the plaintiff in peaceful possession of the property sold. The second defendant had been in possession as a tenant of the third defendant. The third defendant had obtained a mortgage decree jointly with the first defendant against a third party and had redeemed the mortgage with the first defendant, but had then been sued by the first defendant for possession and the first defendant had been successful. The plaintiff sued for the mesne profits reseived by the second and third defendants during the period that the plaintiff had been unable to obtain possession after his pur-The First Court dismissed the suit against the first and sesond defendants but decreed it against the third defendant. An appeal by the plaintiff making the second defendant a respondent was successful, and the second defendant now somes to this Court in second appeal under section 13 of the Upper Burma Civil Courts Regulation.

A preliminary objection is raised that the suit being one of a nature cognisable by a Court of Small Causes and for less than

Rs. 500 no second appeal lies.

For the appellant it is argued that Article 31 of the Second Schedule to the Provincial Small Cause Courts Ast expressly withdraws a suit for mesne profits from the jurisdiction of a Court of Small Causes. There has been a difference of opinion among the Courts in India as to the application of this Article. The Calsutta, Allahabad aud Panjab High Courts have held that a suit for mesne profits is not included in Article 31, and that such a suit is a Small Cause, while the Madras and Bombay High Courts have taken the opposite view. In the case of Kunjo Behary Singh v. Madhub Chundra Ghose (1), it was held by a Full Bench of the Calentta High Court, by a majority of five Judges to two, that no second appeal lies from a suit for means profits where the velue of the subject-matter is less than Re. 50). The line of argument appaars to

have been that a suit for mesne profits is an action for damages for a trespass to immoveable property in which the measure of the damages may or may not be the amount of the profits which the wrongdoer has actually received from the property. The suit is not one to resover the profits of the immoveable property, but is a suit for damages of which the profits of the property astnally received by the wrong doer may not even be the measure, and the majority of the Judges of the Fall Bensh who decided that case apparently held that, even if the last sentence of Article 31 is read by itself, it would not include a suit for mesne profits; but they went further and said that that Article clearly contemplated an account, and that in a simple action for damages, and action for mesne profits is nothing was necessary. assount more, no Allahabad and Punjab High Courts appear to have accepted the reasoning of the majority of the Judges in this case. It may, however, be remarked that of the five Judges who Baverley, J., the majority, formed adhered to his opinion that by the concluding words of Article 31, the Legislature intended to withdraw suits for mesne profits from the jurisdiction of Courts of Small Causes, but he went on to say : "I am bound to admit that the wording of that clause is not so explicit as to justify me in dissenting from the decision of the majority." Two Jadges did dissent from that desision, and, in the case of Antone v. Mahaden Anant (2), the Bombay High Court held that the surrent of decisions in Court had been in accordance with the view held by the minority of the Judges who desided the Calcutta case, and the view was taken that a claim for mesne profite, based on the allegation that the plaintiff had been dispossessed by the defendant, was a claim which must be treated as one to which Article 31 applied, where the defendant had wrongly received profits of the immoveable property belonging to the plaintiff. A Fall Bench of the Madras High Court in the case of Savarimuthu v. Aithurusu Rowthar (3) held that a suit for the profits of immoveable property belonging to the plaintiff which had

^{(2) 25} B. 85; 2 Bom. L. R. 683.

^{(8) 25} M. 103; 11 M. L. J. 428 (F. B.).

^{(1) 28} C. 931; 12 Ind. Dec. (N. s.) 597 (F.-B.)

FIRM RAM RICHHPAL SHAM LAL C. FIRM BANSI DHAR & SONS.

been wrongly received by the defendant who dispossessed the plaintiff in execution of a deeree afterwards set aside on appeal is not eognisable by a Court of Small Causes. reasons for this decision are not given in the jadgment, but it was pointed out in the order of reference that Article 31 includes a suit by a mortgagor to recover surplus collections received by the mortgagee after the mortgage has been satisfied and a suit for meane profits, both of which are not technical suits for an account, but were akin to snits for an account, and were advisedly and not inappropriately included in Article 31. It was also pointed out that these two classes of suit ecrrespond with the suits dealt with in Articles 105 and 109 of the L mitation Ast respectively. In the case of Ramasami Roddi v. Authi Lakshmi Ammal (4), it was held that the suit was framed as one for mesne profits and the form of the plaint determined the nature of the suit, and, although the Court held that in that suit Article 1 19 of the Limitstion Act did not in fast aprly, yet it was excluded from the congnissnee of the Small Cause Court under Article 31 of the Second Schedule to the Small Cause Courts Act.

I have not been able to find any decisions dealing with the second sentence of Article 31 which refers to a suit to recover surplus collections received by a mortgages. This would appear to be a very definite description of the kind of suit excluded from the Small Cause Court's jurisdiction, and it seems to me that it would be stretching the meaning of the words unduly to hold that a suit to recover surplus collections was only excluded from the jurisdiction of the Small Cause Court where the suit was for an account. I think the proposition that the last two sentences of Article 31 are governed by the first part of the first sentence, and that the fact that Article 31 follows Article 30, which deals with a suit for an account of property, indicates that it was the intention of Article 31 to exclude only suits for an account is extremely doubtful. It was noticed in the Calcutta care cited above by Petheram, U.J., that in many suits for damages in the nature of mesne profits a question of title which a Court of Small Causes can-

not finally decide may arise, but the learned Chief Instice said that the appropriate method is provided by section 23 of the Provincial Small Cause Courts Act. It appears to me, however, that it is more in consonance with the intention and general provisions of that Act that suits of the kind in question should not be decided by a Court of Small Causes. A suit for the recovery of rent other than bouse rent is, for instance, expressly excluded by Article S. as well as a anit for the determination or enforcement of any other right to or interest in immoveable property by Article 11, and to hold that the last two sentences of Article 31 are only applicable in cases where a suit is for an account appears to me both to make the last two septences of that Article superflanus and unmeaning and to be opposed to the general intention of the Act. Following, therefore, the decisions of the Madras and Bombay High Courts referred to above, I must hold that the suit was excluded from the juris. diction of the Court of Small Causes and a second appeal, therefore, lies.

1. C. A.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2658 of 1918.

November 22, 1921.

I resent: - Mr. Justice Sport Smith and

Mr. Justice Abdul Qidir.

THE FIRM RAM R. CHHPAL-SHAM LAL

OF DELHI-PLAINTIFF—APPELLANT

THE FIRM BANSI DHAR AND SONS OF

DELHI - D. P. D. Nr RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27

- Appellate Court - Additional evidence.

The legitimate occasion for the admission of additional evidence by an Appellate Court under Order XLI, rule 27 of the Civil Procedure Code is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, or where a discovery is made, outside the Court, of fresh evidence, and an application is made to import it. [p. 371, col. 2.]

^{(4) 8} Ind. Cas. 162; 34 M. 502; 1910; M. W. N. 614; 9 M. L. T. 25.

FIRM RAM RICHAPAL SHAM LAL U. FIRN BANSI DHAR & SONS.

Kessowji Issur v. Great Indian Peninsula Railway Company, 31 B. 381; 9 Bom. L. R. 671; 11 C W. N. 721: 6 C. L. J. 5: 4 A L. J. 481: 17 M. L. J. 3 7; 31 I. A 115, 2 M. L. T. 435 (P. C.), Krishnama Chariar v. Narasimha Chariar, 3' M. 114; 3 M. L. T. 309, Garden Reach Spinning and Manufacturing Company v. Secretary of State for India, 28 Ind. Cas. 865; 42 C. 675; 19 C. W. N. 401, relied upon.

Second appeal from the decree of the District Judge, Delhi, dated the 17th of July 19'8, reversing that of the Subordinate Judge, Second Class, Delhi, dated the 2nd April 1918.

Lala Moti Sagar, R. S., for the Appellant. Lala Sardha Ham, for the Respondent.

JUDGMENT .- In the suit out of which this second appeal arises the plaintiffs claimed damages for non-delivery of ten eases of Sateen. The contract is admitted, but the defendants contended that it had been cancelled, inasmuch as they made an application to the plaintiffs for an extension of time which extension had not been granted by the plaintiffs. onus of proving that the contract had been eancelled was laid by the First Court on the defendants and it was found that they had not discharged the onus. The Court also found that the plaintiffs had definitely extended the time in answer to the defend ants' letter of the 20th August 1915. Reliance was placed mainly on the letters Ebzibits P 4 and P.5 produced by the plaintiffs. In the lower Appellate Court the defendants applied to the Judge to allow them to produce additional evidence, and the Judge allowed them to do so and upon this new evidence held that the letter P.4 was not intended by the defendants to apply to the contract in dispute and that the contract had, in fact, been cancelled. The District Judge, therefore, accepted the appeal and dismissed the plaintiffs' suit. They have filed this second appeal to this Court, and the main point urged by them is that the lower Appellate Court acted contrary to law in allowing additional evidence to be produced before it. It appears from a perusal of the lower Appellate Court's record that 17th July 1918 was the date fixed for the hearing of the appeal, but on the 8th July the defendants made an application for leave to produce a certain letter in evidence. On the 14th July the lower Appellate Court at first rejected the applica-

tion on the ground that new evidence could not be admitted at that late stage in the Appellate Court, but subsequently on the same day recorded an order allowing additional evidence to be taken as it transpired that there were allegations of forgery against one of the plaintiffs' witnesses and of sheating in connection with the matter in suit. From this it is clear that the plaintiffs never agreed to the production of additional evidence. On the contrary, it appears probable that they objected and that, in consequence of their objection, the District Judge had first of all rejected the defendants' application to put additional evidence. Counsel for appellants relies upon the case of Kessowji Issur v. Great Indian Peninsula Railway Company (1) wherein their Lordships of the Privy Council point out that the legitimate occasion for the admission of additional evidence by the Appellate Court under section 558 of the Code of Civil Procedure of 1882, corresponding with Order XLI, rule 27 of the present Code. is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, or where a discovery is made, outside the Court, of fresh evidence, and an application is made to import it. In that case the Eigh Court of Bombay at the hearing had admitted additional evidence and the Privy Council held that the Appellate Court had no jurisdiction to admit it and that it was wrongly admitted and must be disregarded. In Krishnama Chariar v. Narasimha Chariar (2) the same view was adopted. Again, in Garden Reach Spinning and Manufacturing Company v. Secretary of State for India (3), it was held that where in an appeal an application was made before the hearing of the appeal for the admission of additional evidence such application was not warranted by the terms of Order XLI, rule 27, and the Appellate Court had no jurisdiction to entertain it. Now, in the present case there was no such inherent lacung in the evidence as was referred to by their Lordships of the Privy Council in the case quoted above. It was quite possible for (1) 31 B 381; 9 Bom L. R. 671; 11 O. W. N. 721; 6

O. L. J. 5; 4 A. I. J. 461; 17 M. L. J. 847; 84 I. A. 115; 2 M. L. T. 435 (P. O.). (2) 31 M. 114; 8 M. L. T. 308.

(3) 29 Ind. Cas. 865, 43 C. 675, 19 C. W. N. 401,

MURLI I HAR D. PITAMBAR LAL.

the Appellate Court to decide the appeal before it on the evidence on the record. The onus probands of a certain iseue was laid on the defendants and it was for the Aprellate Court to see whether they had discharged that onus or not. It was not competent for it to allow them to produce additional evidence at the hearing of the appeal. Lala Sardha Ram on behalf of the respondents has cited authorities in support of the proposition that such evidence can be admitted with the assent of the parties but these authorities do not help him because we are distinctly of opinion that in the present case the plaintiffs did not assent to the production of additional evidence. Lala Sardha Ram admits that if this additional evidence be excluded, he eannot resist the present appeal or challenge the decision of the First Court.

A further point was urged by Rai Sahib Moti Sagar to the effect that additional evidence was wholly inadmissible having regard to section 94 of the Indian Evidence Act. We do not find it necessary to discuss this point, because we have decided that the lower Appellate Court had no jurisdiction at all to receive the additional evidence.

We accept the appeal and, setting aside the order of the lower Appellate Court, restore the decree of the First Court with costs throughout.

Z. K.

Apreal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 705 OF 1920.

March 21, 1922.

I resent:—Mr. Justice Lindsay and

Mr. Justice Byves.

MURLI DHAR—DEFENDENT—

APPELLANT

ve: 8us

PITAMBAR LAL-PLAINTIFF
AND MANNI LAL AND OTHERS-DEFENDANTSRESPONDENTS.

end Procedure Code (Act V of 1905), O XXXII,
P. 1-Minor defendant-Guardian ad litem-Proper

person not appointed -Illegality-Court, duty of-Hindu Law-Joint family Mortgage by karta, suit on -Karta, whether proper guardian of minor member.

Where a Court appoints a person as guardian ad litem who is disqualified under rule 4, Order XXXII of the Civil Procedure Code it commits an illegality rather than a mere irregularity. [p 374, col. 2.]

Where a minor sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into to find out if the person appointed as guardian ad litem was the proper person to be so appointed. [p 375, col 2.]

In a suit on a mortgage executed by the karta of a joint Hindu family brought against the karta and the minor member of the family, the karta is not the proper person to be appointed guardian ad litem of the minor and a decree obtained against the minor in such a suit is a nullity. [p. 376, col. 2.]

Second appeal from a decree of the Additional District Judge, Allahabad, reversing that of the Subordinate Judge.

Dr. Kailas Nath Kat u, for the Appellant.

Messre, Uma Shankar Bajpai and Peory Lel Banerice, for the Respondents.

JUDGMENT. Rives, J .- Ghezi Din and his first consic, Pitamber, formed a joint Hindu family of which Ghezi Din was the karta. Pitambar was a minor. On the 27th of April 1913 Ghazi Din made a mortgage of the joint family property in favour of Munni Lal and Kashi Prasad. The mortgagess sued Ghezi Din and Pitambar, under the guardianthip of Ghezi Dic, on foot of their mortgage. Ghazi Din confessed judgment and a preliminary deeree was passed on the 20th of March 1916. This was duly made final and the property was attached and put up for sale, and the 6th of February 1918 was the date fixed for the sale. that date Pitambar, still a minor, filed the suit cut of which this appeal arises, agairst Kashi Prasad and the representatives of Munni Lal, the mortgagees, and Ghazi Din for a declaration that the decree in the former suit was void and illegal as against the plaintiff and that he is not bound by it and that in execution of the said decree the remaining half of the joint family property was not saleable. The property was sold and purchased by Murli Dhar, and the sale was ocnfirmed on the 9th of March 1918. On the 22nd of March 1918 the plaint was amended, Murli Dhar was made a defendant, and an additional clause was inserted in the plaint MURLI DHAR U. PITAMBAR LAL.

to the effect that in execution of the decree in the said suit the house was sold by austion on the 6th of February :918 and was purshased by defendant No. 4, that is, Murli Dhar, and an additional prayer was added for a declaration that the said sale was void and illegal. It was alleged in the plaint that the mortgagees, in spile of their having knowledge of the fact that the rights of Ghezi Din were adverse to those of the plaintiff, appointed him the guardian of the plaintiff, and in collection with him obtained a decree; that in fact there was no lawful guardian of the plaintiff; that the whole proseedings were kept consealed from the mother of the plaintiff who only got to know of the suit when execution taken out; that Ghazi Din had no power to execute the mortgage deed and that it was not for the benefit of the plaintiff.

The First Court found that the mortgage was not made for family necessity or for the benefit of the family. It also found, however, that there was no evidence to show collusion between Ghazi Din and the mortgagess, and that the plaintiff properly represented in the former suit. It, nevertheless, dismissed the suit. On appeal the Court below upheld the finding that the mortgage was not executed for legal necessity or the benefit of the minor and it further found that Ghazi Din was not a proper person to be appointed guardian in the suit, and on this ground it allowed the appeal and desreed the suit.

This appeal is by the austion-pershaser. The connected Appeal No. 736 of 1920 is by the mortgagees.

It was argued very strenuously by Dr. Katju for the appellant that Murli Dhar, being a stranger to the litigation, "was justified in believing that the Court has done that which by the direction of the Code it ought to do" [Malkarjun v. Narhari (1)]. He further argued, relying on the same case, that the only Court competent to decide who was a proper person to be the guardian of the minor was the Judge in whose Court the suit was filed. He decided very naturally that Ghezi Din, the karta of the family,

(1) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 (5) 59 Ind. Cas. 67 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 789 (P. C.). U. P. L. R. (A.) 884.

was a proper person and he had jurisdiction so to decide, and so, even if he decided wrongly, his decision is binding and the minor cannot re-open the question in the absence of frand or collusion.

With reference to certain rulings of this Court, which will be noticed later, his argument was, that the utmost length to which they went was, that where it was apparent that there had been an irregularity in the procedure adopted by the Court in the appointment of a guardian, then, and then only, could the Court enquire into the question whether the minor had been prejudiced: and if it found that the minor had not been prejudiced, the deares stood, even if in fact no guardian at all had been formally appointed Walian Behari Pershad Singh (2) and Collector of Meerut v. Umrao Singh (3).] In this case it is said there was no irregularity in the prossdure, and no fraud or collusion was found.

On behalf of the respondents it has been argued that, if the minor was not properly represented in the suit, the deeree and every thing that followed from it, was, so far as the minor was concerned, a nullity. In order to ascertain whether he had been properly represented it necessary to go into the facte, and that sould only be done in most cases in a subsequent suit. If in such suit it was found that there had been irregularity in the appointment of the guardian, then, if the Court was satisfied that the minor was prejudised, the decree against the minor was void, [Baii Nath Ras v. Dharam Des Tewari (4) followed in Chhatter Singh v. To Singh (5)] and, a fort ori, if it was found that the guardian appointed was not a proper person, that was a gross irregularity which inevitably avoided the desree. Before deciding which of these arguments should be adopted, I propose to set out the provisions of the Code applicable, and the facts leading up to the appointment of Ghazi Din as guardian ad litem to his minor cousin and his subsequent conduct.

^{(2) 30} C. 1021 at p. 1031; 30 I. A. 182; 7 C. W. N. 771; 5 Bom. L. R. 822; 8 Sar. P. C. J. 5:2 , P. C.).

^{(3) 29} Ind Cas 2 10; 13 A. L. J. 437.

^{(4) 15} Ind. Cas. 707; 88 A. 81; 14 A. L. J. 853.

^{(5) 59} Ind. Cas. 671; 43 A. 104; 18 A. L. J. 956; 2 U. P. L. R. (A.) 884.

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Order XXXII, rule 3 (1) provides:
"Where the defendant is a minor, the Court,
on being satisfied of the fact of his minority, shall appoint a proper person to be
guardian for the suit for such minor."

Sub-paragraph (3) of the rule provides that an application for the appointment of a guardian 'shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controvercy in the suit adverse to that of the minor and that he is a fit person to be so appointed."

Sub-paragraph (4) directs that "no order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or deelared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian, of the minor or, where father or other natural there is no to the guardian. in where person eare the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule". Rule 4 of the same Order defines who is a proper person, namely, "any person who is of sound mind and has attained majority may act as the next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor" It is further directed that "no person shall, without his consent, be appointed guardian for the suit."

When the mortgagees filed their suit against Ghazi Din and the plaintiff, they stated that the latter was a minor and that he and Ghazi Din formed a joint Hindu family of which Ghazi Din was the karta. They filed an affidavit to this effect and stated therein that Ghazi Din had no adverse interest to the minor and was a fit person to be appointed his guardian. They did not state that the mother of the minor was alive.

Thereupon notices were issued to the minor and to Ghezi Din. The notice to the minor was affixed to the door of his house. Ghazi Din was served personally. He endorsed a note on the duplicate returned to Court, in the Mahajani character (which the Court apparently could not read), refusing to abt as guardian. The attention of the Court was not drawn to this endorsement either by the serving peon or by anybody else. I do

not think, however, that anything turns on this eireumstance. It was the duty of Ghazi Din to appear in obedience to the notice and object, if so advised. He did not appear, and the Court, not unnaturally, concluded from his abstention that he consented, and appointed him guardian without further erquiry. On the date fixed for the hearing of the snit Ghazi Din appeared and confessed judgment both on his own behalf and on behalf of the minor, and the mortgagees' suit was thereupon decreed. There was to irregularity in the procedure laid down in Order XXXII, role 3. But that prosedure is only enasted to enable the Court to appoint a proper person as a guardian. I think that if the nominated guard. ian does not appear, the Court may assume that he concents to being appointed, but that does not absolve the Court from erquiring into the question whether be is a proper person to represent the minor. In fact, where, as here, the mortgage was made by the karta of the joint property of himself and the minor, I think even if the karta consented to be guardian, a duty was east on the Court to consider whether the karta, who could not repudiate his own mortgage, was at all a proper person to represent the minor. It is quite clear that the Court could only appoint a proper person as defined in rule 4. If it appoints a person disqualified under that rule it seems to me it commits an illegal. ity rather than a mere irregularity. Suppose, for instance, the Court, merely relying on a false affidavit of a plaintiff, appointed a lunation to be the gurdian ad litem of a minor defend. ant, could it possibly be maintained that the minor was properly represented, and that, even if no steps were taken to defend the minor's interests, nevertheless the minor could never challenge the dcoree passed against him?

I think it only recessary to give this instance to show that Dr. Katju's main argument is far too breadly stated. In the present case, however, he points cut that the person appointed was the karte, the natural person to be the guardian and whose interest would not necessarily be adverse to the minor's, and it is therefore suggested that the Court was right in appointing him,

The case in Malkarjun v. Narhari (1) was considered by their Lordships of the Privy

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Council in Khirramal v. Daim (6). Lord Davey there said (it page 76 of the Liw Journal Raport): Their Lordships agree that the sales cannot be treated as veil or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside."

later after giving the And, on, facts of the Bombay case, went on to say at page 78, "In so doing the Court was exersising its jurisdiction. It made a sad mistake it is true, but a Court has jurisdietion to deside wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed for setting matters right, and if that course is not taken, the desision, however wrong, sannot be disturbed" and proceeded : "Their Lordships think that these observations do not apply to the ouse now before them. In suits Nos.372 of 1879 and No. 64 of 1873 the Judge seems to have ascepted without question the statement on the record that Amir Baksh was representative of Naurez and Alahnawiz was his guardian, and never applied his mind to the matter. Doubtless, he would have done so if the suits had proseeded in the ordinary course, but in the former case the proceedings were cut short by the agreement for reference, and in the latter care it was in effect a consent decree. It was not, therefore, the case of an erroneous decision, ruling or exercise of diserction of the Judge in a matter in which the Court had jurisdiction, Their Lordships think that the estate of Nauraz was not represented in law or in fast in either of the suits, and the sale of his property was, therefore, without jurisdiction and null and void," I think that these remarks exastly apply here. The Coart did not apply its mind to the question whether Ghazi Din was a proper person having regard to the proviso

(6) 2 A. L. J. 71; 33 C. 213; 9 C. W. N. 20 1; 7 Rom. L R. 1; 1 C. L. J. 594; 33 I. A 23; 8 Sar, P. C. J. 784 (P. C.).

to rule 4. If it had only read the mortgage. deed, it must have been put on ecquiry.

I think the matter is really concluded by the decision of this Court in Baij Nath Rai v. Dharam Deo Tewari (4), which was followed in Ohhatter Singh v. Tei Singh (5). It may be noted that the same argument was raised in that case. Mr. Agarwala is reported to have argued [Bai, Noth Bai v. Dharam Deo Tewari "The requirements of section of the old Code having been complied with, and the Court having once passed an order appointing Bhondu Tewari as guardian ad litem, there is an absolute presumption that the Court had satisfied itself on the materials before it that he was a fit and proper person to be so appointed and that he had no interest adverse to that of the minors. Throughout the course of the proceedings in the former suit there was nothing to indicate that he was not such a person or that he had any adverse interest. No exception was taken to the appointment either by Bhondu Tewari bimself or by his adult son who was a defendant in that suit and whose interest, at all events, would be identical with his minor brothers. When a guardian ad litem has been appointed of a minor defendant in a suit, then, unless the minor shows that the guardian and in collasion with the fraudulently plaintiffs, the minor is bound by the desree passed in that suit,"

The Court, however, overruled this argument,

From all these authorities, which have already been eited, it is abundantly clear that in all such cases where a minor subsequently sues to set aside a desree as against him on the ground that he was not properly represented, the merits have to be gone into. Indeed in the case relied on by Dr. Katju, tis., Collector Umrao Singh (3), the Meerut V. desision of the Court seems to have been that it was necessary first of all to enquire : whether the minor had been prejudiced by the appointment of the guardian. because, if it found that he had not been prejudiced, then it was unnecessary to go into any other question.

Now, it seems to follow that there must, first of all, be an investigation into the merits. In this case it has been found

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that Ghazi Din was only 21 years of age when he executed the mortgage. It was stated in the mortgage deed that money was borrowed "for home expenses and also for the improvement of the theka business in the Sheoghar market". There were no details given of these "home expenses" and it was found by both Courts, quite definitely, that the mortgagees' allegations that the money was required for the marriage of a daughter and the payment of certain debts were false, and that the theka business in the market was a private speculation of Ghazi Din's, and, that the minor was in no way concerned in it and got no benefit from it. Having come to this finding, the lower Appellate Court held that the Trial Court having found that the mortgage invalid against the minor could not consistently find that the minor was properly represented. He said: "I think that both findings cannot go together. If you once say that the elder cousin mortgaged the property of the minor without proper grounds for the transfer, how can you say that the man who threw away, so to say, the property of the minor was a right and fit person to have been appointed guardian, for the purpose of contesting the very transfer which ought to have been contested in the interest of the minor."

Now, the real fasts were known of course to the mortgagees. They knew, therefore, that the interest of Ghazi Din was adverse to the minor and they deseived the Court by their affidavit that be was a proper guardian. I think it is only necessary to cite ore more case which, although not mentioned at the Bar, ie, I think, very much in point. It is Hanuman Prasad v. Muhammed Ishoq (7). In that case also the auction purchaser was a etranger to the mortgage suit. Stanley, O. J., and Burkitt, J., said : "Now the provisions of section 443 (cf the old Code) are imperative." Section 4:3 of the old Code is the same in substance as Order XXXII. rule 3 (1) of the present Code . direct that where a defendant is a minor,

the Court shall appoint a proper person to be guardian for the suit for such minor to put in a defence and generally to act on his behalf in the conduct of the care. It is abundantly clear in this case that Munna Das was not a proper person whom the Court, if it had been made aware of the facts, would have appointed as guardian. In the first place, he was the mortgagor who purported to mortgage as his own, the property which he after. wards alleged was the property of his ward. He, therefore, had a conflicting interest-an interest which should have precluded any Court from appointing him as guardian ad litem in a suit brought by the mortgagees of Munna Das. It is perfectly clear that the Court had not the facts before it; and it also appears to us to be clear that the Court was never ealled upon by the plaintiff, whose duty it was to see that a proper person was appointed guardian ad litem, to appoint such a guardian. The fact is, that Hanuman Prasad was not properly represented as a party to that suit, and, therefore, any decree which was passed against him, was a mere nullity." For the reasons given above, having regard to the various desisions which have been sited, I think the decree of the Court below was right and would dismiss the appeal with costs.

LINISAY, J .- I agree,

ORDER.—The appeal is dismissed with costs including in this Court fees, if any, on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPELL No. 1419 OF 1919.

February 21, 1921.

Present: - Mr. Justice Sadasiva Aiyar
and Mr. Justice Napier.

Sri Raah VENKATA RAMIAH
APPA RAO BAHADUR,

ZAMINDAR GARU OF NUZVID

-DEFENDANT No. 1—APPELLANT
tersus

LANKA LAKSHMINARAYANA
—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (Mad. I of 1908), ss. 8, 115

VENEATA RAMIAH APPA RAO D. LANKA LAKSHMINABATANA.

- Relinquishment of holding by ryot in favour of Zemindar subject to mortgage - Suit to enforce mortgage against mortgagor's heirs - Zemindar not impleaded, effect of Suit by auction-purchaser against Zemindar for possession, maintainability of Relinquishment and acceptance by surrenderce, effect of Madras Rent Recovery Act (Mad. VIII of 1865), s. 12.

A ryot in a zemindari relinquished his holding to the zemindar subject to a mortgage which he had created. The relinquishment was not made in the presence of witnesses as provided in section 12 of the Rent Recovery Act, but the zemindar accepted the relinquishment. Thereafter the mortgagee-sued the mortgagor's heirs for enforcement of his mortgage without impleading the zemindar as a party and obtained a decree for sale. The holding was put up for sale and purchased by the plaintiff's assignor. The plaintiff, on being obstructed by the zemindar while attempting to take possession, sued the latter for possession:

Held, (1) that the mortgage suit was misconceived as the zemindar, who was entitled to redeem,

was not made a party; [p. 885, col. 2,]

12 that the decree for sale in the mortgage suit and the sale in execution did not bind the zemindar and that the plaintiff's assignor not having obtained title to the Kudivaram right by his purchase, neither he nor his assignee could maintain the present suit for possession [p. 385, col. 2.]

Per Eadasiva Aiyar, J—A mere relinquishment by the tenant to the landlord cannot put an end to the mortgage already created by the tenant so as to prejudice the mortgagee's rights. [p. 379, col. 2.]

The term 'abandonment' denotes an unilateral act which does not necessarily imply that the act has been, or has to be, brought to the notice of any other person whereas an act of 'relinquishment' or 'surrender' implies that the act is brought to the notice of the landlord. [p. 378, col. 1.]

Per Napier, J.—Relinquishment, acceptance and abandonment operate to terminate the estate of a tenant. The Kudivaram right is in abeyance until it comes into existence again by the admission of a new ryot and it continues in abeyance as long as the landlor? does, in accordance with law, treat the land as private land. [p. 356, cols. 1 & 2]

The words 'shall hold it as a landholder' in section 8 of the Estates Land Act do not necessarily imply that the land remains rooti land, and surrender is not an operation by which the entire interests become united 'otherwise.' [p. 387, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Appeal Suit No. 90 of 1918, preferred against the decree of the Court of the Temporary District Muncif, Gappayaram at Bezwada, in Original Suit No. 251 of 1915

Mr. T. Ramachandra Rao, for the Appel-

Mr. V. Ramadoss, for the Respondent.

The second appeal and the memorandum of objections coming on for hearing on the 20th August 90 and the let September 1920, and having stood over for consideration till the 21st September 1920, the Court delivered the following

JUDGMENT.

Sadasiva Airar, J .- The let defendant is the appellant. He is the Zamindar of the Mirzapuram E-tate, and the plaintiff, being the person who purchased a holding in the estate from the parchaser in a Court austion sale held in 1909 in execution of the mortgage. decree for sale passed in Original Suit No. 229 of 1900 on the file of the District Munsil's Court of Bezwada against the legal representatives of the original tenant of the holding (by name P. Venkayya) who had executed the mortgage deed in 1834. This sait was brought for possession of the lands comprised in the holding as the 1st defend ant's father (then Zamirdar) obstructed the plain'iff'e enjoyment in 19:0.

The let defendant pleaded (among other

defences):-

(a) that the criginal tenant relinquished the land to the defendant's father in 1894 [See paragraph 2 of the written statement. At the trial, Fasli 1307 (or 1897—8) seems to have been mentioned as the date of the relinquishment;

(b) that the land has been thereafter enjoyed by the Zamindar as his home farm

land;

(c) that the Zemindar did not know of the mortgage of 1894 and was not impleaded in the Suit No. 22) of 1906 instituted long after the relinquishment (of 1897-8) and hence the let defendant was not bound by the decree and sale in execution in that suit.

The District Munsif found (among other conclusions) that the lands were the home-farm lands of the 1st defendant owing to a general relinquishment of all the lands in the suit village of Kesarapalli in Faeli 13)?" by all the ryots of that village and that the mortgage-decree was not binding on the 1st defendant. He, therefore, dismissed the suit.

The Subordinate Julge on appeal gave the following findings:-

(a) "It is clear in this case that the land was Seri" (ryoti) "land and it was relinquished.

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under the Estates Land Act (?); the land which was known to be Seri land cannot be converted into Kamatam land by the Zemin dar I have no doubt that the land is Seri land and not the Kamatam land of the Zemindar."

(b) "The relinquishment by Venkayya cannot affect the mortgage created in 1:94 I find, therefore, that the relinquishment by Venkayya (if any) will not affect the right of

the mortgagee."

On these (and other) findings, the Sabordinate Judge substantially decreed the
plaintiff's suit. Hence this second appeal
by the 1st defendant. Though several
grounds are mentioned in the memorandum
of second appeal, the arguments urged
before us by the learned Vakil for the
second appellant were confined to the following contention:—

The lower (Appellate) Court entirely overlooked the fact that the Zamindar was not a party to the mortgage suit (of 1906)" (6th ground of appeal). The learned Vakil did not reriously dispute the finding that the land had continued to be ryoti land but argued as follows (expanding, if I may say so, the above 6th ground of appeal; (1) that the religquishment of Faeli 1:07 by Venkayya made the Zemindar the owner of the Kodivaram interest; (2) that the Zemindar, therefore, was the proper person to be impleaded as defendant in the mortgage suit of 1906 (and not Venkayya's legal representatives), tha Zemindar then representing the owner of the Kudivaram right and the right of redemption; (3) that the decree passed, and the Courtaustion sale held, behind the back of the Z : mindar did not bind him and could, therefore, be ignored by him, and (4) that the plaintiff as Court acotion purchaser (in a suit to which the owner entitled then to possession was not made a party) could not claim larger rights than the original simple mortgages who had no right as such to possession and becce the plaintiff's suit for possession ought to have been dismissed,

I think that the lower Appellate Court does seem to have ignored the fact that the Zemindar was not a party to the suit of 19 6. He was, therefore, clearly not bound by the decree and sale proceedings therein. On the other hand, as pointed out by the respondent's earned Vakil), the lower Appellate Court has not given a definite finding whether the

P. verkayya is true and legally valid. The judgment of the lower Appellate Court nees the phrase "relinquishment, if any." Further, I am unable to understand the sentence in the judgment of the lower Appellate Court that the land "was relinquished under the Estates Land Act" of 1908 as this Act came into force long after the date (1897—93) of the alleged relinquishment.

I find that the suit of 1906 seems to have been brought, not against Pallagani Venkayya but against Pallagani Lakshmigadu, Pallagani Ramudu and Pallagani Sithayya, (See Exhibit Al sale certificate). If they were the undivided sons or male descendants of P. Venkayya, the question arises whether the alleged relinquishment of 1.3.7, if made by P. Vankayya would bind them if the Kudivaram right was ancestral property. (This question was not argued before us). Again, a: o her legal question (which was argued) hes to be considered, namely, whether the relinquishment was not required to be in writing to have legal validity (see section 12 of the old Rent Recovery Act, VIII of 1865) and if it was orally made, whether the eirsumutances mentioned in Narassmma v. Lakshmona (1) as validating an oral surrender existed in the case. It is a matter for argument whether the decision in Narasimma v. Laks'mana (1) does not, if I may say so with respect, mix up the rights flowing to the landlord from aband: nment of the holding by the tenant with the rights flowing from the surrender or relirquishment of the holding by the tenant to the landlord. I think that "abandonment" denotes unilateral sot which does not necessarily imply that the act has been or has to be brought to the notice of any other person, whereas an act of "relinquishment" or "eurender" implies that the act is brought to the notice of the landlords. See Venka. tesh Narayan | ai v. Krishna i Ar un (2) and Baliji Sitaram Naik Sargavkir v. Bhikaji Soyne Prab'ıu (3), Adiveru Dinabhandu Patrudu v. Lokanadhasami (4) and Machar Rai v. Ramgat Singh (5). Yet another question

^{(1) 13} M. 124; 4 Ind Dec (N. 8) 798.

⁽²⁾ N B. 160; 4 Ind. Dec. (N. 8.) 4.9.

^{(3 8} B. 1/4; 4 Ind. Dec. (N. s.) 48?. (4 6 M 3z2; 2 Ind. Dec. (N. s.) 504 (F. B).

^{(5: 18} A. 290; A. W. N. (1893) 56; 8 Ind. Dec. (N. S.) 899.

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has to be considered, namely, whether the surrender or relinquishment was of a right or interest worth over Re. 100 and whether such a transaction, if in writing is required to be registered to give it validity (see sestion 17 of the Indian Registration Act), though the Rent Recovery Act (passed in 1855) merely required that it should be in writing. A further question is, whether a surrender or relinquishment which is legally valid makes the landlord the owner of a distinct Kudivaram right in the land or whether it merely extinguishes the Kudivaram right just as sub section (2) of section 10 of the Madras Estates Land Act merely extinguishes the Kudivaram right when the tenant leaves no heir except the Government and does not vest any distinct positive right in the land. lord], See also section 8 (1) as to the nature of the right which a landlord obtains over a land in his estate when the tenant's interest is merged with the landlord's and Upadrosta Venkata Sastrulu v. Devi Sitaramudu (6), Zemindar of Ohellapalli v. Rajalapati (7) and orders of reference Somayya to the Fall Bench in Second Appeal No. 1765 of 1918. The extinguishment of the Kadivaram right by merger or extinction of the tenant's natural heirs does not, of course, convert ryoti land into private land and in a real sense, "the extinguishment" is only an abeyance of the right till it is revived by the grant of the land to a third person for rent by the landlord. If the landlord does not by the relinquishment of the tenant obtain for himself the tenant's distinct Kudivaram right, it seems to follow that he sould not also own what is called an equity of redemption in the Kudivaram right where the tenant's right had been subjected to a mortgage before the relinquishment or surrender. A landholder as such has no right to redeem a mortgage ereated over the Kudivaram right by his tenant as he (the landlord) endd not elaim to be a person having any interest in or sharge upon the property mortgaged (that is, the Kudivaram right) and so to fall under section 91, clause (a) of the Transfer of Property Act (unless rent had fallen into arrears in which case he has a charge on the land for recovery of arrears under sestion 5 of the Ast.) The other clauses of section 9; are wholly inapplicable. Section 8 of the Madras Estates Land Ast seems to prohibit a holding ructi land at landholder from any time under any circumstances as if he owned the Kudivaram right therein except' of course, in the case of one of several Sestion 10, elause on sharer lan ibolders. (2) also makes it clear that even when the owner of the Kudizaram right in a ryoti land died leaving no beirs except the Crown, though the Crown was by this Statute prevented from inheriting the tenant's right (as it was entitled to do before this Act came into force) the landlord did not inherit the right of the deceased tenant as a distinct Kudivaram right, but the dead man's right was merely extinguished on his death and the landlord's right was only to indust any person he liked into the land as a tenant and that person would obtain the Kudivaram right under section 6 of the Act.

I shall here refer to two matters which related to the course of the trial in the The appellant (let defendlower Courts ant) seems to have relied in those Courts his contention that the land became his Kamatam land by the relinquishment of 18:7-8 and he seems not to have put forward, or at least pressed enfisiently, his contention that he became the owner of the equity of redemption by the relinquish. ment and was entitled to retain possession as such owner till his right was extinguished by a decree passed and execution proseedings taken in a suit to which he was himself made a party. That a mere relinquishment to the landlord cannot put an end to the mortgage already created by the tenant so as to prejudise the mortgages's right is now well established, See Ohotey Lal v. Sheopal Singh (8) and Ekambara Ayyar v. Meenatchi Ammal (9).

The other matter referred to is, that the Court of first instance did not settle the issues properly on the very complicated questions which I am considering and which were argued before us here. The only issue framed was the general one, "whether the suit land belongs

^{(6) 24} Ind. Cas. 2?4; 26 M. L. J. 585; 88 M. 891. (7) 27 Ind Cas. 77; 89 M. 84 at p. 849; 27 M. L. J. 718; 16 M. L. T. 67c; (1915) M. W. N. I; 2 L. W. 117.

^{(8) 9} Ind. Cas. 217; 38 A. 835; 8 A. L. J. 117.

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to the plaintiff or his predecessor in title." The 3rd ground of anneal to the lawer Appellate Court was, "the lower Court should have framed the most important issus in the suit regarding the relinquish. ment of the suit land in their fayour pleaded by the dafendants, as also with regard to the Kamatam nature of the suit land as sontended for by the defendants." The lower Appellate Court also did not frame all the necessary questions for coneideration and the second point framed by it was, "whether the land was relicquished and whether the relinguishment thereby gives the Zamindar an absolute right in the land." On that question, while it came to the conclusion that the Zemindar did not get the absolute right in the land. it held that he asquired a right in the Kadivaram subject to the prior mortgage, and it at once rushed to the constasion that the decree and the sale properties; in the suit of 1905 to which the Zomindar was not made a party were also binding upon bim and hence he sould not retain presession. What definite right the Zemindar got by the ryot's ralinguishment (if true) has not been properly considered and decided by the lower Appellate Court.

The respondent's learned Vakil (Mr. Ramades;) attempted to support the decres of the lower Appellate Court by raising the ontention that the relingishment itself to the landlord, if true, was wholly invalid as it was made after the tenant had earved out a mort. gage out of the tenancy right in favour of a stranger. He relied upon Sir Bhashyam Iyengar, J.'s dictum in Ekambara Ayyar v. Meenatchi Ammal (S). The learned Judge was considering the proviso to section 12 of the old Rent Recovery Ast of 186) enacting that tenants shall be allowed to relicquish their lands at the end of ins revenue year by a writing to be signed by them in the presence of witnesses or at any other time if the landlord is willing to accept the relinquishment, I might add here that in the corresponding sestion 149 of the Madras Estates Land Ast, the words " by a writing to be signed in the presence of witnesses " does not appear, but section 150, elause (1), which speaks of the landhelder refusing to receive a notice of the relinquishment given under section 149 and section 150, clause (2), which speaks of

tender of such notice clearly imply that the notice should be in writing though it need not be attested by witnesses. (The omission of the words "by notice in writing" in section 49 cosms to be a clerical over. sight on the part of the Lagicistare). In supposition with the right of the terent nuder the Bont Becovery Act of 1865 to relinguish the land even against the will of the landlord, the learned Judge (Bhashyam digangar, J.) remarked "woon the dens diw bereined ei bedeingeniles beal an ingambrance, the relinquishment itself may be inoperative to terminate his liability as tenant to the landholder until the immbrance ceases by officiation of time or is herwise discharged by the tenant. (Sham Das v. Batul Bibi (10) and Bifri Prasid v. Sheo Dhian (11)]." The learned Judge did not lay down that the relingliebment was void but he seems only to point that the right and privilege to relinquish given by the Statute against the will of the landlord cannot be exercised so as to put an end to the tenancy if the insumbranco ereated had not been extinguished before the relinquishment and the landlord refused to resognise the relinquishment owing to the ineumbranser's right to bring the holding to sale and his consequent right to give the purchaser at each sale a claim to repudiate the landlora's dealing with the relirquished holding by letting it to whomso. ever the landlord shooses. I think that all that the learned Judge intended to lay down was that the relinquishment made under circumstances which would not enable the landlord to deal with the relinquished land in its entirety as an uner-cambered holding need not be recognied by the landlord. Take a case where the tenant has sub let his holding for 20 years as he was entitled to do. His relinquishment of the land when !5 years of the emb-lease term had still to run and the sab-lesses was in possession, could not he allowed to prejudice the landlord who ought not to be made to wait for 15 years to exercise bis power to indust a new anant. The same in Badri Prasad v. quoted by the learned Sheolian (11)

(10 21 A. 538; A. W. N. (1902) 155. (11) 18 A. 354; A. W. N. (1896) 103, 8 Ind. Dec.

(N. 8.) 943.

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Judge in support of his dictum lays do vo only that a sab-lease for a term of years g a . ed by an occapancy tenant is not put an e ! to by a relinquishment to the landlord by the oceupancy tenant. If the landlord chooses to waive his rights and to recognise the sub lease (or even a mortgage) and to exercise the landlord's rights assraing under the re linquishment subject to the sub-lease or mortgage righte, I do not see is anything to prevent him from so reengoising the relinquishment. When the learned Judge says that the relicquishment may be inoperative to terminate the tenant's liability, it does not necessarily negative the conclusion that if the landlord onesented to the termination of the liability of the tenant, the liability may be put an end to notwithstanding the existence of an incumbrance or a sub lease. In order to simplify matters, section &6 of the Bengal Tenancy Act, while it says in subsection (1), "A ruot not bound by a lease or other agreement for a fixed period may at the end of any agricultural year surrender his holding," adds in sub-section (6), "When holding is subject to an incombrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer." sub-section (7) says: "Save as is provided in the last foregoing section nothing in this section shall affect any arrangement by which a ryot and his landlord may arrange for the surrender of the whole or a part of the bolding." Thus, under subsection (6) of section 86 of the Bangal Tenancy Act, the consent both of the landlord and the insumbrancer are pecessary to make valid the surrender of a holding which is subject to an incumbrance secured by a registered instrument. But as section 149 of the Madras Estates Land Act contains no similar provisions, I do not think that it can be argued that the relinquishment itself is wholly invalid because it is subject to an incumbrance at the time of the relinquishment which is the contention put forward by Mr. Ramadoes on the strength of the short obiter dictum of Sir Bhashyam Igenger, J., already quoted.

In the result, I am of opinion that this second appeal cannot be satisfactorily

disposed of until some of the material questions arising in the case are definitely formulated and findings obtained from the lower Court on those questions, both parties being at liberty to adduce further evidence. Those questions are:—

1. Did Venksyya relicquish the lands to the Zemindar? When did he do so? Did he relinquish it in the manner provided for by section 12 of the Rent Recovery Act (Act VIII of 1865)? Even if there were defects in the mode, time and character of the relinquishment, did the Zemindar consent to the relinquishment and to the putting an end of the tenancy?

2. Was such a relinquishment binding on Venkeyya and the undivided co-parseners, if any, of Venkayya's family? Was it made by registered instrument? If not, was it invalid on that account?

3. Was the holding not Venkayya's an-

4. Who were the defendants in the snit (Original Suit No. 229 of 1906)? If they were the undivided co-pareners of Venkayya, was the relinquishment binding on them or had they consented to such relinquishment and had their interests in the holding been extinguished before they were made parties to the suit Original Suit No. 22 of 1906?

5. Was the late Sri Baja the owner of the Kudivaram right in the lands at the time of the suit of 1906 and had he by the relinquishment, (supposing it is true and valid) or in any other mode become the legal owner of the Kudivaram and sould he legally become such owner not-withstanding his status as Zemindar?

6. (The Court would have to consider the effect of the provisions of the Madras Estates Land Act already referred to in coming to a conclusion on this point). Was the Zemindar entitled on the date of the suit of 1906 to redeem the mortgage created by Venkayya? Findings should be submitted within six weeks from receipt of records in the lower Court and ten days are allowed for filing objections.

Napies, J.-I' agree with my learned brother that we must have findings on the issues settled by him, and reserve my opinion on the points of law until argument on the findings returned.

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In compliance with the above order, the Subordinate Judge of Bezwada submitted the following

FINDINGS .- The issues I am called upon to find are :-

I.—Did Venkayya relirquish his lands to the Zamindar? When did he do so? Did he relinquish it in the manner provided for by section 12 of the Rent Recovery Act VIII of 865? Even if there were defects in the mode, time and character of the relinquishment, did the Zamindar consent to the relinquishment and to the putting an end of the tenancy?

If.—Was such a relinquishment binding on Venkayya and the undivided co parceners, if any, of Venkayya's family? Was it made by a registered instrument? If not, was it invalid on that account?

III .- Was the holding not Venkayya's

ancestral property?

IV.—Who were the defendants in the suit (Original Suit No. 229 of 1906) on the file of the Court of the District Munsif of Bezwada? If they were the undivided so parceners of Venkayya, was the relinquishment binding on them or had they consented to such relinquishment and had their interests in the holding been extinguished before they were made parties to the suit Original Suit No. 229 of 1906?

V.—Was the late Sri Raja, the owner of the Kudivaram right in the lands at the time of the suit of 1906 and had he by the relinquishment (supposing it is true and valid) or in any other mode become the legal owner of the Kudivaram and sould he legally become such owner notwithstanding his status as Zam ndar's and

VI.-Was the Zemindar entitled on

the date of the suit of 1906 to redeem the

mortgage created by Venkayya?

2. The 1 issue. The defendants' care is that Venkayya relinquished the lands since Fasli 1307 and in support thereof they have now produced and exhibited Exhibit V, dated 2nd February 1897. The execution of this document has been proved by the two defences witnesses (examined after remand) and I see no reason to disbelieve their testimony. I find Exhibit V is a genuine and true document. I, therefore, deside that Venkayya did re-

linquish the lands to the Zemindar on 2nd February 1847 (of course, to come into effect at the end of that Facili 1306).

3. Section 12 of the Rent Recovery Act (Act VIII of 1865) runs thus:......Provided always that tenants shall be allowed to relinquish their lands at the end of the revenue year by a writing to be signed by them in the presence of witness or at any other time if the landholder is willing to accept the relinquishment."

The relinquishment in question is in writing, but there is not clear evidence to show that it was signed in the presence of witnesses. In so far as the evidence of defendants' let witness goes, this document was not signed (mark affixed) in his presence.

The second attestor was not called and the writer (defendants' 2nd witness) has stated nothing on this point. So I must hold that here was defect in the

mode.

But there is evidence enough on record to show that the Zamindar did consent to the relinquishment and put an end to the tenancy. The defendants' second witness has stated that orders were issued to the effect that the lands should removed from the 'Seri' head in the accounts and entered in the 'Kamatam' head and it was accordingly done. The lands were leased as 'Kamatam lands' under Exhibits I and IV and have ever in the possession of the Zemindar. is admitted by almost all the witnesses for the plaintiff.

4. The 11 issue.—The document is not registered. But I hold it is not invalid on that account. Section 12 of Act VIII of 1865 did not require registration. The Limitation Act of 1804 was already in force by then and if the document was required to be registered it would have been so stated in the Act (VIII of 1865). The decision reported as Rangayya App. Rauv. Ratnam (12) supports my decision.

5. The relinquishment which was defective (vide paragraph 3 supra) was binding on Venkayya, since it was accepted by the Zemindar and acted on by him and by Venkayya and his co-pareeners. (The rights of the co-pareeners will be consider.

ed in Issne IV).

(12) 20 M. 392; 7 Ind. Dec. (N. s.) 279.

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- worth the name for the defendants to show that the land is not Venkayya's ancestral property. On the other hand, the defence evidence goes to strengthen the plaintiff's ease that the property is ancestral So I decide the point against the defendants.
- 7. The IV issue .- The defendants in Original Suit No. 229 of 1916 were Venkayya's sons (cide Exhibit G - extract from the suit register: vide Exhibit Gl also which shows that the plaint, decree and judgment were destroyed). These are, according to the evidence on record, the undivided sons of the late Venkayya and all of them were minors at the time of the relinquishment. This is not disputed by the plaintiff. The sons being miners at that time could not have given any consent to the relinquishment. So the question resolves itself into whether the relinquishment by the father binds the sons' I think it is binding on the sons. Zemindar gave notice to Vankayya calling on him to quit the land (apparently alleging that he had no right of occupancy holding). Similar notices in the served on almost all the ruots. of them sent replies disputing the right set up by the Zemindar. Then the Zemin. dar filed suits and obtained decrees against some. It was then that Venkayya relinquished the land. It was clearly in the power of a manager of a joint Hindu family to have asted in the manter Venkayya did, saving the family from the expenses and costs of a ruinous litigation. No doubt, some suits which were filed sometime after this relinquishment were desided against the Z mindar but that is a different matter. By the time of Echibit V the Zemindar's contention was upheld. Venkayya did not want that a suit-should be filed against him and he be taxed with costs. So he relinquished. There is nothing to show that he was coerced. In my opinion, he acted prudently under the circumstances. So the relinquianment is binding on the sons. It is in evidence that ever BIDGE the relinquishment the sons have had no possession and enjoy-The evidence of plaintiff's 6th witness is not entitled to any the least eredit, for his relations with the estate
- the interest of the sons became extingatished by the time of the suit, Original Suit No. 229 of 1906.
- 8. The Vissue. The Zemindar cannot be said to have become the owner of the Kudiyaram. Under section 8 (1) of the Estates Land Ast, the Z mindar can hold the land only as a landholder. he had enjoyed the land for 12 years prior to the Ast soming into fores, i e., if the land had been cultivated as private land by the landbolder himself by his own servants or by his labour, etc., the land can be deemed to be the landholder's private land (tide section 185). But in this case there was no such enjoyment. The relinquish. ment came into effect in 1397. The land was leased for about 8 years to tenants (under Exhibits IV and I) and it was then that the Zamindar commenced to cultivate the lands himself. So I decide the issue against the defendants.
- 9. The VI issus.—It is contended by the defendants that because the Zemindar was in actual physical possession of the land by the time of the suit they are entitled to redeem. No authority has been shown to me to support the defendants' contention. It may be something if that matured and created session had title in the defendants. But it 'was not so. So the mere sirsumstance that defendants were in possession (this is clearly established by the evidence on record) since the time of the relicquishment (and so by the time of the suit) cannot help the defendants. That defendants can have no right to redeem under other stances has been laid down by His Lordship in the remand order (judgment) I must and do find the issue against the defendante.

This second appeal coming on for final hearing, after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial the Court delivered the following JUDGMENT.

Sadasiva Ayyan, J.—The let defendant (appellant) is the Zemindar of Mirzapuram and
the plaintiff (respondent) is the purchaser in
the Coart auction-sale of a certain cultivable
land in the estate, the sale having been

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held in execution of a morgage decree passed against one P. Venkeyya who was the rect tenent of the land all 1897, the mortgage soit having been brought against him in 1905 when he had ceased to be the tenant of the land. In 1897, the said P. Venkayya abandoned the land and the Zemindar took possessin of it and yet as Venkayya was the criginal most agor (the mortgage-deed being cated 1:14) he was impleaded as the defendant in the mortgage suit of 1:06 and the Zemirdar who was in possession was not impleaded. The plaintiff as the Court auction purchaser brought this suit in 1915 in ejectment of the 1st defendant, the Zemindar, who is in possession of the land.

The lower Appellate Court held (1) that as the land was admittedly ryoti land till 1897, it sould never become sonverted into private land, because by the Statute Law land which is ascertained to have been at one time, however remote, ruoti land could never become converted into Kamatam land; (2) assuming even that ryoti land could be so converted by the Zemirdar into Kamatam after relinquishment by the ryot, the mortgage oreated by the syet before such relinquishment could not be affected in any way and the eale in execution of the decree obtained on the mortgage conferred on the purchaser at that sale the right to hold that land as ryoti land.

As regards the first point, it must admitted that there is a strong body judicial opinion in the desisions of this Court in support of the view that if a land is proved to have once been ryoti land, it could never be treated afterwards as baving (by any dealings by the Zemindar or by the tenant or by both) been converted into Kamatam land except in the single case mentioned in the proviso to section 185 of the Madras Estates Land Act, ramely, except where the landholder has by his own servants or by hired labour with his own or hired stock cultivated the land as private land for 2 years immediately before the commencement of the Act. In Zemindar of Chellapalli v. Ra: alugati Somayya (7) that very learned Judge, Seshagiri Aiyar, J., has given reasons in pages 349, 350 and 351.* in support of the above *Pages of 39 M .- [Ed.]

view. This view of Seshagiri Aiyar, J., seems to have been accented by Abdur Rahim, J. and Barn, J., in Variagada Mallikarjuna Prasada Naidu v. Renduchintala Subbiah (13). The lerned Chief Justice, however, in Ze. mindar of Chellapalli v. Rajalapati Somayya (7) held the view that a ryoti land can be shown to have been converted into private land by evidence of other acts than the acts mentioned in the proviso to section 185, but added that such ev.dense should be "very olear and satisfactory." The learned Chief Justice held further in that particular case that the calling of the lands as Kamatam and the letting of them out on terms negativing ossupancy right with a view to prevent the assertion of such right (even if such letting had gone on from 18 5 till 1910) were insafficient to convert them into private lands if such conduct of the Zamindar could be held to have been merely colourable for the purpose of defeating the rights of the ocsupancy tenants. The inclination of my own view is to follow with respect the opinion of Seshagiri Aiyar, J. In the present case as the cultivation by hired servants of the Zemindar could not have begun prior to 12 years before July 1903, when the Madras Estates Land Act came into force (the abandonment having been only in 1897). the land must be deemed to have oontinued to be reofi land.

On the other question whether there has been a valid relinquishment, valid at least to the extent that the tenant lost all interest in the land relinquished, I have nothing to add to what my learned brother has said in the judgment prepared by him in this case.

The next question for consideration is, whether if the relinquishing tenant had created a mortgage right over the Kudivaram interest in the land before his abandonment and relinquishment, that mortgage interest also came then to an end. On principle, it is difficult to see how a parson after having carved out an interest in favour of another for valuable consideration could destroy by his unilateral act the interest so created in the other person's favour, that is, without the consent

^{(13) 61} Ind. Cas 552; 39 M. L. J. 277; 23 M. L. T. 281,

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of the assignee of that interest. In Ekambara Ayyar v. Meenatchi Ammal (9) Bhashyam Lyyengar, J., says: "It is unnesessary to consider and decide in this case the effect of a relinquishment under section 12 (Rent Becovery Act) at the end of the revenue year of his holding by a ryot as it is not analogous to an ejectment on forfeiture. The operation of such relinquishment meane insumbranees created by the tenant may stand altogether on a different footing and the relinquishment itself, when the land relinquished is burdened with such an incumbrance, may be inoperative to terminate his liability astenant to the landholder until the ensumbrance seases by effloxion of time or is otherwise discharged by the tenant. Sham Das v. Batul Bibi (10) and Badri Prasad v. Sheo Dhian (11)." The learned Judge was evidently considering the case of a relinquishment which the landholder refused to accept, the refusal being based on the ground that a mortgage interest had already been ereated over the holding and the landlord sould not let the land to another tenant free from that mortgage. The observation of the learned Judge rather shows that while, on forfeiture for non asseptance of pattah, a mortgage interest erested prior to the forfeiture failed [which was the direct decision in Rkambara Ayyar v. Mesnatchi Ammal (9)] a mere relinquishment would not put an end to a prior mortgage.

Holding, then, that the mortgage of 1892 subsisted in favour of the mortgages after the date of and, notwithstanding the linquishment of 1847, the question is in whom did the right to redeem **789**\$ on that relicquishment? It seems to me elear that it must vest in the person who became the owner of the Kudivaram interest Melwaram interest after the Kudiyaram owner abandoned or relinquished his Kudivaram interest was considered by me. My conclusion was that a land holder,

soil through his hired or farm servants. I further held that when a ryoti land is abandoned by a tenant, it might be legally permissible to state that the Kudivaram thereupon became vested in a certain sense in the land-holder because the land-holder became vested with the right to grant the Kudivaram right to any other person he liked after the abandonment by the former tenant of the said lands. I, however, added that the vesting of the Kudivaram in that sense in the land holder till he granted it to a new tenant could not convert. ryoti land into private land. further considered the matter, I see no. sufficient reason to change my above view . that the Kudivaram in the abandoned holding might be deemed to become vested in the land holder for some legal purposes till the land holder inducted a new tenant into the land. It follows from what I have above stated that the mortgage suit which was brought in 1906 against a person who had essed to be the owner of the right to redeem, namely, P. Venkayya, was wholly missonssived, that the Zeminder who was then the only person who could in a limited sense represent the Kudivaram interest (though he may not be said to be its owner in its full sense) and who was, therefore, entitled to redeem the mortgage was the proper party to have been impleaded as the defendant in the sait for sale by the mortgages, and that as he was not made a party to that: the desree for Bait 8316 bus sale in execution held thereunder bound neither the lands nor the Zimindar and that the plaintiff (purshaser in the Court auction sale) could not, therefore, maintain the present suit for possession having obtained no title to the Kadivaram right in the land on such relinquishment. In Upa. by his purchase in the decree passed in drasta Venkata Sastrulu v. Devi Sitaramudu (6) the said missonsieved suit. The Sabordithe question of the right of an inamdar in nate Judge's decree must, therefore, bar the lands in which he owned only a reversed and that of the District Munsif. restored with costs here and in the lower: Appellate Court.

NAPIER, J .- The Bant Resovery Ast of 18:5, section 12, gives to a tenant a right to though he owned the waste and abandoned relinquish his holding and I am clear that: lands in his village in a certain sense, he cannot create an interest in his estate. could not be considered to enjoy the Kudi. that will operate to destroy that right but varam in the ordinary mode without that all such interests are subject to such direct emiset by the entireation of the right. But in dealing with the facts of this,

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ease we have first to decide whether there was a valid relinquishment. The lower Appellate Court has found that there was no writing in the presence of witnesses as provided for in the first sentence of the proviso to section 12 of the Rent Recovery Act and we must accept that finding. He finds, however, that there was in fact a relinquishment accepted by the Zemindar and acted on by him and by Venkayya and his ec-parceners which amounts to an abandonment in pursuance of the relinquishment. In dealing with similar facts, Shepherd, J., held in Narasimma v. Lakshmana (1), that relinquishment, acceptance and abandonment operate to terminate the estate of a tenant; while Muthusami Iyer, J., went even further and held that a mutual contract from which a surrender in fact might reasonally be inferred was a valid relinquishment. I see no reason to differ from his ruling, given many years ago, and hold that there was a valid relinquishment. The important question remains, bowever, what was the effect of that relinquishment and the subsequent dealings with the land by the landlord on the mortgage right of the original mortgagee in the hands of the present plaintiff sping in The plaintiff is the assignee of the austion-purchaser of the land sold in execution of the mortgage-deeree in 1909 and elaims as owner of the land to recover possession of it from the Zemindar to whom it was relinquished. The relinquishment was in 1897. In the same year the Zemindar purported to lease the land to the same tenant as Kamatam for a term of three years. In 1900 it was leased to a stranger for 5 years as Kamatam. In 1905 the land was cultivated by the landlord as private land, In 1906 the mortgages brought his suit against the original mortgagor ignoring the Zemindar who was in possession and the mortgagor's interest was sold in 1909. On those facts the first question seems to me to be, what became of the Kudivaram interest after the relinquishment and on the lease as Kamatam in the same year. It was decided in Ekambara Ayyar v. Meenatchi Ammal (9), that ejectment of a tenant by a landlord for refusal to accept a proper patta extinguished all mesne incumbrances just as forfeiture of a lease-hold interest extinguishes all incumbrances under section 115 of the Transfer of Property Act, though the Court is eareful

to point out (vide page 408) that a ryot with a right of occupancy is not a mere lease. holder, but the Court expressed no cpinion as to the efficacy of a relinquishment under section 12 where mesne insumbrances have been created by the tenant. I have already expressed my opinion that the statutory right of relinquishment cannot be made inoperative. but the other question stillremains. It was held by my learned brother in Upadrasta Venkata Sastrulu v. Devi Sitaramudu (6) that on abandonment by a ruot with occupancy right the Kudiyaram did not vest in the land-lord in such a manner as necessarily to convert the land into private land (vide page 895) and in Adusumulli Suryanarayana v. Achhutta Potanna (14), that surrender and abandonment were not a method by which the Kudivaram interest ean be acquired by virtue of the exception to section 8 of the Madras Estates Land Act. Agreeing with this view, I would hold that the Kudivaram right in this land was in abeyance until it came into existence again by admission of a new ryot and continued in abeyance as long as the landlord did and could in accordance with law treat the land as private land, Under section 6, sub-section (2) of the Madras Estates Land Act if occupancy right land is surrendered after the Act and a tenant is admitted to possession within 10 years of such surrender, he acquires a right of occupancy. That is to say, the Kudivaram interest is revived in him irrespective of the fact that the land might have been sultivated by the landlord himself for 9 years; but we have to consider the case of land which was treated as Kamatam prior to the Act. It was held by Seshagiri Aiyar, J., as I understand the learned Judge, in Upadrasta Venkata Sastrulu v. Devi Sitaramudu (6), and in Zemindar of Chellapalli v. Rajalapati Somayya (7), that, except in the case specified in the proviso to section 185, no land can, after the passing of the Madras Estates Land Act, ever have been converted into private land because of the retrospective operation of section 8, sub-section (1) and that view has been pressed strongly on us. The learned Chief Justice has distinctly negatived it in the latter case and, sitting with Ayling, J., had deelined to accept it in Chintam

(14) 22 Ind. Cas. 339; 38 M. 608; 26 M. L. J. 99

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Reldi v. Rajasagi Appala Nurasimha Raja Garu (15). I agree with the Justice that the words "but shall hold it as a land-holder" do not necessarily imply that it remains ryoti land, and I am also of opinion that surrender is not an operation by which the entire interests become united "otherwise." I might add that where so large a proposition is contended for as that the conversion of oscupancy land into private land since the Permanent Settlement is, since the Madras Estates Land Act, retrospestively inoperative, very definite language must be relied on and the language used in this section falls far short of that requisite. In my opinion, the view expressed by Seshagiri Aiyar, J, in the two cases referred to should not be followed.

I now turn to section 185. This land elearly does not some within the proviso to section 185. So, it is presumably not private land but at the date of the suit in 1915 it was being sultivated by the land. lord himself and had been so cultivated for 10 years. Even at the date of the mortgage suit, the land was being cultivated by the landlord. It is found that the lands are surrounded by the Kamatam lands of the Zemindar and it is admitted that in 1897, eleven years prior to the passing of the Act, they were let as Kamatam lands and continued to be so let until 1905 when the landlord took them under personal cultivation. In my opinion, it is now too late to contend successfully that the lands are not the priwate lands of the Zemindar, whatever might have been the result if the mortgages had brought his suit on his mortgage against his mortgagor in 1897 when the latter took the lands on lease in 1897 directly after his surrender. What would be the effect on the mortgage right if the lands ever became ryoti again is a question I do not propose to consider. I think it enough to say that the land. lord, not having been a party to the mortgage suit (I do not decide that he could have been made a party), is not bound by the decree and being himself in possession of his Kamatam lands cannot be ejected. I would, therefore, dismiss this suit with coats throughout.

This second appeal having been set down to be spoken to on the 28th April 1921, the Court (Sadasiva Aiyar, J.), delivered the following

(15) 27 Ind. Cas. 50; (1914) M. W. N. 766.

JUDGMENT .- When pronouncing judg. ment, we omitted by oversight to mention what we had resolved and expressed our intention to do during the source of the argaments, namely, to allow the memorandum of objections in respect of decreeing possession of Item No. 2 with mesne profits (Rs. 36) against the defendants who are in possession thereof, and we intended that the suit was to be dismissed and the District Munsif's decree resorted only as regards Item No. 1. This omission in the judgment will be considered as supplied on the above lines and the memorandum allowed to that extent. The District Munsif will, of course, be entitled to pass supplementary deerse after enquiry as regards future mesne profits.

M. C. P.

Appeal accepted.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 2307 OF 1917. November 5, 1821. Present :- Mr. Justice Chevis and Mr. Justice Harrison. JAWALA DAS AND ANOTHER-PLAINTIFFS-APPELLANTS

DETEUS

HUKAM CHAND AND OTHERS-DEFENDANTS-RESPONDENTS.

Limitation Act (IX of 1903), Sch. I; Arts. 64, 85-Open, current and mutual account -Balance struck. effect of.

A suit to recover the balance due on crosstransactions in which each side supplied the other with goods in kind is governed by Article 85 and not by Article 64 or Article 57 of Schedule I to the Limitation Act. [p. 388, col. 2, p. 389, col, 1.]

Jas Ram v. Attar Chand, 30 Ind. Cas. 491; 16 P. R. 1916; 178 P. L. R. 1915; 118 P. W. R. 1915, followed. An account does not become closed whenever

balance is struck. [p. 338, col. 2.]

Second appeal from a decree of the Dietriet Judge, Shahpur, at Sargodha, dated the 12th May 1917, reversing that of the Sub-Judge, Second Class, Sargodba, dated the 13th November 1916.

Mr. Nanak Chand, for the Appellants, Mr. Mukand Lal Puri, for the Respond. ente,

JAWALA DAS C. HUKAM CHANC.

JUDGMENT .- The plaintiffs in this case sue for a sum of Rs. 2,270 which they claim to be due to them from the defendants. There have been mutual dealings between the parties, each side supplying the other with certain goods. The assounts were made up from time to time and on the 19th Baisakh, Sambat 1962, a balance for Rs. 1,712 was struck in favour of the plaintiffs. A later balance for Rs. 1,718 14.6 was struck in favour of the plaintiffs on the 15th Jeth of the same year. This amount was the same as that due on the former balance of the 19th Baisakh 19.2 except that Re. 6-14-6 were added as interest. Since then, there have been no dealings between the parties. enit was brought on the 9th August 1915, i.e., about ten years after the striking of the last balance. The first Court decreed the claim but the learned District Judge holds that the ease is governed by Article 85 of the Sabedule of the Limitation Act and is time barred. The plaintiffs appeal to this Court.

The period of limitation under Article 85 is three years, and it is admitted on behalf of the plaintiffs appellants that if Article 85 applies to the case the suit is barred by limitation. But on behalf of the plaintiffs it is urged that tois is not a case of a mutual, open and surrent ascount but rather a case of a closed account, and that the Article applicable is Article 64, the period of limitation under the Panjab Loans Limits. tion Act being six years. On the 2 sth August 1909 the defendants applied to be declared insolvents and they then showed the debt, which is the subject of the present suit, in their list of liabilities. Coansel for the respondents admits that if the period of limitation applicable to the suit is six years, this acknowledgment made by the defendants in 1909 would be sufficient to renew limita. tion under sestion 19 of the Ast.

The only question for our decision, therefore, is whether the Article applicable is Article 85 or Article 64. Mr. Nanak Chard relies mainly on the case published as Ishar Das v. Harkishan Das (1). ruling, however, does not seem to us to be at all parallel to the present case, for it was a case in which the account consisted solely of loans by the plaintiff to the defend-

(1) 25 Jpd, Cas. 577; 148 P. W. R. 1916; 7 P. L. R. 1917.

ants who made re-payments in the shape of grain. This, obviously, was not a case of a mutual assount but simply an ordinary loan account. Mr. Nanek Chand argues that in the present case the account must be regarded as a elesed account and not an open asscunt from the fact that, since the date of the last balance, no further transactions have taken place between the parties. The mere fact that the plaintiffs have allowed a considerable time to elapse before suing eannot in any way change the nature of the account; nor are we able to hold that an account becomes closed whenever a balance is struck, Mr. Nanak Chand places reliance on a paragraph in the above-mentioned raling which begins: "It will be observed that plaintiffs sue not on an open but on a elesed assount." We note, however, that the preceding paragraph shows that a fresh item had been borrowed and a fresh payment made since the stricking of the last balance, so that no support is here found for Mr. Nanak Chand's proposition that an assount is closed whenever a balance is struck until it is re-opened by fresh dealings. For the respondents reliance is placed on Jas Ram v. Attar Chand (2) which seems to us exactly in point. This is the roling which has been relied on by the learned District Judge respondents also eites Counsel for the Chittar Mal v. Behari Lal (3), which quotes the definition of a mutual account given in Ganes's v. Gyanu (4). Other rulings eited are Murugappa Ohetty v. Vyapuri Chetty (5) and Laljee sahoo v. Roghconundun Lall sahoo (6). In the present case it appears clear to us that there were mutual dealings and that. though balances were struck from time to time, there were merely asknowledgments and not agreements to pay, and the ease is one not of a stated account but of a mutual, open and current account, where there have been resiprosal demands between the parties, The case is, therefore, governed by Article 85 and not by Article 64. Mr. Navak Chand also argued that Article 57 might be applied to the case, but this is obviously inapplicable

^{(2) 30} Ind. Cas. 491; 16 P. R. 1916; 178 P. L. R. 1915; 118 P. W. R. 1915.

^{(3) 4} Ind. Cas. 261; 32 A. 11; 6 A. L. J. 921.

^{(4) 22} B. 606; 11 Ind. Dec. (N. s. 936.

^{(5) 38} Ind. Cas. 227; 5 L. W. 364; 32 M. L. J. 538

^{(6) 6} C. 447 at p. 448; 3 Ind. Dec. (x, s.) 291.

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as Article 57 merely relates to suits for money payable for money lent and can have no application to a case in which the plaintiff eeore co enb. erneird edt revecer of gains ai transactions in which each side supplied the other with goods in kind.

We uphold the decision of the learned District Judge dismissing the suit as timebarred, and we dismiss the appeal with

costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT. APPEAL FROM ORIGINAL OLDER No. 62 **cr** 1920. July 1, 1920.

Present:-Sir Asatosh Mookerjee, Kr., Acting Obief Justice, and Justice Sir Ernest Fletcher, Kr. HARISING NEHALOHAND-

APPELLART

versus KANKINARAH CO., LTD. -

RESPONDEATS. Arbitration Act (IX of 1899), ss. 18 (1), 14-Arbitration-Reception of evidence in absence of party affected thereby, propriety of-Principle of justice-Irregularity of procedure - Misconduct - Award, when should be remitted and when set aside.

Where the arbitrators in a case do not decide a substantial question arising between the parties to the arbitration in the presence of both the parties and arrive at an ex parte decision in the presence of one party the award is invalid. [p. 892, col. 1.]

Whether an arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice must be equally applied in every case. One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents [p. 891, col. 1.]

In arbitration proceedings both sides must be heard, and each in the presence of the other ; however immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it, except in the presence of the

opponent. [p. 891, col. 2.] It is both an unwise and unsafe proceeding for .

an arbitrator to take proof in the absence of either . or both parties. [p. 8+2, col. 1.]

If irregularities in procedure are proved which amount to no proper hearing of the matters in dispute that would be misconduct sufficient to vitiate the award, without any imputation on the .. col. I.

The Court may remit an award when the arbitra

tor has been guilty of misconduct in a technical sense, that is, if the misconduct is of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him. If the arbitrator is guilty of fraud or partiality or such like misconduct, as would justify his removal the Court will not remit the award. But where the arbitrator has merely failed to exercise all his powers or has improperly exercised a discretion, such as, hearing witnesses or consulting documents in the absence of the parties, and this has happened in spite of a complete absence of dishonest motive the Court will not hesitate to remit the award to the arbitrator instead of setting it aside. [p. 892, ols 1 & 2.]

An arbitrator is the Judge chosen by the parties, he has a wide measure of discretion as to the manner in which the proceedings are to be conducted and a due knowledge of the whole case is to be brought to his mind. His award will not be set aside, merely because the Court differs in opinion from him upon the merits of the dispute submitted

for his decision, [p. 393, col. 1.]

Appeal against an order of Mr. Justice

Bankin, dated the 12th April 1920.

Sir B. O. Mitter and Mr. Pearson, for the Appellant.

Mr. W. Gregory, for the Respondents. JUDGMENT.

MOOKERJEE, Acro. C. J .- This is an appeal against the judgment of Mr. Justice Rankin in the matter of an application to set aside an award.

On the 28th August 1919 the appellants agreed to sell to the respondents 5,000 bales of jute of what has been called the Narainganj mark. The contract contained an arbiration clauss in the following terms: -

"Any dispute arising out of this contract shall be referred to the arbitration of the Bangal Chamber of Commerce whose desision shall be assepted as final and binding on

both parites to this contract."

The same for the appellants is that, between the 1st and 30th September 1919, they delivered to the buyers 2,434 bales of jute of the contract mark assortment and quality, which were reseived by them. The buyers were apparently not satisfied with the quality of the jate and on the 11th September 1919 referred the matter to the arbitrators without any notice to the plaintiffs. On the 17th-September 1919, the Registrar of the Arbitration Tribunal of the Obamber intimated to the appellants the objection taken by the buyers. On the next day, the appellants replied that they had received no complaint honesty or impartiality of the arbitrator. [p. 892, from the buyers and denied that there was same for arbitration. After some 877

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of the questions raised in this appeal, the Registrar sent the following letter to the appellants on the 6th November 1919:—

I am instructed by the Court which has been constituted to adjudicate on the above dispute to request you to select in conjunction with Messrs. Jardine Skinner & Co., Managing Agents, Kankinarrah Co., Ld., ten bales from the 1,275 bales in dispute, five bales to be selected by yourselves and five bales by Mesere. Jardine Skinner & Co. The bales must be here at 10 o'clock on Saturday the 8th instant. Should you refuse or neglect to select your portion of the bales in time to enable Mesers. Jardine Skinner & Co., to sand them here on the day and at the hour mentioned, Messre. Jardine Skinner & Co, have been informed that they will be at liberty to select the whole ten bales themselves and send them here. You may identify the bales here at 10-30 A. M. on that day."

On the next day, the sellers replied as "With reference to your letter No. 21914, dated the 6th instant, we are to submit to the Court which have been constituted to adjudicate on the above dispute that our representatives went to select bales, cut of the lot of; 1,275 bales, as advised by the Court, and they found only a mixed lot containing about 150 to 200 bales of the mark in dispute. They politely but persistently requested the mills authorities to show them the lot of 1,275 bales dispute which they refused and failed do; thus they were not in a position to select bales as required by the Court. In the circumstances, we would submit to the Court to postpone the arbitration for the present and to find out the lot in dispute so that we can select the bales for their inspection. If in spite of our this submission to the Court. it proceeds with the arbitration, we would not be bound by the Court's award which will be based on inadequate and one-sided evidense."

It appears on the 6th November 1919 the Registrar had also sent a letter to the buyers in the following terms:—

"I am instructed by the Court which has been constituted to adjudicate on the above dispute to request you to select, in conjunction with Mesers. Harising Nehal Chand, ben bales from the 1,275 bales in dispute, five

bales to be selected by yourselves and five bales by Messrs. Harising Nehal Chand. The bales must be here at 10 o'clock on Saturday next the 8th instant. Should Messrs. Harising Nehal Chand refuse or neglect to select their portion of the bales in time to enable you to send them here on the day and at the hour mentioned, you will be at liberty to select the whole ten bales yourselves and send them here."

To this, the buyers replied next day as follows:-

"In asknowledging receipt of your letter No. 21915 C of 6th instant, we beg to advise you that as Messrs. Harising Nebal Chand have refused to select bales for arbitration ex the parcel in dispute, we have exercised the authority granted us in your letter under reply and have to-day despatched 10 bales of our own selecting to the Chamber for favour of arbitration."

It now transpires that the arbitrators did not communicate to the buyers the reply received from the sellers on the 7th November 1919, in which they alleged that they could not make the selection as directed by the arbitrators, as they were not allowed by the buyers to have access to the 1,275 bales. Nor did the arbitrators communicate to the sellers the reply received from the buyers. On the other hand, they accepted the ten bales selected by the buyers and called upon the sellers on the 14th November 1919 to identify them:

"I am directed to give you notice to identify, on or before 2 P. M. to morrow, Saturday, the 15th November, the ten bales which have been sent here by Mesers. Jardine Skinner & Co., from the parcel in dispute, failing which the bales will be inspected for purposes of the arbitration."

The sellers protested against this procedure and declined to be a party to the arbitration proceedings further. Ultimately, the arbitrators made an award on the 26th November 1919, holding that the quality of the jute was not equal to the standard of the mark, and directing the sellers to pay to the boyers an allowance of Rs. 31,875 on the 1,275 bales in dispute. The award was filed in Court on the 19th January 1920. On the 16th March 1920 the sellers made an application to have the award set aside, which has been refused by Mr. Justice Rankin. On the

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present appeal, we have been invited to set aside the award as improperly made. In our opinion, the award must be remitted to the arbitrators for re-consideration under section 13 (1) of the Indian Arbitration Act.

From the correspondence already set out, it appears that on the 7th November 1919 the sellers alleged that they were unable to select five bales as directed by the arbitrators from the 1,275 bales in dispute, besause the sellers allowed them access to only 150 or 200 mixed bales. The buyers, on the other hand, intimated to the arbitrators that as the sellars had refused to selest the bales, they had exercised the option allowed to them and had selected all the ten bales. Consequently, there was at that stage, a substantial matter in controversy between the parties, namely, whether or not the conduct of the buyers made it impossible for the sellers to sarry out the instructions of the arbitrators. This question should have been decided in the presence of both the parties concerned, after the respective allegations of the sellers and the buyers had been intimated, each to the other. Now, it may be conceded, as stated by Lord Halsbury in Andrews v. Mitchell (1) that although we must not insist upon a too minute observance of the regularity of forms among persons who naturally, by their education or by their opportunities, eannot be supposed to be very familiar with legal procedure, there are some principles of justice which it is impossible to dieragard. Whether the arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice, as Lord Langdale, M. R. put it in Harvey v. Shelton (2), must be equally applied in every ease. One of these elementary prineiples is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents, though the rule has sometimes been ignored by mercantile arbitrators, whose awards have on this ground been set aside: y .

(1) (1605) A. C.78 at p. 80; 74 L. J. K. B. 838; 91 L. T. 587.

Matson v. Trower (3), Brook, In re (4), Camillo Bitson and Jewson and Sons, In re (5).

The validity of the proseedings in this ease must, consequently, be tested in the light of the well-established doctrine that in arbitration proceedings both sides must be heard, and each in the presence of the other, however immaterial the arbitrator may deem a point, he should be very eareful not to examine a party or a witness upon it, exespt in the presence of the opponent. This rule was formulated by Lord Eldon in Walker v. Frobisher (6) where he set aside an award on the ground that the evidence had been improperly admitted, and observed that even though the arbitrator swore that the evidence reseived had had no effect on his award, no Court would permit him to decide so delieste a matter as whether a witness examined in the absence of one of the parties had an influence on him or not. same view was adopted by Lord Denman in Dobson v. Groves (7) and Plews and Middleton, In re (8). In Drew v. Drew (9) Lord Cranworth followed the rule, laying down that an arbit. rator missonssives his duty if he, in any the minutest respect, takes it upon himself to listen to evidence behind the back of a party who is interested in controverting it or is entitled to controvert it. Lord Eldon and Lord Cranworth thus concurred in the view that the principles of universal justice require that the person who is to be prejudiced by the evidence ought to be present to hear it taken, to suggest cross examination or himself to cross-examine, and to be able to find evidence, if he can, that shall meet and answer it. It is indeed indispensable to the impartial administration of justice between the parties that both should be present when proof is being led by either; the same rule applies to an inspection or an experimental test which are regarded as practical proof: Paterson and Son v. Corpora.

(3) (1824. B. & M. 17; 27 R. R. 725.

(5) (1893) 47 Sol. Jou. 439,

(6) (1801) 6 Ves. 70; 5 R. R. 223; 81 E. R. 943. (7) (1844) 6 Q B. 637; 14 L. J. Q. B. 17; 9 Jur.

86; 115 E. R. 289; 68 R. R. 509. (8) (1845) 6 Q. B. 845; 14 L. J. Q. B. 189; 9 Jur, 160; 115 E. B. 819; 68 R. R. 572.

(9) (1856) 2 Macq. 1, 149 B. R. 113,

^{(2) (1844) 7} Beav. 455; 18 L. J. Ch. 466; 49 E. R. 1141; 64 R. R. 116.

^{(4) (1864.6 1} C. B. (N. B.) 403; 38 L. J. C. P. 246; 10 Jur. (N. S.) 704; 10 L. T. 878; 143 E. R. 1184; 139 B. R. 547.

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of Glasgow (10). It is both an unwise son and unsafe proceeding for an arbitrator to take proof in the absence of either or both parties. These rules have been adopted and applied in Cursetii Jehangir Khambatt 1 v. Crowder (11) and Ganes Narain Singh v. Malil: Ecer (12). In the present case, the arbitrators decided of their own motion, to adopt a certain method to obtain a fair sample of the disputed goods. It is conceivable that they might have adopted some other method equally convenient or efficacious: but this much is clear that they could not arbitrarily depart from the procedure they had invited the parties to follow. Now, one of the parties complained that they had been prevented by the other party from making the selection in the manner directed by the arbitrators. The arbitrators did not investigate the matter. Their conclusion that the buyers had rightly exercised the option to select all the ten bales was arrived at ex parte without intimation to the sellers that the buyers elaimed this right and without opportunity afforded to them to controvert the allegation of the buyers. This plainly affects the validity of the award, because, as pointed out by Lord Parmoor in Amir Begam v. Badr ud din Husain (13), if irregularities in procedure are proved which amount to no proper hearing of the matters dispute, that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator.

The question next arises whether the award should be remitted under section 13 (1), or should be set aside under section 14 the Indian Arbitration The Aot. appellants have urged that the award should be set aside and the matters in controversy investigated in Court. We are unable to accept this contention in the eironmetances of the present ease. ean be no doubt that the Court may remit the award where the arbitrator has been guilty of misconduct in a technical sense. that is, if the missonduct is of such a

(10) (1901) 3 F. 34; 38 Sc. L. R. 855.

nature as does not disqualify him from acting or render it impossible for the Court to trust him. If the arbitrator is guilty of fraud or partiality or such like misconduct, as would justify his removal, the Court will not remit the award. But where the arbitrator has merely failed to exercise all his powers or has improperly exercised a discretion, such as, hearing witnesses or consulting documents in the absence of the parties, and this has happened in spite of a complete absence of dishonest motive, the Court will not hesitate to remit the award to the arbitrator instead of setting it aside. This is in accord with the course adopted in Anning v. Hartly (14) and Dasenport v. Vickery (15) and with the opinion expressed by Romilly, M. R., in Tidswell, In re (16). In this connection, it is important to bear in mind that Courts have been invested with statutory authority to remit an award, only in comparatively resent times, as is clear from section 8 of the Common Law Procedure Act, 1:54; even the Arbitration Ast (Scotland) 1894, did not embody a corresponding provision; consequently, in many of the earlier decisions on the subject, orders were made for eancellation of the award under circum. stances in which, in more recent times, the award would have been probably only remitted to the arbitrators. To take one example, when an award was remitted by the Lord Ordinary (Lord MeLaren) in Regerson v. Regerson (17), the Court of Session (Lords Mure, Shand and Adam) set aside the order; see also Follick v. Heatley (18) and the decisions of the Honce of Lords in Adams v. G. N. Scotland By. Co (19), Holmes Oil Co. v. Fumpherston Oil Co. (20), Edinburgh Water Trust v. Olippen's Oil Co. (21). In the present case, the Court has authority either to set aside the award or to remit it to the arbitrators; the scle question is, which of these alternatives should be adopted. Although the procedure

(15) (1861) 9 W. R. (Eng.) 701.

^{(11) 16} B. 299; 9 Ind. Dec. (N. s.) 707.

^{(12) 10} Ind, Cas. 450; 13 C. L. J. 399. (13: 23 Ind. Cas. 625; 19 C. L. J. 494; 18 C. W. N. 755: 76 A. 386; 1 O L. J. 249; 12 A. L. J. 537; 17 O.

C. 120; 16 Pom. L. B. 413; (1914) M. W. N. 472: 16 El, L. T. 36; 27 M. L. J. 181; 1 L. W. 1015 (P. O.).

^{(14) (1858) 27} L. J. Ex. 145; 114 R. R. 1019.

^{(16) (1863) 38} Beav. 218; 140 R. R. 94; 10 Jur. (N. s.) 143; 55 E, R. 349.

^{(17) (1585) 12} Rettie 583; 22 So L, R. 376.

^{(18) (19:0: 47} Sc L R 40?.

^{(19) (1890) 18} Rettie 1: 28 Sc. L. R. 579. (20) (1891) 18 Rettie 52: 28 Sc. L. R. 949.

^{(21) (1902) 4}FF. 40; 89 Sc. L. R. 860.

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RABIABIBI C. GANGADRAB VIBENU PURANIK.

followed by the arbitrators was, as we have held, irregular, there is no suggestion that they asted as they did, from corrupt or improper motives. The appellants are, in view of the unfavourable result of the arbitration, naturally anxious to escape from the tribunal of their choice; but that is no reason why the Court should assist them to achieve that purpose. An arbitrator is the Judge chosen by the parties; he has a wide measure of discretion as to the manner is which the proceedings are to be conducted and a due knowledge of the whole case is to be brought to his mind. His award will not be set aside merely because the Court differs in opinion from him upon the merits of the dispute submitted for his decision; as Lord Halsbury said in Holmes Oil Co. v. Pumpherston Oil Co. (20) "the parties have agreed that his award shall not be subject to the ordinary mode of appeal and that it shall be final; that is, in nine cases out of ten, the very object which they mean to attain by submitting their differences to arbitration." This purpose should not be lightly defeated, merely because, in the course of the arbitration, the arbitrator had failed to comply with what Lord Watson called in Adams v. G. N. Scotland Ry. Co. (19) "any one of the express conditions contained in the contract of submission, or any one of those important conditions which the law implies in every submission." (See also Sharpe v. Bickerlys (22) . The position is manifestly otherwise when the proceedings indicate that the arbitrator has been guilty of corruption, bribery or falsehood; but the ease before us does not fall within that estegory.

The result is, that this appeal is allowed, the order made by Mr. Justice Bankin set aside and the award remitted to the arbitrators for re-consideration with reference to the point whether the samples were or were not properly drawn. The costs of this appeal will abide the result; this, however, does not affect the order for costs thrown away by the adjournment of the appeal on the 23rd June last.

FLUTORER, J.—I agree. B. M. & J. P.

Appeal allowed: Award remitted.

·- (22) (1815) 8 Dow. 102, 3 B. B. 1008.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 277 of 1920.

November 9, 1921.

Present:—Sir Norman Maeleod, Kr.,
Chief Justice, and Mr. Justice Shah.

RABIABISI—PLAINTIFF—

APPELLART

DETEUS.

GANGADHAR VISHNU PURANIK

Bombay Salt Act (II of 1890)—Sub-lease of salt pane

-Breach of condition as to permission of Collector, effect of.

A breach of the condition of a license under the Bombay Salt Act as to a sub-lease of salt pans without the written permission of the Collector makes the sub-lease invalid.

Ismailji Yusufali v. Raghunath Lachiram, 8 Ind. Cas. 779; 38 B. 636; 11 Bom. L. R. 748, followed.

First appeal from the decision of the First Class Subordinate Judge, Thans, in Civil Suit No. 165 of 1917.

Mr. Coyajes, (with him Mr. W.B. Pradhan), for the Appellant.

Mr. P. B. Shingne, for the Respondent.
JUDGMENT.

MACLEOD, C. J .- This case is covered by the decision in Ismailji Yusufali v. Raghu. nath Lachivam (1) in which the facts were similar to the facts in this case. The licenses Ynenfally, who held his lease to certain calt. pans on condition that he should not sub let without the written permission of the Collector, sub-let them to the respondents without getting such permission. Then, Yusufally having died, his son obtained a fresh lisense from Government. The respondent obtained a fresh sub-lease on the same terms as those contained in the sub lease obtained from Yusufally, but no permission had been obtained from the Collector. It was urged in second appeal that the appellant manufastured salt not only under the sub-lease but also under the power of attorney by the appellant. The Court held that there was no evidence in support of that.

Chandavarkar, Acting C. J., said at page

"The real object and necessary effect of the agreement between the appellant and the respondent was to enable the latter to manufacture salt without a license in the guise of a sub lesse, although that was forbidden by law and by the terms of the license."

(1) 8 Ind. Cas. 779; 83 B. 686; 11 Bom. L. R. 748. Page of 22-B.—[Ed.]

NARAIN BAO KALIA U. MANNI KUBB.

Mr. Justice Heaton said :-

"The question, therefore, is whether the object of the agreement is forbidden by law within the meaning of section 25 of the Contract Act. It seems to me that it is, for the object was to enable the plaintiff to manufacture salt without a license, and the law says that no salt shall be manufactured otherwise than by the authority of a license granted by the Collector."

In this care it had also been urged in the Trial Court that the appellants were really servants of the licensee and agreed as such servants to work the salt-pans. But considering the terms of the agreement, it is perfectly obvious, although the term "service bond" is used in the sub-lease, that the appellants in consideration of a certain sum paid agreed to work the salt-pans for the manufacture of salt for a particular period and to do all that was required for the purposes of manufacture. There is nothing, therefore, in the nature of an agreement between master and servant which might save the appellants from having their suit dismissed. I think, therefore, that we are bound by the decision in Ismailie Yusufali v. Raghunath Lachiram (1) and that the appeal

SHAH, J.—I agree. I desire to add that, apart from the decision in Ismail; Yusufali v. Raghunath Lachiram (1), I should have found it difficult to hold that a breach of the condition of the license as to the sub letting, in so far as the permission of the Collector in writing was not obtained, would necessarily mean that the object of the provisions of the Salt Act was defeated thereby. However, there is a clear decision of this Court on the point and it is binding on us. On this ground the appeal must be dismissed with costs.

must be dismissed with costs.

N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT, SECOND CIVIL APPEAL No. 1150 of 1919, March 28, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokal Prasad.

NARAIN RAO KALIA AND OTHERS-DEPENDANTS-APPELLANTS

versus

Limitation Act (IX of 1908), s. 19-Acknowledg. ment of liability-Mukhtar-i-am, power of.

It cannot be assumed that a mukhtar-i-am has power to acknowledge liability within the meaning of section 19 of the Limitation Act, such a liability can only be fastened upon the principal by a person duly authorised in this behalf, that is, who has been given authority to make such an acknowledgment of liability. [p. 895, col. 2; p. 396, col. 1.]

Second appeal from a decree of the Officiating District Judge, Ghazipur.

Mesers. Sital Prasad Ghosh and K. N.

Laghate, for the Appellants.

Messrs. Gulsari Lal and Haribans Sahai, for the Respondent.

JUDGMENT. - This is a defendants'at peal arising out of a suit for a declaration of title as mortgagor by the plaintiffs. The defendants who are now recorded as Zemindare, sued to eject the plaintiff, Lalji Singh, from a certain holding under section 58 of the Tenancy Act. The plaintiff, Lalji Singh, pleaded in defer se that he was the real owner of the said holding, that the possession of the defendants was merely that of mortgagees on his behalf, and that they had, therefore, no right to bring a suit for his ejestment. On the 3rd of February 1916, the Revenue Court referred him to the Civil Court to have his title declared, and hares he brought the present suit. The plaintiff's allegation was that the defendants were purchasers of mortgagee rights and that they had asknowledged the mortgage in the beginning of the Settlement of 1882. The defendants pleaded in reply that the suit was barred by six years' rule of limitation, that the mortgage was made by the plaintiff's predecessor-in title on the 27th of March 1819, to Gur Dayal, that Gur Dayal transferred his rights to one Ram Kumar Mahant by two deeds of the 19th of August 1868, and the 1st of September 1869, that the defendants' predecessor-in-title purchasNARAIN BAO KALIA U. MANNI KURR.

ed these rights at austion on the 21st of November 1874, that in the meanwhile on the 20th of March 1854, the Maharaja of Benares had purchased the rights of some of the mortgagors, that on the 22nd of May 1885 the Maharaja of Benares had taken an agreement from the remaining mortgagore, that is, those whose rights were not purchased, enabling him to bring a suit to redeem the mortgage promising in exsharge some rights to the remaining mortgagors, that on the 10th of June 1885 the Maharaja of Benares brought a suit for redemption and to this suit the present plaintiff, Laiji Singh, was made a defendant, that in the written statement Lalji Singh and others said that they had relinquished all their rights in favour of the plaintiff. Maharaja of Benares, and had been unneces. earily impleaded, that this suit was dismissed by the First Court but the High Court remanded it and it was decreed after remand. that the Maharaja was given time to deposit the mortgage-money but be failed to deposit it in time, and bence the suit formally stood dismissed and the Maharaja's right of redemption disappeared, that on the 6th of March 18:6 the mortgagees applied for mutation of names and succeeded and the plaintiff's name was removed from the column of owners and entered in the column of tenante, that in the year 1909 the mortgagees sucd the plaintiff for enhance. ment of rent, that Lalji Singb, the present plaintiff, then set up a defence that be was not a tenant but a mortgagor, that this deferse was repelled and on the 29th of April 1910, rent was enhanced, that in the year 1913 Lalji Singb, plaintiff, aucd the contesting defendants for redemption a mortgage of Re. 100 which was different mortgage, but the suit was dismissed and the dismissal was ultimately confirmed by the High Court on the 14th of July 1915, and that now the plaintiff brought the precent suit which did not lie. On these pleadings the parties went to trial. The first Court came to the conclusion that this suit, which had been brought within three menths of the order of the Revenue Const passed under seelien 199 elaute (a) of the Tenancy Act, was within time. But it held that the plaintiff had failed to prove specifically the mortgage and, therefore, was not entitled to a deelaration. On these

findings it dismissed the plaintiff's suit. The plaintiff went up in appeal and the learned Judge of the lower Appellate Court same to the conclusion, that the vertification of the wajib-ul-are of 1882 by the mukhtari am of the defendants-mortgagess amounted to an asknowledgment of liability within the meaning of section 19 of the Limitation Ast, and that the suit was within time and in the result he gave the plaintiff declaration he wanted. The defend. ants come here in second appeal. The first plea taken by their learned Advoeate is that there was no subsisting mortgage for which the plaintiff could be The next contention granted a declaration. raised on behalf of the appellants was that the plaintiff had lost his equity of redemption by virtue of the agreement into which he entered with the Maharaja of Benares in 1885, and it was also contended in the alternative that as the plaintiff had already transferred his rights in the equity of redemption to the Maha. raja of Benares, even if a separate suit could lie for redemption, the suit of the Mabaraja of Benares having failed, Lalji Singh could not bring such a suit until he had got back by conveyance from the Maharaja of Benares the right which had been trasferred to him by the of 1885. On the last oseasion when the appeal same on for hearing before us we referred the following issue of fact to the Court below: "Whether Lalji Singh, present plaintiff-respondent, had at date of the suit any rights left in the equity of redemption." The learned Judge of the Court below found that there was no asknowledgment in the Settlement of 1812 as it was not shown Mukhtar.i.am of the mortgagees who verified the waith ul ars was duly authorized to asknowledge the liability within the meaning of section 19 of the Indian Limitation Act. He also found that whatever right Lalji Singh had in the equity of redemption, it was not lost because of the transfer of 1885. We agree with the first finding that it eannot be assumed that a mukhtar-i am has power to acknow. ledge liability within the section 19 of the Indian Limitation Act but that such a liability can only be factoned upon the principal by a person MATAMOLLA MANILOTH PATIAN CHANDO D. ECITIVIL BAYING.

duly authorised in this behalf, that is, who has been given authority to make such an acknowledgment of liability. In this connection, see the Privy Counsil decision in Beti Maharani V. Collector of Etawah (1) and Gokul Singh v. Saheb Singh (2). In this case there is nothing to show that the muchtar i am who verified the wajib ul ars in 183; was authorised to admit the liability mortgagees to the mortgagors. On this finding of the lower Appellate this appeal must succeed. We allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher seale.

J. P.

Appeal allowed,

(1) 17 A. 198; 22 I. A. 31; 6 Sar. P. C. J. 551; 8 Ind. Dec. (N. s.) 452.

(2) 38 Ind. Cas. 16?; 15 A. L. J. 121.

MADRAS HIGH COURT. SECOND CIVIL APPEAL No 694 or 1919. December 9, 1921. Present:-Mr. Justice Oldfield and Mr. Justice Ramesam. MATAMULLA MANIKOTH PATTAN CHANDU-DEFENDANT No. 2-APPELLANT

DETEUS

KUTTIYIL RAYIRU AND OTHERS-PLAINTIFFE Nos. 1 AND 2 AND DEFENDANTS Nos. 1 AND 3-RESPONDENTS.

Malabar Law-Trust-Grant of lease by majority of Uralars without consulting remaining Uralars, validity of-Uralars not consulted personally interested, effect of.

Under Malabar Law, the grant of a lease or melcharth by the majority of the Uralars of a religious trust without consulting the remaining Uralars is invalid. And the fact that the latter are personally interested in the subject of the lease does not disentitle them from being consulted. [p 399, cols. 1 & 2.]

Attorney-General v. Shearman, (1839) 2 Beav. 104

48 E. E. 1119; 50 R. R. 118, distinguished.

Second appeal against the decree of the Court of the Additional Temporary Subordi. nate Judge, North Malabar, in Appeal Suit No. 9 of 1918 (Appeal Suit No. 12 of 1917 on the file of the District Court, North Malabar) preferred against the decree of the Court of the District Munsif, Payoli, in Original Suit No. 132 of 1915.

This second appeal coming on for hearing on the 12th and 14th April 1921, the Court

delivered the following

JUDGMENT .- The lower Appellate Court's conclusion on one material point, the right of second defendant to the Uralarship, is vitiated by its assumption that his acceptance by the other Uralars before the suit was sufficient for all purposes, whereas the important question was whether the right persons were regarded as Uralars at the date of the granting of Exhibit B. Plaintiff in fact argues that Tali Chappan was the rightful Uralar at that time. But although this was pleaded and considered by the Distriet Munsif, the lower Appellate Court overlooked it.

We must, therefore, call for findings on the issues: -

(1) At the date of Exhibit B, was Tali Chappan or second defendant the 7th Uralar ?

(2) If Tali Chappan was, was he consulted

as to the grant of Exhibit B?

Findings on evidence on record are to be returned by August 15th. Seven days allowed for filing objections. The Endings will be returned by the District Judge.

In compliance with the order contained in the above judgment the District Judge of North Malabar submitted the following

FINDINGS:-The following are the issues in respect of which findings have been called for by the High Court in this case, 118.

(1) At the date of Exhibit B was Tali Chappan or second defendant the 7th Uralar ?

(2) If Tali Chappan was, was he consulted

as to the grant of Exhibit B?

The case of the plaintiffs is that the 7th Uraima belorg; to the Madamulla Manikkoth Tarwad, which is split up into two Tavazhie, cie., Padikkal and Meethale and that the right is exercised by the seniormost male member in the two Tavazhis taken together, though he does not thereby lose

MATAMULLA MANIKOTH PATTAN CHANDU C. KETTIYIL RAYIRU, the right of management of the properties of his own particular Tavezbi. It is not alleged that the main Tarwad real existence at present or that there are any properties which appertain to the main Tarwad except this Uraima right. The two Tavazhis have no community of interest with each other and they are really two separate Tarwads. When the division took place is not known and there is no specific evidence to show whether the Uraims was also the subject of division or whether it was left intact to be exercised by the senior most male member of both Tavazhia as is contended by the plaintiffs. case for the second defendant is that the Uraima belongs to the Padikkal Tavezhi. There is no mention in the evidence of any 7th Uralan belonging to the other Tavazhi except Tali Chappan himself. All the previous 7th Uralans mentioned in the evidence have been members of the Padikkal Tavazhi, riz., Koyyotan Kannan, Byru and Obathu. No doubt Chathu was a junior member of the Tavazbi and it is not quite elear how he happened to exercise the rights of the 7th Uralan. It is, however, seen from the admissions of plaintiffs' witness No. 1 and from Exhibit IV that Chatha was actually managing the affairs of the Padikkal Tavazbi after the death of Ryru till; his death, though he was only a junior member and it may be that he acted as 7th Uralan by virtue of his de facto management of the Tavazhi affairs. This is far more probable than the allegation or rather supposition that he must have acted as such as an agent, or with the concent of Tali Chappan. Plaintiffs' witness No. 1 himself admits that Tali Obappan never acted as Uralan and that he does not know whether any Karnavan of the Tarwad who came from Meethale Tavezhi ever asted as Uralan. This Tali Chappan was undoubtedly the seniormost male member of both the Taysghis after the death of Ryru in 1077 M. E. and till his own death in 1090 M. E. If, as a matter of fact, the Uraima apportained to the seniormost male member of both the Tavashis, it is difficult to explain the fact that he never exercised such Uraima right. That he never exercised it is admitted; but it is attempted to be shown that the third defendant was exercising that right on his behalf or as an agent of his,

and for this purpose reliance is placed on Exhibit D. After careful consideration I have no doubt that the District Munsif's view on this point is correct, vis., that Exhibit D is a document got up for the purpose of defeating the elaims of the second defendant and that the resital in it, especially of a prior authority granted in 1083 M. E., is false. The matter has been fully discussed by the District Muneif in paregraphs 18 to 23 of his judgment and I am in full agreement with the reasoning therein. If, as a matter of fact, the third defendant was acting under the authority conveyed by Tali Chappan so early as 1908 it is impossible to explain his contentions as a defendant in the suit of 1909. vide Exhibit I, copy of his written statement. There he contended that the : 7th Uraima belonged to the Padikkal Tavazhi and he claimed the same as Karnavan of that Tava-There is no mention whatever made of Tali Chappan's right as Uralan or any authority granted by him. Exhibit VI also shows that the third defendant was not acting under any authority granted Tali Chappan or that the other Uralans did not recognise Tali Chappan as an Uralan. It was only after the third defendant found that his claim to be Karnavan of his Tavazhi could not be established that he had recourse to Tali Chappan and got Exhibit D from him with a false recital therein about a previous power of attorney. None of the documents prior to Exhibit D make any reference to the alleged powerof attorney of 10-3 M. E. and I have no doubt that there was no such powerof attorney in 1083 and that the third defendant was not acting till .913, at least as a munhtiarnama holder under Tali Chappan, but was elaiming Uraima his own individual right as Karnavan his Padikkal Tavazhi. It is quite that the third defendant was accepted the other Uralans as 7th Uralan, not an agent or representative of Tali Chappan but as the Karnavan of his Tavashi which he claimed to be. The District Munit's observation that plaintiffe' witness No. 1 and the third defendant have been conspiring together to defeat the claims of the second defendant by every means in their power is, in my opinion, quite justified by the evidence, and I have no doubt that the contention now put forward, vis, that Toli MATAMULLA MANIKOTH PATTAN CHANDU D. RUTTIYIL RAYIKU.

Chappan was 7th Uralan and that the third defendant acted as Uralan by virtue of an authority granted by Tali Chappan is a pure afterthought that was invented after the institution of the suit (evidenced by Exhibit V) by the second defendant in 1912, and that such was not their ease when the Melcharth, Exhibit B, was granted. Exhibits I and VII seem to me to be almost conclusive on this point. I agree with the District Munsif that the 7th Uraima belongs to the Padikkal Tavazhi because that view alone is consistent with the facts of the case and the probabilities. I find, therefore, that the second defendant was the 7th Uralan at the date of Exhibit B and not Tali Chappan.

the date of Exhibit B and not Tali Chappan. 3. As regards the second issue it may be dealt with in a few words. In the first place, in view of the finding on the first issue that Tali Chappan was not the Uralan at the time of Exhibit B, it would appear as if no finding is necessary on the second issue. As, however, a finding has been ealled for on this issue as well, I have to deal with it. The only evidence adduced for the purpose of showing that Tali Chappan was consulted at the time of Exhibit B is that of plaintiffs' witness No. 1 himself. Plaintiffs' witness No. 1 is not a satisfactory witness as ean be seen from a perusal of his deposition. The District Munsif was of opinion that he has perjured nimself by swearing that Chappan was consulted and I see no reason to disagree with the Court which heard him. When questioned about the registered notice sent to him by the second defendant and the reply thereto he at first pretended that he did not remember whether second defendant-had sent any notice elaiming to be Uralan or whether any reply was sent to it and it was only after Exhibit VI was shown to him that he admitted that it was the reply sent by him to the second defendant's notice. This shows how ready plaintiffs' witness No. 1 is to make false statements when there are no documents to contradict him. has been observed already, he has been treating the third defendant as the Uralan throughout, at any rate. till the date of Exhibit D, as if he was the Uralan in his own right and not as an agent or representative of Tali Chappan. Exhibit VI clearly shows that he was not prepared to disregard the third defendant's.

elaim to the Uraims and it is most unlikely that, in these circumstances, he would have consulted Tali Chappan about the granting of the Melsbarth. There is no doubt that Tali Chappan was not even set up as an Uralan till after the institution of Original Suit No. 347 of 1912 by the second defendant. It may also be mentioned that there is no allegation in the plaint that Tali Chappan was consulted about the Melsharth. In these circumstances, I have no hesitation in soming to the conclusion that Tali Chappan was not consulted as to the grant of Exhibit B and I accordingly,

This second appeal came on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial.

Mr. R. Govinda Marar, for the Appellant. Mr. K. P. M. Menon, for the Respondent.

JUDGMENT.—We accept the finding. In the light of it, the facts we have to deal with are that the second plaintiff has obtained a Melcharth from five out of the seven Uralars, of the two remaining Uralars one having been and the other, the second defendant, not having been consulted. The second defendant, as now appears, is the 7th Uralar. The only question remaining is whether the Melcharth is invalidated by the failure to consult him.

The general rule that Uralars are entitled to be consulted before any act is done in the management of the trust property is well-established. It is, however, argued that this general rule is subject to an exception, when the omission to consult the Uralar is attributable to his possession of an interest which would disqualify him from giving an independent opinion.

In the present case the evidence is stated by the lower Appellate Court as being that plaintiffe' witness No. I asked the second defendant to take a renewal of his lease and the second defendant said he would not as he could not pay the arrears of rent already due. It was after this that the suit Melcharth was given to the second plaintiff to enable him to oust the second defendant from possession of the property.

Now, it is quite clear that the whole of the difficulty in this case has arisen

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from the fact that the second defendant had obtained a benefit from his trust. But with that we are not concerned directly. we have to settle is whether his having done so justifies us in holding that, so far as he was concerned, the rule requiring batween the Uralars was consultation abrogated. The authority on this point, as already stated, lays down that rule in highly general terms. Thus, it was said "that the very in Kunban v. Moorthi (1) recognising validity the principle of of the asts of the majority of the trustees public trust" and that principle is not disputed-"involves the of the majority being assertained Bll the discussion among members:" and Wilkinson v. Malin (2) Mr. Menon sense. ib in the same plaintiffs hahalf οŧ the on relied on the Attorney-General v. Shearman (3). But that case was distinguished in Kunban v. Moorthi (1) and wemay add that in it there was no question of failure to consult the trustee, who had not joined in the lease under consideration, since that lease had been sent to him for signature before any action had been taken to give effect to it and he could then have put forward his objections. The decision is authority only for this, that a majority of trustees of a public trust can act in the business of the trust. There is, then, in our opinion, no reason for treating eases similar to those before us as exceptions to the principle thus established. For it cannot be assumed that a trustee in the position of second defendant would necessarily take advantage of an opportunity to join in the discussion of the matter, in which he was interested, at all or that, if he did so, he would be incapable of giving a disinterested opinion for the advantage of the trust; and, again, we cannot assume that the other trustees would necessarily consider themselves bound to act on his opinion or would be unable to apply their minds to the question whether it was invalidated by his interest.

In these circumstances, we must hold that the second defendant was, notwithstanding

(1) 7.Ind, Cas. 422; 84 M, 408; (1910) M. W. N. 359, 8 M. L. T. 208, 20 M. L. J. 951.

(2) (1882) 2 O. & J. 636; 2 Tyr. 544; 1 L. J. (N. s.) Ex. 284, 37 R. R. 791, 149 E. R. 269.

(8) (1889) 2 Beav. 104; 48 E. R. 1119; 50 R. R. 118.

his interest n the suit property, entitled to be consulted, and that the Melcharth given to the second plaintiff without such consultation does not bind the trust and cannot be enforced. The result is, that the appeal is allowed and the District Munsif's decision is restored with costs here and in the lower Appellate Court.

M. C. P.

Appeal allowed,

LAHORE HIGH COURT. FIRST CIVIL APPRAL No. 3381 OF 1917. November 16, 1921. Present :- Mr. Justice Scott-Smith and Mr. Justice Abdul Qadir. MANOHAR AND OTHERS-PLAINTIFFS -APPELLANTS

VETSUS

Musammat NANHI AND OTHERS-DEFENDANTS -BESPOADENTS.

Custom-Ancestral property-Village abandoned and re-founded-Succession-Self-acquired property-Daughters-Collaterals-Rurden of proof-Near male dollaterals-Riwaj-i-am, entry in, value of.

The inhabitants of a village left the village abadi and the village land became deserted and passed out of cultivation. Later on, some of the proprietors or their descendants returned, re-founded the village and brought the land again under cultivations

Held, that those persons who returned to the village re-acquired the land and it became their self-acquired property and could no longer be regarded as their ancestral property. [p. 401, col. 1.]

The expression "near male collaterals" means collaterals not more remote than the 5th or the 6th

degree. [p. 401, col. 2.]

There is a general custom in the Punjab that daughters are usually preferred to collaterals so distantly related as the 6th degree even in regard to ancestral property, while in the case of selfacquired property daughters usually exclude even nearer collaterals. It is quite opposed to all the principles of customary law that collaterals so distantly related as the 9th degree should exclude daughters in the case of property which is nonancestral, and a mere entry in the riwaj-i-am, unsupported by instances, that daughters can under no circumstances inherit their father's property, is of very little weight, and it is quite insufficient to shift the onus on to the daughters. [p. 402, col. 1.] .

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Statements in the riwaj.i.am when "opposed to general custom can carry very little weight unless supported by instances." [p. 402, col. .]

Beg v. Allah Ditta, 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 44 C. 749; 21 M. L. T. 310; 32 M. L. J. 615; 19 Boin. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

explained.

Chuttan v. Hazari Lal. 30 Ind. Cas 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916; Wazira v. Maryan, 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918; Khuda Baksh v. Fatteh Khatun, 46 Ind. Cas. 679; 13 P. R. 1919; 140 P. W. R. 1919, relied upon.

First appeal from a decree of the Senior Subordinate Judge, Karnal, dated the 12th November 1917.

Dr. Gotal Chand Narang, for the Appellants.

Pandit Sheo Narain, B. B, and Lala Badri Das, B. B., for Respondents Nos. 1 to 4.

JUDGMENT .- The parties to the suit, out of which the present appeal arises, are Gour Brahmans of Mauza Chhapri in the Thanesar Tabeil of the Karnal District. The village is divided into four Thullas. ealled Khushi Ram, Ram Karan, Kasumbri and Majlas. Musammat Nanhi, defendant. widow of Molu was in possession of 10 biswas of the village land, 5 biswas as the widow of Mola and 5 biswas which she inherited from Musammat Sardhi, widow of Kanbya of Thulla Ram Karan. She gifted five-sixths of the whole land to her two daughters and one-sixth to Atma Bam, daughter's son of Anant Ram of Thulla Ram Karan, and the brother in-law of At the time of the Musammat Sardhi. suit Atma Bam had died and the land gifted to him was in possession of his father Chhaju. The plaintiffs, who belong to the other two Thullas of the village, brought the present suit for a declaration that these gifts should not affect their reversionary rights after the death of the donor. The lower Court held that 5 biswas out of the land in suit was ancestral qua the plaintiffs and the other 5 bisuas was non-ancestral. The plaintiffs are related to Musammat Naphi's deseased husband in the 9th degree and the lower Court held that they had not proved that they were heirs in the presence of the daughters of the donor. One of these daughters has also got a daughter and the Court held that their suit was speculative and dismissed it. The plaintiffs have appealed to this Court,

The first point which we propose to diseass is, whether the land in suit or any part of it is ansestral qua the plaintiffs ?. The history of the village appears from a translation of an extrast from the pedigree-table of the proprietors prepared in 1384.85 (printed at page 38 of the paper-book) and from the judgment of Munshi Tulsi Ram, Settlement Superintend. ent, dated 24th December 1853, (printed at pages 67.69 of the paper book). From these documents it appears that the village, was founded some 300 years ago by Baja, Ram, who was stated in 1884 to be the ancestor of the then proprietors. His deseendants remained in possessien until some 50 years before 1853. At that time they abandoned the village and the inhabitante settled in various other places. After a period of some 25 years the village was re-inhabited by the people belonging to the Thullas of Khushi Bam and Ram Karan. At the time of the 1853 Settlement the representatives of these two Thullas were said to be in possession of 15 biswas while 5 biswas were in possession of the members of Thulla Majlas. Kasumbri same back to the village more than 20 years after it was re-founded and was given 5 bismes by the members of the Khushi Ram and Ram Karan Thullas. In 1853, he said he was entitled to half the village and his elaim was enquired into and disposed of by Munshi Tulsi Ram, Settlement Superintendent. At page 59 of the paper-book the latter in his judgment says :- "It is. proved that the plaintiff has been out of possession for a long time. Had the plaintiff not some into possession of the above 5 biswas estate, he would not have been entitled to it, even assording to the instructions of the Sadar." His claim was, therefore, dismissed obviously on the ground that the then defendants had re founded the village and had been in possession of the land in dispute for a long period.

Now, even if we are to suppose that the whole of the land in suit was originally in the possession of the common ancestor of the parties, and if it be assumed that all the land was ancestral land when the village was deserted about the year A. D. 1800, we fail to see how any of the land can be considered to be ancestral after

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the village was re-founded some 25 years later. The inhabitants had left the village abadi and the village land became deserted and passed out of sultivation. Some of the original proprietors, or their deseendants, returned 25 years later, founded the village and brought the land again under cultivation. In our opinion, it must be held that those persons who returned re-acquired the land, and that it became their self-acquired property and could no longer be considered to be aneestral property of the representatives of Kasumbri and others who returned later. We are unable to understand the learned Sabordinate Judge's reason for holding that half of the land was appeatral. our opinion, none of it is ancestral

the plaintiff, and we hold accordingly. The second point is, whether the plaintiffs, who are related to Musammat Naphi's husband in the 9th degree, are heirs to the land in preference to daughters. The lower Court laid the onus upon the plaintiffs and the decision of the case really depends upon the question of onus, because it is admitted that there is practically no evidence as to which has the better right. The appellants relied very strongly upon an entry in the riwai-i-am prepared in the 1834 Settlement, questions Nos. 65, 67 and 68. The translation of these entries will ba found printed at pages 64 and 65 of the paper-book. Question 65 is, "can daughter inherit in any case?" and the answer is, that a daughter or her descendants cannot acquire property by virtue of inheritance or in any other way. The translation given in the paper book is not quite correct. The answer really was, that a daughter or her descendants cannot get the inheritance, i.e., her father's property by inheritance or in any other way. The answer to question No. 68 is that a gift or Will can never be made in favour of daughter, her husband, or her dessendants. These answers are not supported by any instances. In Article 23 of Rattigan's Digest of Customary Law, it is stated that a daughter only susseeds to the ancestral landed property of her father, if an agriculturist, in default (1) of the heirs mentioned in the preceding paragraphs, and (2) of nearer male sollaterals of her father, and there is ample authority in the decisions of the

Ohief Court for the proposition that near male collaterals means collaterals not more remote than the 5th or 6th degree. It is also stated in Rattigan's Digest that in regard to the acquired property of her father a daughter is preferred to collaterals. In Abdul Karim v. Sahib Jan (1) it was held that the plaintiff upon whom the onus lay had failed to prove that by custom among Chohan Rajputs of village Kharwan, Tabsil Jagadhri in the Ambala District, sollaterals of the 7th degree were entitled to succeed in preference to married daughter of the deseased sonless proprietor, and it was stated that there was no general presumption that agnates, however remote, exclude daughters from succession even to ancestral property. The question of the onus in such a case was very fully considered in Bholi v. Man Singh (2). was held that the burden of proof as to whether remote collaterals, such as of the 6th degree, exclude daughters, rests on the party who alleges it. Now, if this is the law as regards the onus where ansestral property is concerned, a fortiori it lies : much more heavily upon the collaterals in the ease of non-ansestral Counsel for the appellant, however, says that the entry in the riwager am, unsupport. ed by instances, is sufficient in the present: ease to shift the onus, and in support of his contention he relies upon the case of Beg v. Allah Ditta (3). Their Lordships held there that the entry. in which riwaj-i-am WAS not supported by instances in favour of the succession of a daughter's son, whose father was a khanadamad in preference to collaterals was a strong piece of evidence in support of such custom which it lay upon the plaintiffs' collaterals to rebut. This ruling . of the Privy Council has been considered . subsequent decision in 8 Ohief Court in Wasira v. Maryan (4),

(4) 42 Ind. Cas. 859; 84 P. R. 1917; 151 P. W. R.

1917, 3 P. L. R. 1918,

^{(1) 5} P. R. 1908; 99 P. L. R. 1908; 29 P. W. R. 1908. (2) 88 P. R. 1908; 146 P. W. R.-1908.

^{(3) 38} Ind. Cas. 354; 45 P. R 1917; 12 P. W. R. 1917; 44 0. 749; 21 M. L. T. 310; 82 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 26 O. L. J. 175: 44 I. A. 89 (P. C.).

BANDAU BAM U. CHINTAMAN BINGH.

It was held, following Chhuttan v. Hazari Lal (5), that statements in the riway i am when opposed to general sustom can earry very little weight unless supported by instances" and that consequently the entries in the viway-i-am of the Gujranwala District in favour of the special custom relied on by the plaintiff collaterale, unsupported by instances, were insufficient to establish that enstom, such riwai.i.am having, moreover, been imperfeetly compiled. In Khuda Baksh v. Fatteh Khatun (6) it was held that answer No. 13 of the riway-i-am of the Multan District (unsupported by instances) being a very peculiar one, quite opposed to sustomary law, was not sufficient to shift the caus on to the plaintiffs to prove that they were not excluded by a sister. Now, we have the general sustom that daughters are usually preferred to collaterals so distantly related as the 6th degree even in regard to ancestral property; while in the case of self acquired property daughters usually exclude even nearer collaterals. It is quite opposed to all the principles of enstomary law that collaterals so distantly related as the 9th degree should exclude daughters in the case of property which is non-ancestral, and, therefore, we are of opinion that the mere entry in the riwaj-i-am, unsupported by instances, that daughters can under no circumstances inherit their father's property. is of very little weight, and it is quite insufficient to shift the orus on to the daughters. We, therefore, agree with the lower Court that the onus was upon the plaintiffs and that they have failed to discharge it, and we dismiss the appeal with costs.

There are cross objections by the respondents as to the order of the lower Court directing that the parties should bear their own costs. It is contended that the plaintiffs having failed in their suit, the usual rule should be followed and that costs should be allowed to the successful party. The Court below has given no reasons of any sort for directing that the parties should bear their own costs, but has held that the plaintiffs' suit was a

speculative one. The defendants have certainly been put to considerable expense in defending the suit, and we do not think that the mere entry in the riwa; i am in favour of the plaintiffe' case is a sufficient reason for holding that their suit was so far justified that the defendants should not be allowed their costs. We accept the cross-objections and direct that the plaintiffs should pay the defendants' costs of the lower Court also, and they will also pay any costs incurred in these cross-objections,

Z. K. Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM PATNA HIGH COURT. June 9, 1921.

Present:—Viscount Cave, Lord Shaw, Sir John Edge and Mr. Ameer Ali. BANDHU RAM AND OTHERS—APPELLANTS

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CHINTAMAN SINGH AND OTHERS-

Hindu Law-Joint family-Bond in favour of managing member-Joint property-Burden of proof-Presumption.

Where a bond is executed in favour of the managing member of a joint Hindu family, the presumption, in the absence of evidence to the contrary, is that the bond is joint property of the family. It is for those who assert the contrary to make good their case. Mere proof that some of the members of the family had some private transactions, would not prove that the bond was the private property of the member in whose favour it was executed.

Appeal against a decision of the Patna High Court, dated the 20th January 1919, reversing that of the Additional Sub-Judge, Bhagalpore, dated the 9th August 1916.

Messrs. L. De Gruyther, K. O., and Kenworthy Brown, for the Appellants.

JUDGMENT.

VISCOUNT CAVE.—This appeal has been fully argued on behalf of the appellants, and all the material facts have been brought to their Lordships' notice, but in the result their Lordships see no reason to differ from the conclusion reached by the High Court at Patna.

^{(5) 30} Ind. Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916.

^{(6) 46} Ind. Cas. 679; 13 P. R. 1919; 140 P. W. R. 1918.

BANDHU RAM U. CHINTAMAN SINGH.

The question raised is one of fast, and it is unnesessary to state the circumstances at length. It is sufficient to say that the title to the land in dispute must, in their Lordships' opinion, depend on the title to the bond given by Pyare Mander to Rajdbari on the 17th August 1891. If that bond was the separate property of Rajdbari, then the land which he parabased in the suit brought by him to enforce the bond was also his separate property, and he could give a good title to the appellants. But if he held the bond on behalf of himself and his two brothers, Chintaman and Gobardhan, then he sould, in the circumstances of this ease, have no better title to the land, and the first respondent is entitled to retain the decree granted by the High Court.

Now, it is plain that at the date of the bond, Rajdbari and his brothers were members with their three cousins (sons of their uneles) of a Mitakebara joint family, and that when, in the year 1832, the cousing separated from the family and disslaimed all interest in the bond, Rajdhari and his two brothers continued joint. Rajdhari was the managing member throughout, and the presumption is that the bond held in his name was joint property; and it is for those who (like the appellants) assert the contrary to make good their

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It is said on behalf of the appellants that the members of the family had some separate business transactions, and this appears both from a statement in the terms of compromise, dated the 28th July 1892, and from other evidence. But proof that some of the members had some private transactions by no means proves that the particular bond in question was the private property of Bajdhari; and there are several eireumstances which tend to show that this was not the ease. Thus, in the first partition suit in 1892, the plaintiff elaimed as joint property a bond of Pgare Mander for 945 rupees, which must be assumed, in the absence of no evidence to the contrary, to be the bond in question; and by the terms of compromise on that suit it was admitted that all the debts (which would include that bond) belonged to the defendants Nos. 1 to 3, that is, Rajdbari and his two brothers. If the bond had been the separate property of Rajdbari, this would almost certainly have stated.

Again, in the second partition suit of 1902, the plaintiff Chintaman elaimed as joint property a sum due to Rajdhari under a bond from Pyare Mander, and the award in that suit, dated the 30th March 1901. found that the three brothers were members of a joint family, and that all the moveable and immoveable properties were joint between them. It is not clearly shown that the bond here mentioned was the bond in question ; but it appears unlikely that, if Rajdhari held a separate bond from Pyare Mander, it would not have been referred to and excepted from the award.

Farther, in the subsequent proceedings in the same suit Rajdhari admitted that Ohintaman was entitled to be eredited with 1.000 rapses, being one-third of the purchase. money for the property comprised in the bond, an admission which could only have been made if the bond was joint property " and while it is true that this was after the sale to the appellants, it eannot be assumed without proof that Rajdhari was a party

to a fraud.

Lastly, it is (to say the least of it) remarkable that when, in 1908, Ram Golam made an attempt to execute the order which he had obtained against Rajdhari by a sale of this property, and Chintaman objected, no further proceedings were taken in execution, but a private sale was made to the first appellant, who appears to be connected with Bam Galam. Neither Rajihari nor anyone else gava evidence that the bond was the separate property of Rajdhari nor was any document produced in which it was referred to as his private proparty.

Upon the whole, while the evidence on both sides is somewhat meagre, it appears to their Lordships that the presumption in favour of joint ownership is not displaced and, therefore, this appeal should be dismissed; and they will humbly advise His Majesty accordingly.

As the respondents have not appeared there will be no order as to costs.

W. O. A. & J. P.

Appeal dismissed. Solisitors for the Appellants :- Mesers. Pugh & Co.

ABDUL AZIZ U. AMEBB BEGAM.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 824 OF 1921. November 12, 1921. Present :- Mr. Justice Broadway. ABDUL AZIZ - DEFENDANT-APPRILLANT

CETA148

Musammat AMEER BEGAM AND ANOTHER -PLAINTIFFS-BESPONDENTS.

Muhammadan Law-Legitimacy-Acknowledgment, effect of.

Under the Muhammadan Law an acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. [p. 405, col. 2.]

Muhammad Allahdad Khan v. Muhammad Ismail Khan, 10 A. 289; 6 Ind. Dec. (N. s.) 193, relied upon.

Where there is a clear finding that no marriage at all took place between the parents of a child the presumption of legitimacy which results from acknowledgment cannot arise. [p. 405, col. 2]

Second appeal from a decree of the Additional District Judge, Jullundur, at Hosbiarpur, dated the 3rd February 1921, affirming that of the Muneif, First Class, Jullandar, dated the 19th July 1920.

Lala Badri Das and Mr. Eagar Chand, for Lala Fakir Chand, for the Appellant.

Bakhshi Tek Chand and Mr. Obedulla, for the Respondents.

JUDGMENT.—The dispute giving rice to this litigation relates to the succession to the estate of one Hadait Ullah of Jullundur On the 1st August 1919 Musammet Amir Begum, a daughter of Hadait Ullah, and Musammat Ako, his brother's wife, instituted a suit against Abdul Aziz, asking for a declaration that they (the plaintiffs) were the rightful owners of the land in suit which had belonged to Hadait Unllah, deceased. It was alleged that Abdul Azz, defendant, was the illegitimate son of Hadait Ullah and as such not entitled to any share in the property. In the alternative it was prayed that a declaration be granted to the effect that Musammat Amir Begum was entitled to one-third share of the land under a Will said to have been executed by the said Hadait Ullab, who had died on the 13th December 1918.

The Trial Court found that Abdul Azz was the illegitimate son of Hadait Ullab. deceased, but that Musammat Begam sould not challenge the Will above mentioned. It perdingly dismissed the suit qua Musammat

Ako but granted Musammat Amir Begum a deeree deelaring her title to one third share in the estate left by Hadait Ullah. Musammat Ako assepted the situation. Amir Bagam and Abdul Aziz, however, preferred appeals against this decree to the District Judge, Musammat Amir Begum claiming to be entitled to a declaration that she was the owner of the whole property and Abdul Az'z claiming to be the legitimate son of Hadait Ullab. The learned District Judge dismissed both the appeals by one judgment, and Abdul Aziz and Muszmmat Amir Begum have come up to this Court in second appeal, the former through Mr. Badri Das and the latter through Mr. Tek Ohand. I shall deal with both the appeals together.

Turning first to that by Abdul Aziz (Civil Appeal No, 824 of 1921), it will be seen that the learned District Judge has come to certain definite findings of fact which admittedly are not open to examination in second appeal. The mother of Abdul Aziz was one Musammat Jijan. The learned District Judge has held that Musammat Jijan was never married to Hadait Ullah by any religious or legal seremony. Further, he has held that this lady never lived in any house occupied by Hadait Ullah but that there was evidence to show that she lived in the house rented by Hadait Ullah, which house was situated in a mohalla inhabited by prestitutes.

It has also been found that Hadait Ullah during his lifetime on several occasions asknowledged Abdul Az'z to be his son, It was apparently contended before the lower Appellate Court, as it has been before me, that the legal effect of these findings should be in favour of the legitimacy of Abdul Az'z. learned District Judge held, on the authority of Muhammad Allahdad Khan v. Muhammad Ismail Khan (1), that an asknowledgment had only the effect of legitimation where the fact of the marriage was a matter of uncertainty, that in the present case the evidence on the record proved that no marriage had taker place between Musammat Jijan and Hadait Ullah and that, therefore, there being no uncertainty on the point the acknowledgments by Hadait Ullah did not render Abdul Az'z legitimate. Mr. Tek

^{(1) 10} A. 259, 6 Ind. Dec. (N. s.) 193.

ABDUL AZIZ U. AMBER BEGAM.

Chand urged that the question whether a child was legitimate or illegitimate was one of fast, pure and simple. On the other hand, Mr. Badri Das contended that he was only attacking the inferences drawn from the findings of fact arrived at by the learned District Judge. The matter is not free from difficulty, and I am inclined to the view that in this case there being a clear finding that Abdul Az'z is the illegitimate son of Hadait Ullab, no question of law arises. As, however, Mr. Badri Das has argued the case at length I will deal with the case as put forward by him. He drew my attention to Sulakhan Singh v. Santa Singh (2) and contended that in a case where it was proved that a man and a woman lived together for a number of years as man and wife, there was a strong presumption in favour of a marriage having taken place between them. With this proposition I have no quarrel, but in the present case it has not been found that Musammat Jijan and Hadait Ullah lived together for a number of years as man and wife. What has been found is that Musammot Jijan, a prostitute, lived in the prostitute's quarters in a house rented for her by Hadait Ullah and bore him a son. This authority is, however, in support of Mr. Tek Chand's contention that a finding on a question of legitimacy is one of fact, and in the present case the lower Appellate Court has considered every bit of evidence on the record and has not ignored anything of importance.

It was next contended that, under Muhammadan Law, asknowledgments by a man that a certain person was his son were sufficient to establish legitimacy and, further, that if a man asknowledged a woman to be bis wife, the matrimonial contract was completed with. out any formal ceremony being necessary. In this connection my attention was drawn to Ibrahim Ali Khan v. Mubarak Begam (3). The facts of that case, however, are so diffierent from the facts in this that I am unable to find any assistance from this decision. No doubt, under Muhammadan Law if a man bas asknowledged another as his legitimate shild, the presumption of paternity arises Anglo Muhammadan Wilson's Article 85, page 162; see also Ashrufood Dowlah Ahmed Hussein Khan v. Hyder

(2) 60 Ind, Cas, 875.

Hossein Khan (4) and Abiul Rasak v. Aga

Mahomed (5)].

Mr. Badri Das further contended that, under striet Muhammadan Law, no ceremonics were needed in order to effect a valid marriage and relied on page 51 of Wilson's Anglo-Muhammadan Law as well as Ameer Ali's Muhammadan Law, Volume II, page 333. Ameer Ali, no doubt, says that the law appoints no specific egremony for the contractual performance of a marriage but he also says that, ascording to recognised sustom, marriages among all the seets are solemnized by a person conversant with the requirements of the law, i.e., the kasi, while two other persons are appointed for the purpose of acting on behalf of the contract. ing parties with a certain number of witnesses. Asknowledgments by a father create a presumption of legitimacy no doubt, but, as pointed out by Mahmood, J., in Muhammad Allahdad Khan v. Muhammad Ismail Khan (1). an asknowledgment has only the effect of legitimation where either the fast of the marriage or its exact time with reference to the legitimacy of the shild's birth is a matter of uncertainty. In the present case neither the fact of the marriage, nor its exact time is in uncertainty, for the Courts below have elearly and unequivocally found that on the evidence on the record it has been proved marriag: that no took place between Musimmat Jijan and Hadiut Ullah. In this view of the case the presumptions contended for by Mr. Badri Das do not arise and I must, therefore, hold that it having been proved that no marriage took place between the parents of Abdul Az'z, he is illegiti. mate.

It was arged that the learned District Judge had not disposed of issue No. 5, which was whether plaintiff admitted defendant as the legitimate son of the deceased. This issue was decided against Abdul Az'z by the first Court, and he did not attack the correctness of this finding in the appeal to the District Judga. The learned District Jadge, however, has stated in his judgment that he had considered the evidence in the case and a part of the evidence consisted of what Abdul Az'z termed "admissions" of his legi-

^{(8, 56} Ind. Cas. 928; 1 L. 229; 82 P. L. R. 1920; 20 P. W. R. 1920,

^{(4) 11} M. I. A. 94; 7 W. R. P. O. 1; 1 Suth. P. C. J. 659, 2 Sar. P. O. J. 223, 20 E R 87.

^{(5) 21} U. 663; 27 T. A. 59, 4 M. L. J. 131; 6 Sar. P. C. J. 889; 10 Ind. Dec. (N. s.) 1074,

ABDUL AZIZ U. AMEBR BEGAM.

timacy by the plaintiff. The mere fact that the learned District Judge has not referred specifically to this evidence does not mean that he has ignored it and the mere failure to refer to it specifically does not give a ground for second appeal.

The appeal by the defendant fails and is

dismissed with costs.

I now some to Civil Appeal No. 1156 of 1921. It was contended by Mr. Tek Chand that the learned District Judge having held that Abdul Aziz was illegitimate, Musammat Amir Begam, should have been held to have been the successor to her father. Accepting the finding that the parties were governed by eastom, and that by eastom, Musammat Amir Begam could not challenge the devise made by Hadait Ullab, it was contended that before the alleged Will could be given effect to, it should have been proved and its terms considered. For if, under the Will there was a devise to Abdul Aziz as a son then it having been found that he was not the legitimate son the devise failed and in support of this I was referred to Ram;i Das v. Durga Parshad (6). This was a case of adoption where it was held that "when a Hindu widow makes a Will in favour of a boy whom she has adopted and it is found that the adoption is invalid, it has to be assertained whether the mention of the legatee as an adopted son is merely descriptive or whether the assumed fact of his adoption is the reason and motive of the bequest and indeed a condition of it, and if the latter is found as a fact the Will is of no effect." A similar case is reported in Fanindra Deb Raik t v. Rajeswar Das (7). It was contended that in the present case Musammat Amir Begam bad no knowledge of the Will or its contents. She knew that Abdul Azz was setting up a Will under which she was a legatee of one-third. During the course of the proceedings Abdul Aziz was repeatedly called upon to produce the Will but failed to do so, asserting that no Will existed. Mr. Tek Chand argued that in such circumstances Illustration (g) to section 114 of the Evidence Act applied and that it would be held that if the Will had been produced the evidence afforded by it would have been unfavourable to Abdul Az'z. Mr. Badri Das, on the other hand, contended that, as a matter of fact, there was no Will at all but that the plaintiff having admitted the existence of a Will in parapraph 5 of her plaint, and also having admitted that Abdul Aziz was a legatee to the extent of two-thirds, she was bound to abide by these admissions. Paragraph 5 of the plaint, however, does not bear out Mr. Badri Das' contention. It is there alleged that Abdul Aziz had got Hadait Ullah to execute a Will which Will he was keeping in his possession, and that under that Will one-third of the estate bad been left to her while two-thirds had been left to Abdul Az'z. It is obviously impossible to consider a dcoument that is not before the Court and it seems to me that the presumption contended for by Mr. Tek Chand must be given effect to. There is no clear admission on the part of Musummat Amir Begam that the devise to Abdul Aziz was made as a persona designata and not as the legitimate son of Hadait Ullah. This question could have been put at rest by production of the Will and its non production gives rise to the presumption that devise was made to Abdul Aziz not as a persona designata but as the legitimate son of the testator which he is not. Abdul Az'z himself can scarcely object to the raising of this presumption, inseumeh as he himself maintains that Hadait Ullah pever executed a Will at all. If there was no Will the plaintiff's suit should have been deereed.

I accordingly accept this appeal with costs, and modify the decree of the learned District Judge by granting the plaintiff, Musammat Ameer Begam, a decree declaring that she is the owner of the property in suit.

z. K. Defendant's appeal dism'ssel;

Plaintiff's appeal accepted.

^{(6) 45} Ind. Cas. 90; 6 P. R. 1918.

^{(7) 11} C. 468; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. s.) 1058.

GRAITANYA CHARAN ART U. MOHAMMAD YUSUF.

APPLICATION No. 28 of 1920.

December 8, 1920.

Present: -Sir Lancelot Sanderson, Kr., Chief Justice, and Justice, Sir Asutosh Mockerjee, Kr.

CHAITANYA CHARAN SET-

persus

MOHAMMAD YUSUF-OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110— High Court varying decree of lower Court as regards costs only—Judgment of affirmance—Leave to appeal to Privy Council, whether to be granted.

Where in an appeal High Court merely exercises its discretion as regards the costs of the suit in the lower Court and it entirely confirmes the decision of the lower Court on the merits of the case, its decree is one of affirmance within the meaning of section 110 of the Code of Civil Procedure, [p. 408, col. 1]

Application for leave to appeal to His Majesty in Council from the decision of Mr. Justice Richardson and Mr. Justice Huda, in Appeal from Original Decree No. 53 of 1919, dated the 17th May 1920.

Babus Birai Mohan Ma umdar and Satindra Noth Mukherjes, for the Petitioner.

Babus Ram Charn Mittra and Surendra Nath Guha, for the Opposite Party.

JUDGMENT.

SANDERSON, O. J .- This is an application by the plaintiff in the suit, for a certificate that this is a fit and proper case for leave to appeal to His Majesty in Council. There is no question as to the value of the subject matter of the suit, or the subjectmatter of the appeal; but it is urged on behalf of the respondent that the judgment of the High Court against which it is desired to appeal was one of affirmance and that there is no substantial question of law involved. On the other hand, it is urged by the learned Vakil for the plaintiff, that the judgment of this Court was not one of affirmance, and that, if it was one of affirmance, there is a substantial question of law involved.

The suit was brought to recover damages for an alleged malicious prosecution. The First Court dismissed the suit without costs. The matter then same on appeal to the

High Court and the decree of the High Court was as follows: "It is ordered and decreed that the decree of the lower Court in so far as it relates to costs be set aside and in lieu thereof it is hereby ordered and decreed that the plaintiff do pay to the defendant No. 1 the costs incurred by him in the Court below with interest thereon at the rate of six per cent. per annum from the date of the decree of that Court until realization: And it is further ordered and desceed that save and except as aforesaid the said decree of the lower Court be affirmed and this appeal dismissed: And it is further ordered and decreed that the plaintiff, appellant, do pay to the defendant No. 1, respondent, the sum of rupees five hundred and thirtytwo and annas six, being the amount of costs insurred by him in this Court, with interest thereon at the rate of six per cent, per annum from this date until realization."

The first question which I have to decide is, whether, in the circumstances of this ease, the judgment of the High Court is one of affirmance. In my judgment, it is. The only part of the judgment and decree of the lower Court which is varied by the decree of this Court was that part which related to coats. The costs were entirely in the discretion of the Court which heard the appeal. The Court exercised its discretion and ordered that the plaintiff should pay the costs of the suit in the First Court and the costs of the appeal to this Court. If we were to hold that this was not a deeree affirming the deeree of the lower Court, it would follow that whenever, in a ease where the subject was of the requisite value, this Court varied the decision as to costs of the lower Court, however small the extent might be, and dismissed the appeal on the merit in all material respects, the party who failed on the appeal in the High Court would have a right to appeal to the Judicial Committee. I cannot believe that that was intended by the Legislature and I am confirmed in this view by the fast that no authority can be produced in support of the contention put forward by the learned Vakil for the appellants though the situation which occurs in this case, must have occurred many times in the past.

In the case of Thakur Baldeo Bakheh Singh

LARHT MAL U. BISHEN DAS.

v. Thakur Lahi Singh (1) this question was

The learned Officiating Judicial Commissioner who delivered the judgment stated as follows:—"It appears to me that we shall be doing no violence to the language of section 596 of the Code of Civil Procedure if we hold that the words affirms the decision of the Court immediately below relate to the subject matter of the suit. The costs of the suit claimed by a plaintiff are never taken into account in considering whether the subject matter of the suit in the Court of first instance amounted to Rs. 10,000 for the purpose of the first clause of section 596 of the Code of Civil Procedure.

"In my opinion the applicant is not entitled to appeal merely because the two Courts

differed on the question of costs."

The learned Commissioner was dealing with section 590 of the Code of Civil Procedure, which was then in force; but the material words in that section do not differ from the words in section 110 of the Code of Civil Procedure, 1908.

In this case the High Court merely exercised its discretion as regards the costs of the suit in the lower Court and it entirely confirmed the decision of the lower Court on the merits of the case; consequently, in my judgment, the decree appealed from affirmed the decision of the Court immediately below the High Court within the meaning of section 110 of the Code of Civil Procedure.

As regards the second question, tiz,—Whether there is a substantial question of law involved. I have read the judgment of my learned brother Mr Justice Richardson and it is clear from that judgment that the question was entirely one of fact and that there is no substantial question of law involved.

For these reasons, in my jadgment, the application must be refused with costs, three gold nohurs.

MOOKEFJEE, J .- I agree.

B. N.

Application refused.

(1) 10 O. C. 65.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 3026 of 1917.
November 18, 1921.
Present:—Mr. Justice Scott Smith and Mr. Justice Abdul Qadir.
LAKHU MAL—DEPENDANT—
—APPELLANT

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BISHEN DAS AND OTHERS—
PLAINTIFFS AND ANOTHER DEFENDENT—
RESPONDENTS.

Hinda Law-Joint family-Antecedent debt-Mort.

gage, whether antecedent debt.

In order to bring a case within the exception that family property in the hands of the sons is bound by a mortgage executed by the father during his lifetime to pay off an antecedent debt, two conditions must be fulfilled, first, the mortgage must have been to discharge an obligation antecedently incurred and, secondly, the obligation antecedently incurred must have been incurred wholly apart from the ownership of the joint estate. [p. 410, col. 1.]

A mortgage whereby joint family property is charged cannot be regarded as an antecedent debt.

[p. 410, col. 1.]

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), Brij Narain Rai v. Mangla Prasad, 50 Ind. Cas. 101; 41 A. 235; 17 A. L. J. 249; 1 U. P. L. R. (A.) 49, Bankhandi Rai v. Keshori Mandal 61 Ind. Cas. 102; 2 P. L. T. 17; 6 P. L. J. 72; (1921) Pat. 113, relied upon.

First appeal from a decree of the Additional Senior Subordinate Judge, Rawalpindi, dated the 31st July 1917.

Mr. M. S. Bhagat, for the Appellant. Pandit Sheo Narain, R. B., for the Respond-

ents.

JUDGMENT,—This is a first appeal against a declaratory decree passed by the Senior Subordinate Judge, Rawalpindi, setting aside two mortgage deads and one sale-deed executed by defendant (1) Ram Chand, in favour of Lakhu Mal defendant (2), as without necessity and consequently null and void against the plaintiffe, Bishen Das. son of Ram Chand, and Harbans Lal, etc., grandsons of Ram Chand. The alience has come up to this Court in appeal and his case has been argued before us at length by Mr. M. S. Bhagat, while the case for the respondents has been argued by Mr. Sheo Narain.

The facts of the case are, bricfly, as

follows: -

Ram Chand and his son and grandsons are members of a joint Hindu family, Their LAKHU MAL O. BIGHEN DAS.

property consists of a residential house, four shops and some land in Rawalpindi. The property is admittedly ancestral. There is no dispute at present about the house and the land and the deeds against which the plaintiffs have asked for a declaration all relate to the shops. Three of these shops had been mortgaged by Ram Chand's father, Prabh Dial, to Hari Shah-Hem Raj, two in April 1902 and one in October 1904. 1906 Ram Chand executed a sonsolidated mortgage deed in respect of the same three shops for Rs. 8,500 in favour of the same mortgagees and gave possession. He mortgaged the fourth shop to one Lashman Das in April 1907 for Rs. 2,500. An additional mortgage deed without possession was executed by Ram Chand in respect of all the four shops for Rs. 2,500 in favour of the appellant, Lakbu Mal, on the 24th May 1916. This was followed by a deed of sale of one shop in favour of the same person for Rs. 8.000. This was dated 6th September 1916 and the sum of Rs. 2,500 due on assount of the mortgaged deed, dated 24th May 1916, was a part of its consideration. Ram Chand executed another mortgage dead on 2nd October 1916 for Rs. 4,300 in favour of Lakhu Mal with regard to two of the shops. This sum, as well a sum of Rs. 4,000 out of the money raised by the sale of the shop, was for redeeming the previous mortgage in favour of Hari Shah-Hem Raj. The suit of the plaintiffs to impugn the three last transastions, vis., those of the 24th May, 6th September and the 2nd October 1916, was brought on the 24th Ostober 1916. shops in dispute were admittedly in possession of Hari Shah Hem Raj at the time the suit was brought but they were redeamed on the 11th November 1916.

A preliminary contention raised in the ease was that the defendant having redeem. ed the property from the possession of the previous mortgagess, the plaintiffs sould not bring a suit for a mers declaration and should have sued for possession. It has been held by the Court below that a deslaratory suit was permissible at the time when it was brought and we agree with this view, as the property was in the possession of the preyions mortg igees at that time and had not actually passed into the presession of the defendant before an injunction issued by the Court maintained the status quo ante,

The main question in this case is, whether these alienations or any of them were for necessity. Barring incidental references to some other points, the arguments have been confined to this point and the grounds of appeal not argued before us were given up by Counsel. Mr. Bhagat contends that the mortgage deed, dated 24th May 1916, has merged into the sale of the 6th September 1916, and has no separate existence and the question of the necessity of the items of which the sum of Rs. 2,500 borrowed on the strength of it was composed, should not be now gone into, as the sum must be regarded as an antecedent debt, which, under Hindu Law, is resognized as a necessity. He adds that the subsequent sale as well as the other mortgage were both made shiefly to redeem the previous mortgage for Bs. 8,500 and, therefore, those two alienations should also be upheld as made for necessity. He draws our attention to the fact that the mortgage for Rs. 8,500 was mainly on account of debts due from the time of Ram Chand's father, which it is not open to any of the plaintiffs to dispute. He also emphasises the fact that the additional mortgage, dated the 24th May 1916, was executed to raise money to pay off sertain decrees against Ram Chand and Bishen Das (plaintiff No. 1) due on assount of debts incurred by Bishen Das. It is added that Ram Chand had actually been arrested and sent to Jail to secure payment of these decrees and that it was really necessary for him to raise money to save his own skin. Besides, it is urged that the plan adopted by him to redeem the old mortgage and to discharge the previous debts was an act of good management and in the interests of the joint family.

Mr. Sheo Narain replying to the above arguments refers us to Sahu Ram Chandra v. Bhup Singh (1) and points out that the law as to the antesedent debts incarred by the father of a joint Hindu family is clearly laid down in that ruling. Their Lordships of the Privy Council observe that "the statement of the law in Nanomi Babuasin v. Malhun Mohun (2) by Lord Hobbouse does not give any

(2) 13 I. A. 1; 13 C. 21; 10 Ind. Jur. 151; 4 Sar. P. Q. J. 933; 6 Ind. Dec. (N. s.) 510 (P. C.).

^{(1) 89} Ind. Cas. 280; 89 A. 437; 21 C. W. N. 698; 1 P. L. W. 657; 15 A. L J. 437; 19 Bom. L. R. 498; 26 C. L J. 1; 83 M. L. J. 14 (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 218; 41 I. A 126 (P. O.).

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countenance to the idea that joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or sharge has been made in order to dissharge an obligation not only antecedently incorred but incorred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate." This ruling was followed and explained by the Allahabad High Court in Bri Narain Rai v. Mangla Prasad (3) where it was sought by the sons to invalidate a decree for the sale obtained by the mortgages upon a mortgage of joint family property executed by the father, and it appeared that the mortgage in question had been executed to pay off two earlier mortgages of joint family property also executed by the father. It was held that "it was for the mortgagee—to show that the earlier mortgages fell within the exception recognised by the Judicial Committee of the Privy Council in Sahu Ram Chandra v. Bhup Singh (1)." The Patna High Court in a still more recent decision, published as Bankhandi Rui v. Kishori Mandal (4), has followed the same principle and has laid down that, "in order to bring a case within the exception that family property in the hands of the sons is bound by a mortgage executed by the father during his lifetime to pay off an antecedent debt, two conditions must be fulfilled, first, the mortgage must have been to discharge an obligation anteredently insurred and, secondly, the obligation antecedently incurred must have been incarred wholly apart from the ownership of the joint estate." In the light of these observations the mortgage deed, dated the 24th May 1916, cannot be allowed to pass as embodying an antecedent debt because joint property was mortgaged by it and the item of Rs. 2,500 due on account of it will have to be examined on its own merits as to the necessity for it.

We now proseed to examine the transactions one by one and take up, first, the sale deed dated the 6th September

1916.

(3) 50 Ind. Cas. 101; 41 A. 235; 17 A. L. J. 249; 1 U. P. L. R (A.) 49.

(4) 6(Ind. Cas. 102; 2 P. L. T. 17; 6 P. L. J. 72; (1921) Pat. 113.

The details of the sale money are as under:-

1.	On account of the previous mor	Ra.
2.	gage-deed, dated the 24th Ma 1916 For payment to the previous mortgagees Hari Shah-He	2,500
3.	Rai	4,000
	Bank	1,000
	Total	8,000

As already remarked above, Item No. 1 eannot be allowed as an antecedent debt. With regard to Item No. 2, it is to be observed that it was meant to be a part payment to Hari Shah Hem Raj, the previous mortgagees, but we cannot make any pronouncement as to the validity or other. wise of this item as the Court below has exeluded the mortgage-deed in favour of Hari Shah-Hem Baj from consideration, the plaintiffs having expressly stated in the plaint that the said deed was not disputed at present. This item will stand or fall with the decision that may be subsequently arrived at, if the plaintiffs choose to dispute the said previous mortgage. We agree, however, with the Trial Court in holding that this item cannot furnish a necessity for the sale in dispute, as the previous mortgagees were not pressing for payment in any way and the sale by itself could not discharge the debt due on account of the previous mortgage. For the eash item of Re. 500 no necessity has been shown at all, and all that Mr. Bhagat urged with regard to it was that it represented the balance of the sale money and was a small fraction of the whole and should be allowed. This would be done in a case where the greater part of the price was to be allowed as for necessity, but, such being not the case here, we cannot hold that this item was for necessity. As regards Item No. (4) it is admitted that this item has not been paid in each to the vendor. At first, a rukka was given to him on a Bank in which the money was in deposit but before he could realise it, the form of a payment was changed, the rukka was presumably taken back and instead credit was given to Ram Chand for Rs. 1,000 in the item of consideration for the mortgage dated the

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2nd October 1916 for Rs. 4,300. Thus, so far as this sale and the resital in the saledeed are concerned, the consideration for this item fails and the item is disallowed.

We have now to see what part of the item of Rs. 2,500, due on assount of the mcrtgage of the 24th May 1916, can be held to be valid and for necessity. The consideration money as given in the deed was as follows :-

		Rs.
1.	Registration expenses and the value of a wasted stamp paper for	
	Rs. 20	. 60
2.	To be taken in cash before the Sub	
	Fegistrar	
3,	The mortgagee will himself pag	
	on the mortgagor's behalf to	
	decree-holders and creditors	. 2,315
	Total	, 2,500

Out of Item No. 1 Rs. 40 should, we think, be allowed as cost of registration as a considerable part of Item No. 3 is going to be allowed. Our attention has not been drawn to anything on the record to show who was to blame for the wasted stamp of Rs. 20 and the item cannot be allowed. Of the necessity of the cash item of Rs. 125 there is no proof and it is not allowed, For the item of Rs. 2,315 we have to examine the following details :-

		Rs.
I.	In payment to Musammat Damodari, decree-holder	1,200
2.	The state of the s	
3.	For payment to Ujagar Mal, etc.,	450
	deoree-holders	225
4.	For payment to Karm Chand, etc., decree-holders	60
б.	For payment to Hari Ram-Chuni	
6.	For payment to (shar Das on a bond	180
	executed by the mortgagor	200
	Total	2,315

As to item of Rs. 1,200 admittedly Rs. 700 were paid to Musammat Damodari in full settlement of her decree, and thus the mortgagee (Lakhu Mal) saved Rs. 500 over this. He produces, however, a receipt, Exhibit D-7, dated the 18th January 1917, purporting to be executed by Ram Chand, showing that he acknowledged having taken Rs. 211 out of the said sum of Rs. 500

from Lakhu Mal. This receipt is printed at page 86 of the printed record but there is no proof that the receipt was for consideration. There is a receipt, D 7, purporting to have been given by Ram Chand to Lakhu Mal, but no question was put to Ram Chand about this receipt when he was examined as a witness, and there is no admission on his part of having got the sum of Rs. 211 from Lakhu Mal. This is, we think, an extremely doubtful payment and cannot be taken into account, Rs. 500 out of the item of Rs. 1,200 on account of Musammat Damodari's deeree must, therefore, be disallowed as not paid. The item of Rs. 450 is proved to have been paid, and we are told that the actual payment to Dhan Raj Sukhraj was Rs. 469 which is the sum hereby allowed instead of the item of Rs. 450. The item of Rs. 225 has been paid, and so has the item of Rs. 60 which had swollen into Rs. 112. Therefore, Rs. 225 and Rs. 112 are allowed, Rs. 165 was the sum actually paid out of Re. 180 and, therefore, Re. 165 are allowed. The pay. ment of Item No. 6 for Rs. 200 is not proved and thus the total sum that deserves to be allowed out of Rs. 2,315 is Rs. 1,671 and adding Rs. 40 to the same which have been allowed as expenses of registration, we get a total of Rs. 1,711, which may be said to be due on asscunt of Item No. 1 in the consideration of the sale deed dated the 6th September 1921.

The first mortgage having been disposed of with the sale-deed, of which it had become a part, the second mortgage, dated the 2nd Ostober 1916, remains as the only deed that is to be dealt with in this appeal. The consideration for it was Rs. 4,300 which may be said now to include the sum of Rs. 1,000 which we have excluded above out of the consideration of the sale-deed. This sum was wholly meant for payment of the previous mortgage of Rs. 8,500. As the previous mortgage remains as an open question between the parties, we think the mortgage dated the 2nd October 1919 cannot be set aside and will stand or fall with any decision that may be eventually arrived at as to the said mortgage.

We, therefore, accept this appeal in part and, modifying the decree of the Court below, pass a decree declaring that the sale of the 6th September 1916 is set aside but Re, 1,711

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out of half the consideration therefor shall remain as an equitable charge on the property sold. As regards the other half of the consideration which is said to have been paid on account of Hari Shah and Hem Raj's mortgage nothing is decided and no declaration about it is made in this suit.

As regards the mortgage of the 2nd October 1916 we make no declaration in the present suit. Under the circumstances of the ease, we leave the parties to bear their own costs.

Z. K.

Arpeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 198 or 1920. February 10, 1921.

Fresent: —Pandit Kanhaiya Lal, J. C.
RAGHUBAR AND OTHERS — DEFEND: NTS
—APPELLANTS

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RAM BHAROSE AND ANOTHER—PLUNTIFFS —RESPONDENTS.

Minor-Transfer by guardian-Minor, whether can avoid transfer-Benefit of minor-Registration, absence of-Agreement, defective-Part performance, effect of.

Even where a compromise or settlement is considered to be defective or inchoate and insufficient to make a final and validly concluded agreement, the subsequent acts of the parties may be such as to supply all defects. In fact, when the actings and conduct of the parties are founded upon it, as in the performance or part performance of an agreement, the locus penitential which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded, for equity will support a transaction, clothed imperfectly, in those legal forms to which finality attaches, after the bargain has been acted upon.

[p. 413, col. 1.]

Where the guardian of a minor effects a transfer of the minor's property for the benefit of the minor, and the latter after attaining majority continues to derive the benefit which the transaction conferred on him, it is not open to him to take advantage of the absence of registration, particularly when the parties can no longer be restored to their old positions without material prejudice to the interests of one of them. [p. 413, col 1.]

A minor can repudiate an act done by his guardian only if it is prejudicial to his interests. [p. 413 col. 1.] Appeal from a decree of the Additional Subordinate Judge, Hardoi, dated the 22nd April 1:20, reversing that of the Munsif, Bilgram, dated the 7th March 1913.

Mr. S. P. Kain, for the Appellants.

Mr. Mohammad Wasim holding the brief of Pandit Harkaran Noth Misra, for the Respondents.

JUDGMENT.-The parties to this appeal are to sharers in the village Dhondhi. On the 14th May 1907 Bharat, acting on behalf of himself and his minor brother, Bikrams, and Musammat Parbati, acting on of her minor son, Ram Bharose, gave plot No. 607/2 thasra, measuring 1 bigha 16 biswas, to Bakkha on a rent free lease in perpetuity and took in exchange from the latter plot No. 610/2 khasra, containing a similar area on similar terms. Each party executed a patta in favour of the other in evidence of the transaction but did not get it registered. The present suit was filed by Ram Bharose and Bikrama for the recovery of possession of 3/4ths of the land given in exchange by their then guardians on the allegation that their guardians had no power to enter into the said transaction on their behalf. The Court of first instance dismissed the claim, holding that the plaintiffs had been benefited by the transaction. The lower Appellate Court held otherwise. It is not disputed that the plaintiffs attained majority within three years prior to the suit. It is also not disputed that plot No. 607/2 kharra was parti land close to the abadi; that Bakkhe, who is now represented by the defendants. appellante, built a house and a compound over it and planted a tree thereon; that plot No. 610-2 khasra was sultivable land and that the plaintiffs and their guardians have been in beneficial possession of the same by the receipt of rant from the person enltivating it.

The first question for consideration is, whether the guardians of the plaintiffs had authority to bind the minors by the transaction. The lower Appellate Court observes that both the plots contain land of equal quality. But if the plaintiffs and their guardians had got by exchange land which was under cultivation in lieu of that which was lying preti, it cannot be said that the minors had not been benefited by the transaction. They have

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been getting the benefit of the exchange by holding the land granted to them rent-free since 1907. They have a right to repudiate any act done by their guardiane, prejudicial to their interests, but this particular act was not prejudicial to their interests. On the other hand, it was beneficial to them. The transaction cannot, therefore, be set aside.

The pext question is, whether in the absence of registration the leases in question can be admitted in evidence to prove a perpetual rent-free grant. The lower Appellate Court rightly observes that such a lease requires registration. But as pointed out by their Lordships of the Privy Council in Mahomed Musa v. Aghore Kumar Ganguli (1) even where a compromise or settlement is considered to be defective or incheste and insufficient to make a final and validly concluded agreement, the subsequent acts of the parties may be such as to supply all defects. In fact, when the actings and conduct of the parties are founded it, as in the performance of part performance of an agreement, the locus penitentiæ which exists in a situation where the parties stated upon nothing but an engagement which is not final or complete, is excluded, for equity will support a transaction, clothed imperfectly, in those legal forms to which finality attaches, after the bargain bas been acted upon. Here the conduct of the minors cannot be pleaded in defeasance of their right to repudiate the ast of their guardians during their minority. But if their guardians had asted for their benefit, and after attaining majority they continued to derive the benefit which the transaction emnferred on them, it is not open to them to take advantage of the absence of registration, particularly when the parties can no longer be restored to their old positions without material prejudice to the interests of one of them. The lower Appellate Court has granted a decree for the removal of the wall standing on a portion of the compound and maintained the rest of the structure, built by the father of the defendants appellants; but the transaction, which can at

(1) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 430; 21 C. L. J. 281; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

best only last till a partition of the village is effected, cannot be set aside piecemeal in that manner. The minors are bound by what their guardians had done in their interests.

The appeal is, therefore, allowed and the decree of the lower Appellate Court set aside and that of the Court of first instance restored except in so far that the parties will bear their own costs throughout.

Z. K. & N. H.

Appeal allowed,

NAGPUR JUDIOIAL COMMISSIONER'S COURT.

December 15, 1921.

Present:—Mr. Hallifex, A. J. C.

BHAWANIBAM—PLAINTIFF—

APPELLANT

versus

DAMMARSINGH-DEFENDENT-

Will-Nuncupative-Finding as to intention of testator-Finding of fact-Appeal, second.

In the case of an oral Will by one R. to his daughter, the witnesses used slightly different terms of expression but all said that the daughter was to have the property for ever, or words to that effect. The lower Appellate Court taking all the circumstances into consideratio came to the finding that "R. did make a Will in favour of his daughter and expressed his intention to give her an absolute estate":

Held, that this was a finding of fact binding in second appeal.

Appeal against a decres of the District Judge, Jubbulgore, in Civil Appeal No. 23 of 1920, dated the 29th September 1920.

Mr. J. O. Ghosh, for the Appellant. Dr. H. S. Gour, for the Respondent.

JUDGMENT.—The last male holder of the property in dispute was Ramlal. After his death his widow Chironji married Todal Singh, and it happens that the next reversionary heir to Ramlal is Todal Singh's father Bhawaniram. We are not, however, conserned with Bhawaniram's relationship to Todal Singh or Chironji but only with

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his relationship to Ramlal. As the result of certain arrangements made after the death of Ramlal, that part of his property which is now in dispute went to Batti Bai, his daughter by his first wife Jai Bai, and she held it till her death in 1918. The plaintiff Bhawaniram now claims it as Ramlal's reversionary heir, from the defendant Dammar Singh, Batti Bai's husband, who is in possession and claims to retain it on the allegation that Ramlal made an oral Will whereby Batti Bai became the absolute owner of it.

(2) The learned District Judge found that Ramlal did make an oral disposition of his property and that he did direct that the property in dispute should go to his daughter Batti Bai. The correctness of this finding is not now questioned. It was further held that Ramlal directed that Batti Bai should be the absolute owner of the property. The reasons for the finding are stated as follows: "I have read through the oral evidence several times and duly noted the arguments of the lower Court but I cannot agree in rejecting this evidence. I find that the conduct of the parties and the surrounding eireumstances lend it great support, and that Ramlal must have made a Will of the nature indicated. The case of Dhuri Lal v. Dhania (1) was rightly referred to as ineleting on presise proof of the terms of a nuncapative Will, but this case cannot mean that an oral Will cannot be proved unless all the witnesses give precisely the same words in telling what the testator said. It is only to be expected that the resollection of the witnesses should use slightly different terms of expression but if the effect of the language is the same this will not matter. Now, all the witnesses are agreed as to what Batti Bai and the others were to get, and they all say that she was to have the property for ever or words to that effect I find that Ramlal did make a Will in favour of daughter and expressed his intention to give her an absolute estate."

(3) The only contention pressed by the learned Advocate for the plaintiff-appellant is that, according to the ruling of the Privy Council in Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee (2)

which is quoted by Skinner, A. J. C., in Dhuri Lal v. Dhania (1) no evidence of an oral Will can legally be sufficient unless it gives proof of the ipsissima verba of the testator, and here the witnesses all disagree as to the exact words used by Ramlal though they may agree as to the sense and effect of those words. answer to this is to be found in the passage in Dhuri Lal v. Dhania (1)dealing with the finding of the lower Appellate Court that an oral Will was made, where the learned Additional Judicial Commissioner said: "There is evidense on which it was, in my opinion, open to the learned Judge to arrive at this conelusion, nor do I see anything inconsistent therewith in the statement of the defendant when examined as a witness for the plaintiff. I am not, therefore, prepared to review this finding on second appeal, and, with reference to the distum of their Lordships of the Privy Council in Baboo Beer Pertab Sahee v. Maharajah Ra ender Pertab Sahee (2) relied on by the learned Counsel for the appellant, that the party setting up a nunsupative Will should be required to prove with the utmost precision, the words on which he ralies, with every eireumstance of time and place,' would remark that their Lordships' observations on this point (though in the particular ease before them obiter dicta, as they decided it on other grounds) should certainly guide Courts in this country having to deside questions of fact with regard to such Wills, but that their Lordships are Judges of fact as well as law, and that remarks made by them before the passing of the late Code of Civil Procedure (Act XIV of 1382) must be read as subject to their own subsequent desisions, requiring a strict interpretation of the provisions precluding a second appeal to a High Court in this country on a question of fact."

(4) It is clear from the passage quoted above from the judgment of the lower Appellate Court that I am bound by the finding of fact at which that Court arrived, to the effect that the oral Will made by Ramlal conferred an absolute estate on Batti Bai in the portion of his property that went to her, so that it passed on her

^{(1) 3} Ind. Cas. 59; 5 N. L. R. 85. (2) 12 M. I. A. I; 9 W. R. P. C. 15; 2 Suth, P. C. J. 114; 2 Sar, P. C. J. 348; 20 E. R. 241.

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death to her husband and not to Ramlal's heirs. The appeal is, therefore, dismissed and the appellant must pay all the costs.

N. 3.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIEST CIVIL APPEAL No. 53 OF 1920.
February 15, 1921.
Present:—Pandit Kanhaiya Lal, J. C.
BISHUNATH BHARTHI—PLAINTIFF—
APPELLANT

UST&US

Ohaudhri HAR SARUP AND OTHERS-

Specific Relief Act (I of 1877), s. 42—Religious endowment—Alienation by mahant—Suit by chela to challenge alienation—Burden of proof- Minor, whether can be appointed chela—Appointment during life-time of predecessor-in-title of Mahant making appointment, validity of.

The chela of a mahant who has a contingent right to succeed to the office of mahant on the death of the present holder of the office can take steps to protect the endowed property against any acts of waste committed by the present holder of the office or against any threatened sale in execution of a decree not legally enforceable against the endowment. [p. 416, col. 1.]

In cases of mortgages granted over the security of endowed property by the mahant thereof, it lies upon the mortgages or those claiming through him to prove that the debt was a necessary expense of the institution itself. [p. 416,

col. 2]

It is not uncommon in the case of celibate ascetics that a minor is taken as a disciple in order that he might succeed to the office of mahant after the death of the then mahant. [p. 415, col. 2]

The appointment of a disciple is not made illegal by the fact that at the time of such appointment the predecessor in title of the Mahant making the appointment was alive and in office. [p. 416, col' 1.]

Appeal from a decree of the Additional Subordinate Judge, Fyzabad, dated the 8th September 1920.

Mesers. A. P. Sen and H. K. Ghosh, for the Appellant.

Messrs. St. G. Jackson and Suraj Prasad Khandelwal, for Respondent No. 1. JUDGMENT.—The dispute in this appeal relates to a house situate in Ajudhia, which was mortgaged by Dasrath Bharthi, the Mahant of the Parela Asthan, with the predecessor-in-title of Chaudhri Har-Sarup. The latter obtained a decree for sale on the strength of that mortgage and in execution thereof applied for the sale of the said house.

The plaintiff claims to be the chela of Durga Bharthi, the successor of Dasrath Bharthi, and as such entitled to succeed to the office of Mahant on his death. He further claims that the house in question is waaf property. appertaining to the temple at Parela, and that Durga Bharthi has made him owner of the entire property. There is also an allegation that if the property in dispute be not found to be wagf property, he is still entitled to protect the house from sale by reason of its being the ancestral and joint family property of Durge, Bharthi and himself. The defendant, Chandhri Har Sarup, denied the right of the plaintiff to file a suit and asserted that the house in question belonged to the mortgagor and that the mortgage was in any case binding because it was made for legal. necessity.

The learned Subordinate Judge found that the honce in dispute appertained to the temple at Parela and was waaf property, that it had been acquired by one of the preceding Mahants out of the income of the endowment, and that there was no legal recessity to justify the mortage. He, however, dismissed the claim on the ground that the plaintiff was not at cheia of Darga Bharthi and had no right to sue.

The sole question for determination in this appeal is, whether the plaintiff is the chela of Durga Bharthi and as such entitled to protect the disputed property from sale. The plaintiff is described as 10 years old. There is evidence to show that Durga Bharthi had made him his disciple seven or eight years ago. Durga Bharthi belongs to a seet of selibate ascetics. It is not uncommon in the case of such ascetics that a minor is taken as a disciple in order that he might succeed to the office of Mahant after the death of the then Mahant. In fact, the tambignama executed by Durga Bharthi on the 28th February 1916 expressly recognises

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the status of the plaintiff as the disciple of Durga Bharthi and his future successor to the property therein mentioned. The entire property appertaining to the Asthan has been found in Rampat v. Durga Bharthi (1) to be waqf property; and as the house in dispute was purchased from the proceeds of the waqf property it must be deemed to partake of the same character. The only question, therefore, is whether the plaintiff is the disciple of Durga Bharthi and can protect the property of the waqf from waste or alienation or forced sale in execution of a decree.

It has been found by the Court below, and that finding is not here disputed, that there was no necessity for the mortgage. A diseiple can protect the property of the endowment either by virtue of his interest as a possible future successor of the estate or by virtue of his being a person interested in the If he acts in the former endowment. capacity he is entitled to a declaration under section 42 of the Specific Relief Act, I of 1877 because a cale of the property would affect his contingent right. If he acts as a member of the public interested in the endowment he san adopt the procedure prescribed by Order J, rule 8, of the Code of Civil Procedure. He has done the former. not the latter. His election as a disciple is not illegal by reason of the fact that Dasrath Bharthi was alive when his appointment was made. Section 42 lays down that a person entitled to any legal character or to any right as to any property may institute a suit for a declaration of his title to such a character or right. Being the disciple of Durga Bharthi he has at all events, a sontingent right to succeed to the office of Mahent on the death of the present bolder of the office and he can take steps to protect the endowed property against any acts of waste committed by the present holder of the officer or against any threatened sale in exeention of a decree not legally enforceable against the endowment,

The learned Counsel for the defendant No. 1 contends that the plaintiff has not asserted any such right in the plaint. He has undoubtedly set up a much higher right there; but he is entitled to fall back on his right

as a disciple, and as the contingent future successor to the office to protect the property which would devolve on him when that office falls vacant. The sale of the property will only complicate matters and cause injury to the endowment, the maintenance of which is almost dependent entirely on the income derivable from the endowed property. The house in dispute forms part of the endowed property and as such cannot be sold in execution of a decree not properly chargeable against the endowment. As observed by their Lordships of the Privy Council in Murugeram Tillai v. Manickavasaka Desika Gnanasam. banda Pandara Sannadhi (2). in eases of mortgages granted over the security of endowed property by the Mahant thereof, it lies upon the mortgagee or those elaiming through him to prove that the debt was a necessary expense of the institution itself. That burden has not been discharged.

The appeal is, therefore, allowed and the claim decreed for a declaration that the property in dispute is endowed property appertaining to the Parela Asthan and is not liable to sale in execution of the decree obtained by the contesting defendant respondent against Durga Bharthi. The plaintiff-appellant will get his costs here and hitherto from the contesting defendant respondent who shall bear his own costs throughout.

z, K, & N. H.

Appeal allowed,

(2) 39 Ind. Cas. 659; 44 L. A. 98 at p. 102; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; I P. L. W. 467; 5 L. W. 759; 21 C. W. N. 761; 40 M. 402; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487 (P. C.).

BAMPARTAP LAL U. BABH MUNICIPALITY.

PATNA HIGH COURT. CRIMINAL REVISION No. 563 OF 1921. January 5, 1922. Present:-Mr. Justice Jwala Prasad, RAMPARTAP LAL-Accused-PETITIONER

ter tus

BARH MUNICIPALITY-COMPLAINANT-OPPOSITE PARTY.

Bengal Municipal Act (III of 1884), ss. 178, 224, 271-Notice to demolish-Objection against notice-Objection disallowed - Committee, duty of, to specify time for compliance-lime not specified-Prosecution

Where, under section 178 of the Bengal Municipal Act, an objection against a notice issued under section 224 directing the removal, within a specified time, of a building constructed without permission, is disallowed, the Committee is bound to specify a time within which the requisition is to be carried out, the fact that a period of time was mentioned in the original notice does not absolve the Committee; after disallowing the objection, from the obligation of again specifying the time within which the requisition should be complied with, and where a Committee omits to do this, a conviction under section 271 of the Act is bad in law. [p. 417, col 2.]

Revision.

Mr. M. Yunus, for the Petitioner.

JUDGMENT .- This is an application against the conviction of the accused under section 271 of the Bengal Municipal Act (Act III of 1884).

On an application, dated the 26th of February 1921, made by Saukhi Lal of Barb, and on a report drawn by the Sanitary Inspector, dated the 2nd of March 1921, a notice, dated the 4th of March, under section 224 of the Municipal Act was served upon the petitioner to remove a new latrice which he had constructed upon his premisee, without the permission of the Municipality, within 15 days. On the March the petitioner filed an objection (Exhibit 7) before the Municipality against the said notice, and on a report of the Sanitary Inspector and the Vice Chairman, the Obsirman recorded the following order upon the back of the petition :-

"Please prosecute the man if you are satisfied that the privy is objectionable and erected

without permission."

On the 28th of Arril the Vice-Chairman passed the following order (Exhibit 8):-

"Instruction was given to him to settle the matter amicably, but he failed. The privy was bailt without permission. However, prosesute him."

This order is said to have been verbally communicated to the petitioner by the Vice-Chairman. The petitioner was thereafter prosecuted and convicted. He has directed to pay a fine of Bs. 15 for not having pulled down the privy within 15 days of 4th of March 1921, that is, within the 19th of March 1921, and annas 2 for every day subsequent to that, till the said privy is removed. This order has been passed under section 271 of the Bengal Municipal Act.

Mr. Yunus contends that his objection filed on the 7th of March was not disposed of in terms of section 178 of the Act, nor was any time specified within which the requisiton was to be earried out. On the other hand, the Magistrate holds that the order of the Chairman, dated the 6th April, and of the Vice-Chairman, dated the 28th of April, had the effect of making the requisition absolute and that the time of 15 days mentioned in the first requisition was a suffieient compliance with the requirements of section 178. It is, however, conceded that no order in terms of section 178 was recorded and the orders of the Chairman, dated the 6th of April, and of the Vice Chairman, dated the 28th of April, cannot be construed to be a record of the disposal of the objection of the petition filed by the petitioner. Even if those orders can be construed as such, they should have specified the time within which the requisition was to be earried out. The fact that 15 days' time was mentioned in the original notice served on the 4th of March does not absolve the Municipal authorities from the obligation of again spesifying, after the disposal of the objection under section 178, the time within which the requisition shall be complied with. The original notice of the 4th of March spent itself on the 19th of March and became nugatory after the objection of the 17th of March was filed by the petitioner under section 178. The objection under section 178 may be withdrawn by recording a formal order, and if made absolute the person . affected thereby is entitled to a fresh time within which to comply with the order of the Municipality. He objected to the first notice and the right of the Municipality to require him to demolish his latrine, and, therefore, he did not comply with that no.

BADRI PRASAD C. EMPEROR.

The law permits him not to comply with the notice in the eircumstances, that is, when he files an objection. If the objection is decided in his favour, then the notice is cancelled. If, on the other hand, it is decided against him, then the decision earnot have the retrospective effect of punishing him for the default sommitted by him with respect to the first notice and imposing a fine with retrospective effect from that date, as has been done in the present ease. It is also elear from the concluding words of section 271 of the Act which imposes a daily fine during the continuance of the default after the service of requisition on him. If no objection is made, then the default after the service of notice will bring him under this clause. If, on the other hand, he makes an objection, then the default, after the service of a fresh requisition and after the disposal of the objection, will make him liable for the disobedience of that requisition. Therefore, the contention of Mr. Yunus appears to be substan. tial, though I fully agree with the view of the Magistrate that it is a technical one.

The conviction and the sentence are set aside. The Municipality will be at liberty to proceed afresh after the service of notice under section 178 and after recording a formal order.

W. C. A.

Consiction set aside.

CRIMINAL REVISION No. 80 of 1922.

March 24, 1922.

Present:—Sir Grimwood Mears, Kr., Chief Justice, and Justice Sir P. C. Banerjee, Kr., BADRI PRASAD—Applicant

versus

EMPEROR - OPPOSITE - PARTY.

Penal Code (Act XLV of 1860), ss. 890, 392— Robbery—Sentence of fine only illegal—Imprisonment essential—Whipping, when should be inflicted— Whipping Act (IV of 1969), s. 4. Where a charge under section 390 of the Fenal Code is proved against an accused person, a sentence of fine only, which may or may not be accompanied with a sentence of whipping, is illegal; as under section: 92 of that Code a sentence of imprisonment is essential and ought to be imposed.

[p. 419, col. 1.]

Although in such a case whipping may also be inflicted, yet under the Whipping Act, as amended, a sentence of whipping should be imposed only where there is a certain amount of aggravation in the commission of the original offence, where the degree of injury is extremely slight, the penalty of whipping should not be added to the sentence of imprisonment [p. 419, col. 1.]

Criminal revision against an order of the Sessions Judge, Aligarb, dated the 13th February 1922.

Mr. N. C. Vaish, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

MEARP, O. J .- In this case one Badri Prasad was convicted by a Magistrate of the First Class of Aligarh. The prosecution case against him was, that he, with two other companions, on the evening of the 21st of January, followed three servants who were going to the house of their master, Jarao Lal, and who had at the time with them some money and a considerable quantity of valuables, said to be worth about Rs. 700. When two of the servants had entered the shop of their master, Badri Prasad was proved to the satisfaction of the Magistrate to have struck the third and rearmost man, Jwala Pracad, with a stout donda on the head; and in the confusion which resulted either Badri Prasad or one of his associates got hold of the box containing the valuables and got away with it. The blow struck was not a severe one. After that, Badri Prasad ran away. The man who had been struck was apparently able to follow him and some body or other saught Badri Prasad, he having slipped up. In these eireum. stances, the Magistrate inflieted a fine of Rs. 100 with an alternative period of imprisonment, if that fine was not paid, and sentenced Badri Prasad also to thirty stripes. Badri Prasad preferred an appeal to this Court and it has been admitted upon the question of sentence only-and, at the same time, notice has been served on him to show cause why the sentence should not be enhanceed or otherwise altered. This was a charge under section 390 and the penalty is prescrib. ed under section 392. An examination of ARJUN MARTON C. JUGGARNATH SINGH.

that section shows that a fine alone is not a permitted punishment for a robbery. Robbery, under these circumstances, may be punished by rigorous imprisonment and by a fine, and in certain cases whipping by addition. in Bat the Magistrate erred in law in sentencing the accused to a fine and a fine unaccompanied by imprisonment. We have got the whole matter before as and I personally wish to say, and I wish it to be known, that, in my view, when a person infliets pain upon another and when the offence is one which permits of the penalty of whipping, I think it a good thing to infliet that penalty. There are, of course, oirenmetanees in which the actual hurt caused is very slight, and that is a eirenmetanes to which attention has to be paid; and though I myself should certainly have reduced the number of stripes awarded to this young man in this case, I should not myself have eliminated the punishment of whipping altogether; but I see that there are other points of view in this case. The accused is a young man, a Brahmin, and the degree of injury which be indicted on Jwala Prasad was extremely slight, perhaps, in a sense, negligible. Therefore, I defer very gladly to what I have no doubt is in this case Mr. Justice Banerji's better judgment on the matter. I am quite in accord with him that there must be a substantial period of imprisonment and, therefore, we alter the nature of the punishment which Badri Prasad must undergo, and we sentence him to twelve months' rigorous imprisonment with effect from the date of his arrest. maintain the fine of imprisonment with the alternative period of imprisonment if that fine he not paid, and we wipe out that part of the sentence which orders him to receive a whipping.

BANERJI, J .- I am of opinion that the Court below was wrong in not inflicting on the appellant a sentence of imprisonment. A sentence of imprisonment is an essential sentence under section 392 of the Indian Penal Code. To this sentence a fine may be added and, under section 4 of the Whipping Act, a sentence of whipping may be imposed where, in the commission of a robbery, hurt is saused. Therefore, the sentence of fine only was an illgal sentence, and a sentence of imprisonment ought to

have been (imposed. (The sentence of whipping was not an illegal sentence but, in the circumstances of the present case, I think a centence of whipping should not have been inflicted. That is a punishment which, in view of the provisions of the Whipping Act, as amended, should be inflicted in cases where there is a certain amount of aggravation in the commission of the original offence. In the present ease the offence was the first offence, so far as is known, committed by Badri Prasad. He is a young man and is a shop keeper. The hurt caused was obviously slight. A sentence of twelve months' rigorous imprisonment would, in my opinion, be a sufficiently deterrent punishment so far as he is concerned, in addition to the fine which the Court below imposed on him. I, therefore, agree in the order proposed by the learned Chief Justice.

W. C. A.

Order accordingly.

PATNA HIGH COURT. ORIMINAL REVISION No. 92 or 1922. March 24, 1922. Present:-Mr. Justice Ross.

ARJUN MAHTON-PETITIONER

DST&US JUGGARNATH SINGH-OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145 -Witness, summoning of, whether obligatory-Refusal to summon witnesses, effect of.

It is not obligatory on a Magistrate to assist the parties to a proceeding under section 145 of the Criminal Procedure Code, to produce their witnesses, and they cannot claim as a matter of right that processes should be issued by the Court to enable them to bring forward their evidence. The refusal by a Magistrate to issue summonses to witnesses is not tantamount to refusing a fair trial.

Oriminal revision against an order of the Sub Divisional Magistrate, Hazaribagh.

Messre, Manchar Lal and Nawal Richor Prasad, II, for the Petitioner.

Mr. Bankim Oh. De, for the Opposite Party.

GIRWAR LAL C. BANSIDHAR.

JUDGMENT .- This is an application by the first party against an order passed by the Sub-Divisional Magistrate of Hezaribagh under section 145 of the Criminal Procedure Code, declaring the second party to

be in possession of certain land. Two grounds are taken in this application. The first is, that the petitioner has been refused a fair trial because he had no opportunity of presenting his ease before the Court. It is stated that the petitioner resides 70 miles away from Hazaribagh and that the proceeding drawn up against him was served on the 14th of January, the date fixed for trial being the 21st. On that date a petition was filed stating that the witnesses had not come and that copies of papers were required and an adjournment of one month was prayed for. The Magistrate appears to have refused this application and decided the case on the arguments of the Pleaders of both sides and on such evidence as was adduced. Now, section 145, clause (4), laye down what the presedure is to be: The Magistrate has to peruse the written statement, to hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and, if possible, decide the question of possession. There is nothing in this section which requires the Magistrate to issue processes on any witnesses. The whole queswas discussed fully in Tarapada Bisuas v. Nurul Hug (1) where it was pointed out that "the Legislature could hardly have contemplated an elaborate and protracted investigation the result of which might in many instances be to defeat the object in view, namely, an effective vention of a breach of the peace. whole object might obviously be defeated if the Court could be compelled to summon and re summon witnesses at the choice of the parties." It was further observed that it appeared clear from the provisions of the Code that it is not obligatory upon the Magistrate to assist the parties to a proeeeding, under section 145 to produce their witnesses, and they carnot claim as a matter of right that processes should be

issued by the Court to enable them to bring forward their evidence. This case is a direct authority against the ecutention of the petitioner and it has been approved and followed in Harenara Kumar Bose v. Girish Chundra Mitra (2). I cannot eee, therefore, that in refusing to issue summons the Magistrate refused a fair trial. took all the evidence that the parties had ready and heard what they had to say.

The second contention is, that the Magietrate has acted on the delivery of possession by the Civil Court without going into the question whether that possession was symbolical or actual. Whether there was reengnition by the second party of the sub-tenancy claimed by the first party or whether there was resumption of tenure under section 14 of the Chota Nagpur Tenancy Act, these are plainly questions which were not for the Magistrate to decide. He had evidence before him that the judgment debtor in the decree under execution was ejected and that possession was delivered by the Civil Court to the second party. His decision may be right or it may be wrong but I can see no defect in jurisdiction. The application is dismissed.

W. C. A.

Application dismissed.

(2) 7 Ind. Cas. 798; 38 C, 24; 11 Cr. L, J. 530.

ALLAHABAD HIGH COURT. ORIMINAL REFERENCE No. 168 of 1922. April 12, 1922. Freient :- Mr. Justice Lindsay.

GIRWAR LAL-PETITIONER

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BANSIDHAR AND ANOTHER-OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss, 138 (1', 139-Jurors-Perverse refusal to return verdict, -Procedure.

Where a Jury, or a majority of the Jurors, appointed under section 138 (1) of the Criminal PARSURAM BAI U. SHIVAJATAN UPADHAYA.

Procedure Code, refuse perversely to return a verdict, the Magistrate should appoint a fresh Jury, and decide the matter before him under section 139 of the Code

Criminal reference made by the Sessions Judge, Aligarb, dated the 18th February 1922

REFERRING ORDER.—This is an application in revision against an order of Sayyad Zainuddin, Deputy Magistrate, First Class, stopping further proceedings under section 139 (2) of the Criminal Procedure Code.

A Jury of five were appointed. of these wanted the platforms in dispute to be eat down slightly. The other three refused to return a verdiet at all. The lower Court has interpreted this as meaning, that the three men have not found the order under section 133 of the Code of Oriminal Procedure to be a reasonable one nor have they agreed to any modification, I am, however, of the opinion that the three men have deliberately shirked their duty as they have not given any verdiet at all probably because they do not want to offend either party. Under the above eirenmstances, I am of the opinion that there has been a perverse refusal on the part of the three men to decide and, in accordance with the note in paragraph 9, on page 220 of Sohoni's Criminal Procedure Code, 9th Edition, it was competent on the part of the lower Court to appoint a fresh Jury.

I, therefore, refer the case to the Hon'ble High Court with the recommendation that the order of the lower Court stopping further proceedings be set aside, and that the lower Court be directed to appoint a fresh Jury.

The lower Court is asked to submit its explanation to me within a week.

JUDGMENT.—I have read the order of the learned Sessions Judge and agree with his view of the case. I. therefore, set aside the order of the Magistrate as recommended by him, and direct that the case be sent back to the Magistrate who will proceed to appoint a fresh Jury and decide the matter before him, under the provisions of section 139 of the Code of Oriminal Procedure.

W. C. A.

Order set aside; Oase sent back. PATNA HIGH COURT.
CRIMINAL REVISION No. 97 CF 1922.
March 23, 1922.
Present:—Mr. Justice Rose.
PARSURAM RAI—PETITIONER

SHIVAJATAN UPADHAYA AND OTHERS-

Criminal Procedure Code (Act V of 1893), 88. 145, 146-Attachment of property-Procedure.

Before attaching property under section 146 of the Criminal Procedure Code, the Magistrate should make some inquiry in order to ascertain, if possible, who was in possession. An order of attachment made without such inquiry cannot be sustained.

Criminal revision against an order of the Deputy Magistrate, Arrab.

FACTS appear from the judgment.
Mr. S. N. Roy, for the Petitioner.
Mr. Manchar Lal, for the Opposite Party.

JUDGMENT .- In this case the learned Magistrate attached the land in dispute under section 146, Criminal Procedure Code, holding that it was not possible to ascertain as to who was in possession besause, on the date fixed for hearing, the parties did The learned not appear. Counsel for the opposite party concedes that the order cannot be supported. It was the duty of the learned Magistrate, before attach. ing the property, to make some enquiry in order to assertain, if possible, who was in possession. No enquiry was made and the order cannot stand.

The order is set aside and the case must be remanded to the Magistrate to take evidence and decide it according to law.

W. C. A.

Order set aside; Case remanded, JAGANNATH SINGH C. EMPEROR.

ALLAHABAD HIGH COURT.

ORIMINAL APPEAL No. 53 of 1922.

February 8, 1922.

Present:—Mr. Justice Gokul Prasad and

Mr. Justice Stuart.

JAGANNATH SINGH—APPELLANT

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EMPEROR-OPFOSITE PARTY

Murder-Evidence, absence of-Corpus delicti not

stablished-Conviction, whether justified.

In the absence of the corpus delicti, and of the best evidence as to the cause of death, a conviction for murder would be unjustified; the fact that the accused has made it difficult to procure evidence, cannot be accepted as a substitute for the evidence.

Criminal appeal from an order of the Sessions Judge, Budaun, dated the 7th January 1922.

Mr. S. O. Mukerji, for the Appellant. The Government-Advocate, for the Crown.

JUDGMENT .- The accused, Jagannath Singh, has been convicted of the murder of a woman called Radbika Kunwar and also on a charge of having poisoned Radhika Kunwar. There can be no doubt as to the fact that the appellant's ecudust has been most suspicious. This woman, who was a widow, was his mistress and the mother of his illegitimate shild. He had been put out of easte owing to his connection with her. On the 2nd of November she was seen at midday sitting outside her door vomitting and purging, and she attributed her illness to something which the appellant had given her to eat. She retired later inside the house and got worse. She stated that the appellant had given her vinegar, which was making her worse, Later on, she was sereaming. Finally, she was found dead. The appellant eremated her body with all the speed that was possible. In her room were found two pieces of rope with human blood and to which were adhering human hair. Further, bajra cakes containing arrenic were found in her room, but on the evidence there can be no conelusion as to the cause of death. At the best, it can be said that the symptoms before the weman's death were not incompatible with the conclusion that she was suffering from arsenical poisoning and that the circumstance that the pieces of blood-stained ropes were found in the room

LEDGA U. EMPEROR.

after her death would lead to a suspicion that she had in some way been maltreated in such a manner as to draw blood from her, but there is no evidence that would justify the conclusion that she died of poison. ing or had been murdered. No poison was discovered in her vomit, in her exereta or in the organs of her body. There is no evidence that would justify the conelusion that she was poisoned at all. True, it may be said that, owing to the action of the appellant, it has not been possible to obtain the best evidence as to the eause of death but the fact that he has made it difficult to procure evidence is not a substitute for the evidence. In these eircumstances, we are satisfied that the first element justifying a conviction is No corpus delicti is established. We absent. must, therefore, admit the appeal, set aside the convictions and sentences, and direct that the appellant be released from enstody.

W. C. A.

Conviction set aside,

NAGPUR JUDICIAL COMMISSIONER'S COURT.

December 15, 1921.

Present: - Mr. Dhobley, A. J. C.
LEDGA alias PAOHHAND-APPELLANT

versus

EMPEROR-OPPONENT.

Penal Code (Act XLV of 1860), ss. 445, 457— "Fastened," meaning of—Entry merely by pushing shutters—Nature of offence.

The word "fastened," as used in section 445 of the Penal Code, implies something more than being closed such as chaining the shutters or tying them with a rope or bolting them or locking the door. An entry of an accused into a house by merely pushing in shutters of the door does not constitute the offence of house-breaking, as it does not come under any of the six clauses of section 445 of the Penal Code, but constitutes an offence of house-trespass under section 457 with intent to commit an offence.

EMPEROR C. DURGA PRASAD.

Appeal against a judgment of the Magistrate, First Class, Raipur, dated 16th November 1921, in Oriminal Case No. 55/166 of 1921.

Mr. G. P. Dick, Standing Counsel, for the

Crown. JUDGMENT.—The appellant above named has been convicted under section 457, Indian Penal Code, on a charge of having, on the night of the 27th September last, broken into the house of Ludbra (P. W. No. 4) with the intention of committing theft and sentensed to five years' rigorous imprisonment. That the appellant was actually found inside the house and that he had gone there for committing theft has, not withstanding his denial, been satifactorily established. The question, however, is whether the ast committed by the appellant amounts to house break. ing. From the evidence of Ludhra it is elear that the door of the house entered into by the appellant was neither chained nor looked. The appellant must have, therefore, got into the house by merely pushing in the shutters of the door. The evidence does not show that he had got inside the house by any other passage. The appellant's entry into the house by merely pushing in the shutters of the door does not some under any of the eix elauses of section 445 which defines the term bousebreaking. The door sould not be said to have been "fastend", when its shutters were merely closed. The term "fastened" implies something more, such as chaining the shutters or tying them with a rope or bolting them or looking the door. The appellant's conviction under section 457 cannot, therefore, stand. His act falls under the last portion of section 451, Indian Penal Code, and amounts to a house-trespass with intent to commit theft. His conviction under section 457 is altered into one under the last portion of section 451, Indian Penal Code. As regards the sentence, considering his record of the previous convictions, five years' rigorous imprisonment cannot be called severe. It is maintained and so is the order passed under section 565, Code of Criminal Procedure.

G. B. D. & J. P.

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Appeal dismissed.

ALLAHABAD HIGH COURT.

ORIMINAL REPERENCE No. 133 of 1922.

March 30, 1922.

Present:—Mr. Justice Lindsay.

EMPEROR—Prosecutor

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DURGA PRASAD—Accused.

**Criminal Procedure Code (Act V of 1898), ss. 202, 203—Magistrate—Inquiry—Local investigation—Procedure—Irregularity.

Under section 202 of the Criminal Procedure Code a Magistrate, when not satisfied with the truth of a complaint has the option of only one out of two alternatives, viz., either to enquire into the case himself, or direct a previous local investigation. If he proceeds to inquire into the case himself, an order thereafter directing local investigation is irregular and the whole proceeding against the accused is vitiated if a material portion of the irregular proceedings has a share in the formation of his judgment.

Criminal reference by the Sessions Judge, Bands, dated the 7th March 1922.

REFERRING ORDER.—Durga Praead, teacher of the village of Mungae, Sahai, a co-sharer and Lambardar of the village, and Madho were tried together and convicted of offences punishable under sections 342 and 381 of the Indian Penal Code. Darga Praead was fined Rs. 50 only; the other two, more than Rs. 50. Sahai and Madho prefer this appeal from the order of conviction and sentence passed against them.

Having heard the learned Vakil for the appellants and the Government Pleader, I have arrived at the conclusion that the convictions and sentences of Sahai and Madho should be set aside and they should be re tried by any other Magistrate of the First Olase.

Six persons brought the complaint, which gave rise to the trial against the accused persons in the lower Court, on the 4th Ostober 1:21. The complainants were examined on the same date. Processes for the appearance of the accused persons were not ordered to be issued. The complainants were told, instead, under section 202, Criminal Procedure Code, to produce evidence on the 19th October. Ordinarily, after the examination of the complainant, processes are issued. And, according to decided cases, a Magistrate has no discretion to make a judicial erquiry, unless he is not satisfied as to the truth of the complaint. The above order is, therefore, . prima facie proof of the fast, that the learned

EMPEROR D. DUSSA PSABAD.

Magistrate was not satisfied as to the truth of the complaint, even after hearing the statements of the complainants on oath. the 19th, evidence of two witnesses, Gajju and Bharosa was recorded. Having heard them, the learned Magistrate wrote the following order, which is to be found in the order. sheet :-

"I am not satisfied with the section 202 evidence produced to-day. It is admitted that the complainants had stipulated to plough up the fields and, therefore, the subsequent alleged extortion may not have any truth in it."

If the reasons given by the learned Magistrate were valid, the proper order, in the ordinary course of things, ought to have been a dismissal of the complaint under section 203, with brief reasons for such dismissal, Instead of that, the learned Magistrate proeeeded to make an order, directing a Naib-Tabsildar "to report after an enquiry." The meaning of this order is not quite clear. Under section 202 an "enquiry" into the case is the province of the Magistrate only. Any offiser subordinate to such Magistrate, or a Police Officer, or any other person may, if so directed, hold a previous "local investigation." In a case decided by the Hon'ble High Court Bai, Nath v. Ra, a Rum (1) the enggestion was thrown out that cases in which there were any disputes about boundary, or any matter of that kind was involved, were alone fit cases for a "local intestigation." But I presume that the learned Magistrate's order, directing the Naib Tabsildar to hold "an enquiry and report," was really an order directing an investigation authorised by The Naib-Tabsildar examined section 202. a number of witnesses on the spot, besides the complainants, the accused, and the two witnessee, whom the complainants, produced before the learned Magistrate under section 202. After a perusal of the Naio-Tahsildar's proceedings and the report, on the 3rd November 1921 processes were issued for the appearance of the accused persons, who appeared on the 18th November. On this date two out of the six complainants, two witnesses, who were examined under section 202 and one further witness, Marzir Nabi, who proved not a word of the charge, were

(1) 16 Ind. Cas. 512, 10 A. L. J. 79; 13 Cr. L. J.

104.

examined. The Court then adjourned and on the 3rd December 1921, the Naib Tabaildar and one Ram Prasad an assistant teacher in the school of one of the accused, Darga Prasad, were examined. I notice that the Counsel for defense objected to any question being put to the Naib-Tahsildar relating to what the assused persons or the witnesses stated to him. This objection was overruled. On the other hand, the prosecution wanted the Naib Tabsildar to prove the statements of persons recorded by him. That was also disallowed. The Naib Tahsildar proved (1) that Sahai, one of the accused persons, saluted the witness in a manner which led bim to think that he wanted the matter to be hushed up; and (2) that the assistant teacher, Ram Prased, told him that one of the boys who had been produced before the witness, was tutored by one of the accused. The evidence of the assistant teacher, Ram Prasad, before the Court did not help the prosecution. The latter thereupon declared the witness hostile, and was permitted to eross. examine him. The resord indicates that this witness was put in eross-examina. tion a statement said to have been made by him before the Naib-Tabsildar, where he mentioned that the accused, Darga Prasad, real zed Rs. 10 each from the complainants. He was apparently contradicted by his statement before the Naib. Tabsildar, for he goes on to say that the Naib-Tahsildar did not record his full statement; that he made notes only; that his statement was not shown or read out to him, and that he signed it, merely because he was desired by the Naib Tabsildar to do so.

The learned Magistrate in his judgment observes as follows: - "Marzor Nabi, witness, gives elue to the first parchayat having been held in the school, although he denied all knowledge of the second, (I may note here that no offence was committed in the first panchayat and the offences, which are subject of the charge, were said to have been committed in the second panchayat alone). Pandit Suraj Nath Misra, the Naib-Tahail. dar, who held the preliminary investigation, has also been formally examined. Prasad, assistant teacher, has retracted the statement made by him before the Naib-Tabaildar, obviously under pressure."

The learned Magistrate bases his judgment, in the above eireumstances, on the evidence of DURGA SINGH U. AMAR DAYAL SINGH.

the two complainants and the two witnesses, the same who were examined under section 202 alone. A comparison of their evidence under section 202, and at the time of the trial, will show that there was nothing new in their subsequent statements; but so far as their testimony went, the case stood exactly where it did after the proceedings under section 202.

Now, under section 202 the learned Magis. trate had the option of only one out of two alternatives, namely, either to enquire into the ease himself, or direct a previous local investigation. Assuming that this was a fit case for a local investigation, there is nothing in sestion 202 which empowered the learned Magistrate to have resourse to both the alternatives. The record shows that he shose one of the two alternatives, namely, to enquire into the ease himself, which he did. His order, therefore, directing local investigation was irregular. And if it be found, that any material obtained through this irregular course acted on the mind of the learned Magistrate in arriving at a conclusion prejudicial to the accused persons, it must be held that the accused persons were prejudiced in consequence of that irregularity. It would, therefore, vitiate the proceedings. Upon a perusal of the judgment under appeal and the passages quoted, I have seareely any doubt that a material portion of the irregular proceedings had a share in the formation of the learned Magistrate's judgment. I would accordingly set aside the order of conviction and sentence made against the appellants and send down the record to the District Ma. gistrate to pass it on to some other Magistrate empowered to try the case, for re-trial of the appellants. In view of the ruling in Bhola v. Emperor (2), I refer the case of Darga Prasad, against whom a non appealable sentence was passed and who has not appealed, to the Hon'ble High Court after taking the learned Magistrate's explanation.

JUDGMENT. - For the reasons stated in the Referring Order of the Sessions Judge, I set aside the conviction and sentence of the accused Darga Prasad and direct that he be

(2) 40 Ind. Cas. 882, 15 A. L. J. 574, 18 Or. L. J. 684; 89 A. 549.

re-tried before a competent Magistrate along with the two other accused, namely, Sahai and Madho, in whose case a re triel has been directed by the learned Sessions Judge.

J. P. & N. H.

Conviction set onide.

PATNA HIGH COURT.

ORIMINAL REPERENCE No. 513 of 1921.

December 14, 1921.

Present:—Mr. Justice Adami.

DURGA SINGH—FIRST PARTY—PETITIONER

versus

Rai Bahadur AMAR DAYAL SINGH

AND OTHERS—SECOND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), so. 107,

125—S. 125, scope of—District Magistrate, powers of

High Court, power of, to interfere.

The provisions of section 125 of the Criminal Procedure Code do not confer upon a District Magistrate either an appellate or revisional juris, diction in respect of orders passed under section 107 binding down persons to keep the peace; the section merely empowers a District Magistrate to cancel a bond for any sufficient reason, and confers no power on him to set aside a proceeding under section 107, even though the Subordinate Magistrate had acted without jurisdiction. [p. 427, col. 1.]

Where a District Magistrate, acting under section 125 of the Criminal Procedure Code, sets aside a proceeding under section 107, he acts without jurisdiction, and the High Court has power to interfere and set aside his order. [p. 427, col. 2.]

Application against an order passed by the Deputy Commissioner, Palamau, dated the 12th August 1921, setting aside an order passed by the Magistrate, First Class, Daltonganj, dated the 23rd June 1921.

Mesers. Hasan Imam and Gour Chandra Pal, for the Petitioner.

Messrs. Sultan Ahmad, Shi.eshwar Dayal and Bri, Kishore Prasad, for the Opposite.

JUDGMENT.—This is an application to set aside an order passed by the Deputy Commissioner of Palamau, whereby an order passed by the Deputy Magistrate binding DURGA SINGH C. AMAR DAYAL SINGH.

down the opposite party under section 107 of the Code of Criminal Procedure was declared to be void and of no effect.

It appears that the present petitioner obtained a lease of forest rights for a period of seven years from the opposite party and proceeded to work the timber of the forest. A dispute arose between the parties as to various matters but mainly as to the manufacture of charcoal and the danger of setting fire to the forest. It is the petitioner's case that the opposite party employed men to supervise and that these men used force. It was, therefore, prayed that steps should taken under section 107 against the opposite party to bind them down to keep the peace.

The case came before the Sub-Divisional Magistrate in charge and he drew up proceedings and called for written statements of the parties and the Court ordered the parties to produce their witnesses. The witnesses were produced on a certain date but an adjournment was asked for and the Sub Divisional Magistrate, after placing the witnesses on personal recognizance, allowed an adjournment for four days.

On the 16th of May when the case was to be heard and the witnesses to be examined, the Sub-Divisional Magistrate was ill and the next Senior Deputy Magistrate took charge of the pending file. He took up this case under section 107 and tried it himself, and finally passed the order binding down the opposite party under section 107 of the Code of Criminal Procedure to keep the peace for one year.

The opposite party thereupon moved the Deputy Commissioner who, after considering the ease on its merits, found that the story put forward by the present patitioner was not altogether to be believed; he also held that, at the time the order was passed by the Deputy Magistrate, there was no imminent likelihood of a breach of the peace; and, thirdly, he considered the question whether the Deputy Magistrate who passed the order under section 107 had jurisdis. tion. The point was that the Sub Divisional Magietrate in charge had taken cognizance of the ease and there had been no order by the Deputy Commissioner for the transfer of the case from the file of the Sub. Divisional Magistrate to the file of the

Daputy Magistrate. He came to the conelucion that the Deputy Magistrate had acted without jurisdiction. His finding was that.

"He, therefore, acted without jurisdiction in this case and under section 530 where a Magistrate acts without jurisdiction the whole proceeding is void ab initio. There has been no trial and the order is void. There is in fact no order for security such as would be enforced in law, and I, therefore, quash the whole proceedings. Party aggrieved should seek his remedy in the Civil Court."

It is to be noticed that there is no order eancelling the bond. Mr. Hasan Imam on behalf of the petitioner argues that the learned Deputy Commissioner had no jurisdiction to pass the order he did. Section 125 of the Code of Criminal Procedure runs as follows:—

"The Ohief Presidency or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace, or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court."

There is no provision in the Criminal Procedure Code allowing an appeal against an order passed under section 118 requiring a person to execute a bond to keep the peace, and section 125 alone enables a Magistrate to deal with orders passed under section 107 and section 118 read together. In the case of an order for the execution of a bond to be of good behaviour, the Oode, under section 406, allows an appeal. It is to be noticed that section 125 only allows cancelment of the bond; it says nothing about setting aside proceedings or in any way dealing with the proceedings which have led to the order for the exeeution of a bond. In fact, the order passed under section 125 is an executive order. It has been held in the case of Daya Nath Thakur v. Emperor (1) that a proceeding under section 125 is not a judicial proceeding and, in fact, it cannot be otherwise than an executive order. It has been held further in Barka Chandra Dey v. Janmeioy Dutt (2) that section 125

^{(1) 5} Ind. Cas. 555; 37 C. 72; 14 C. W. N. 306; 11 Cr. L. J. 147.

^{(2) 32} C. 948; 9 C. W. N. 860; 2 Cr. L. J. 550.

DALLI U. TMPEROR,

of the Criminal Procedure Code does not confer upon a District Magistrate either an appellate or revisional jurisdiction in respect of orders binding down persons to keep the peace. In that case the District Magistrate set aside a proceeding which was taken under section 107 before any bond had been executed, and the learned Judges held that "sufficient reason" mentioned in section 125 was sonfined to the reason that a bond was no longer necessary. In the case of Nabu Sardar v. Emperor (3) the decision passed in the previous case was overruled and it was desided that a bond to keep the peace might be cancelled on other grounds than that the bond was no longer necessary. In that case there was no overruling of the desision in the earlier case that section 125 conferred no appellate or revisional juriediction. In the case of Daya Nath Thakur v. Emperor (1) to which I have alluded above, it was held that cestion 125 does not confer the right to hear an appeal from an order in a proceeding under section 107.

Either of two courses was open to the learned Daputy Commissioner : if he sonsidered that there was no likelihood of a breach of the peace, or there were other sufficient reasons for cancelling the bond, he sould, under section 125, cancel the bond, or, if he considered that the Deputy Magistrate had acted without jurisdiction and the pressedings under section 107 should be queshed on that ground, he could have referred the matter to this Court for the exercise of its revisional jurisdiction. He has not, however, cancelled the bond as he was empowered to do by section 125, but has usurped appellate or revisional jurisdietion and set saids the whole proceedings as being without jurisdiction and void ab ini. tio. This he plainly sould not do.

Mr. Sultan Ahmad on behalf of the Crown had urged that this Court has no jurisdiction to interfere with the order of the learned Deputy Commissioner as it was not passed in a judicial proceeding. He, therefore, admits that the order under section 125 is an executive order. He has also argued that the person against whom orders are passed under section 107 is an

(8) 84 C. 1; 11 C. W. N. 25; 4 C. L. J. 428; 4 Cr. L. J. 869; 1 M. L. T. 368 (F. B.).

assused person and that the proseedings under section 107 are criminal proceedings, so that if the Deputy Commissioner's order is set aside by this Court it will be tenta. mount to the setting aside of an acquittal, But if his admission that an order under section 125 is an executive order is right, then, plainly, there could be no executive order setting aside an order passed in a judicial proceeding under the Code of Oriminal Projecture. The learned Counsel has contended, too, that the whole trend of the judgment of the learned Deputy Commissioner was to show that the bond must be cancelled. It would have been quite regular if the Deputy Commissioner at the end of his judgment for the reasons he gave, had simply cancelled the bond, but he has not done so; he ha deelared the whole proceedings to be void ab initio, Under sestion 125 he had no power to do this.

The order of the learned Deputy Commissioner must, therefore, he set aside as being without jurisdiction and the order of the Deputy Magistrate restored. If the opposite party is aggrieved, he can approach the Deputy Commissioner again and the latter can then consider whether, under the existing circumstances, it is necessary to careel the bond for any sufficient reason.

W. C. A.

Rule male absolute.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 194 of 1922.

Merch 30, 1922.

Present:—Mr. Justice Ryves
and Mr. Justice Gokul Present.

DALLI—APPELLANT

EMPEROR-OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 271

-Murder-Plea of guilty, conviction on-Practice.

In case of murder it has long been the practice of the Allahabad High Court not to accept the

SUPERINTENDENT AND BENEMBRANCER OF LEGAL APPAIRS, BENGAL U. J. S. MELL.

plea of guilty. Murder is a mixed question of fact and law, and unless the Court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried.

Criminal appeal from an order of the Sessions Judge, Budaun dated the 29th March 1:22.

Mr. Mukhtar Ahmad, for the Appellant.

Mr. Lalit Mohan Baner, ee (Government

Advocate), for the Crown.

JUDGMENT,-Dalli has appealed from his sentence of death for the murder of his mistress. The learned Sessions Judge assepted his plea of "guilty" and convicted him upon it. No evidence at all was taken in the Court of Session. In a case of murder it has long been the practice of this Court not to accept the plea of guilty. After all murder is a mixed question of fact and law, and, unless the Court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried, and in dealing with people of the status of Dalli, this, of course, can never be the case. We, therefore, set aside the conviction and sentence and direct the learned Sessions Judge to refuse to accept the plea of guilty" and to re-try the case.

Appeal allowed;

Oase sent back for re-trial.

OALOUTTA HIGH COURT.
GOVERNMENT APPEAL No. 3 OF 1921.

July 21, 1921.

I resent:—Mr. Justice Newbould and
Mr. Justice Subrawardy.

SUPERINTENDENT AND REMEM.

BRANCER OF LEGAL AFFAIRS,

BENGAL—APPELLANT

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J. S. MULL-OPPOSITE PARTY.

Licensed Ware-house and Fire-brigade Act (I of
December of the Chairman, power of, delegation of—

1893), ss. 7, 15—Chairman, power of, delegation of—Order by Vice-Chairman, validity of—Bengal Municipal Act (III of 1884), s 45—Application not disposed of within 80 days, effect of.

A Chairman may delegate, under section 45 of the Bengal Municipal Act, 1884, his duties or powers to defined by that Act to the Vice-Chairman but cannot by virtue of that section delegate to him his powers under the Licensed Ware-house and Fire-brigade Act, inasmuch as by virtue of section 9 of the latter Act the power can be delegated only to a Special Committee.

Therefore, an order passed by the Vice-Chairman refusing an application for license to use a building or place as a ware-house is no refusal under section 15 of the Licensed Ware-house and Fire-

brigade Act.

An application for license under section 7 of the Licensed Ware-house and Fire-brigade Act not disposed of within 50 days from the date of its being received by the Chairman, exempts the applicant from liability so long as the application is not finally refused.

Appeal by the Government against an order of the Deputy Magistrate, Howrab, dated the 31st March, 1921.

Mr. Orr, for the Appellant.

Babus Dasarathi Sanyal and Gour Mohun

Dutt, for the Opposite Party.

JUDGMENT .- This is an appeal against an acquittal. The respondent J. S. Mull was charged with baving committed an offence punishable under section 15 of the Lisensed Ware house and Fire brigade Act, 1893 which provides a penalty for any person who uses any building or place as a ware-house in respect of which a license has been refused. A preliminary objection has been taken which is fatal to this appeal. The Act provides that the refusal of an application for license shall, under section 7, be by an order in writing under the hand of the Chairman of the Commissioners. In the present case, the order of refusal was passed by the Vice Chairman. Although under section 45 of the Bengal Municipal Act, III (B. C.) of 1884, the Chairman may delegate his duties or powers to the Vice Chairman, the powers he can so delegate are the powers as defined by that Act. He cannot by virtue of that section delegate to the Vice-Chairman his powers under the Licensed Ware-house and Fire brigade Act. That Act provides in section 9 for the delegation of the powers of the Chairman to a Special Committee but makes no provision for delegation to the Vice. Chairman. We must consequently hold that the prosecution was bound to fail as there was no refusal of the application for licence in accordance with this Act.

We are requested by the learned Deputy Legal Remembrancer to point out an error in the judgment of the Trying Magistrate. He has held that section 7 of the Fire brigade SESHA PRABHE O. EMPEROR.

Act requires that any application for license shall be disposed of within thirty days from the date of its being received by the Chairman and, if not disposed of within that period, the applicant shall not be liable. This, as stated, is wrong, because, if the application is not disposed of within thirty days, the applicant is only exempted from liability so long as the application is not finally refused.

The appeal is dismissed.

Appeal dismissed,

J. P.

MADRAS HIGH COURT. CRIMINAL BRVISION CASE No. 523 of 1921. (CRIMINAL REVISION PETITION No. 421 OF 1921).

December 15, 1921. Fresent :- Mr. Justice Oldfield and Mr. Justice Krishnan. V. SESHA PRABHU—Accused— PETITIONER

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EMPEROR - OPPOSITE PARTY, Madras District Municipalities Act (Mad. V of 1920), ss 249, 886, Sch. V-Sale of grain wholesale without license-'Wholesale,' meaning of-Notification to take license under new Act not yet in force issued by Council constituted under old Act, validity of-Conviction for infringement, legality of.

The sale by a person of bags of grain from one to six at a time without opening them, constitutes a 'wholesale' trade within the meaning of Schedule V to the Madras District Municipalities Act (V of

1920). [p 480, col. 1]

A notification by a Municipal Council constituted under the old District Municipalities Act (Mad. IV of 1884) directing dealers in wholesale grain to take out a license under section 249 of the new Act V of 1920 before that Act actually comes into force is ultra vires and void, as the notifi cation being neither a rule, nor a bye-law, nor a Regulation cannot be validated under the proviso to sections 365 of that Act. [p. 482, col. 1.]

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Tellisherry, in Oriminal Appeal No. 23 of 1921, preferred against the judgment of the Court of the Stationary Second Class Magistrate, Kottayam, in Calendar Case No. 37 of 1921.

FACTS appear from the judgment.

Mr. B. Sitarama Row, for the Petitioner .-No lisense is necessary as there was no wholesale trade in grain by the accused. The sale was only to retailers.

On a question of law, the conviction should be quashed. The Municipal Council had no power to issue the notification under the new District Municipalities Act, of 1920, section 249. It was not constituted under the new Act as the Council did not go out and some in again. Infringement of an illegal notification is no offence.

The notification is not a bye-law, rule or regulation to be validated under seetion 365.

Mr. J. O. Adam, (Public Prosecutor) for the Crown.-The trade was wholesale as accused stored thousands of bags out of which he sold six without opening them.

The notification, Exhibit D, is under the powers given to the old Council under section 866 (a) of the new Act, which says that until the Chairman and Councillors come into office under the new Act they shall have all the powers under the old Act.

Under section 365 they have the power to issue Exhibit D. If Exhibit D cannot be regarded as a rule, bye law or regulaSESHA PRABHU U. EMPEROR.

tion, infringers will be practically immune under the Act.

Mr. B Sitarama Row in reply: —Section 366
(a) cannot be invoked as the Council issued the Notification before the new Act came into force.

ORDER.

OLDFIELD, J.—We are asked to revise the petitioner's conviction and sentence for the effence of storing and selling grain wholesale within the Cannanore Municipal limits without a licence from the Municipal Chairman, punishable under sections 249/338 (b) of the Madras District Municipalities Act, V of 1920.

The first objection taken to the conviction is, that there is no evidence of the sale of grain wholesale or of the storage for wholesale trade, contemplated by Schedule V (o) for which a licence can be required under section 249. In the absence of a definition of 'wholesale' in the Act, the meaning of the expression in common parlance must be decisive, and, the definition in the Century or Webster's Distionaries as "sale in large quantifies" or the secondary definition in the latter "selling to retailers or jobbers" is accepted, the Sub-Divisional Magistrate's finding of fast is sufficient, that petitioner " has eix shops in which he stores thousands of bags of grain, selling them from one to six bags at a time to petty merchants and others and not, so far as was shown, selling them by measures after breaking up the bags."

This failing, we have to deal with the more substantial contention that storage without a license was not punishable under section 338 (b) because there had not been any valid notification under section 249, making it obligatory on petitioner to obtain one. The facts are that under section 365 Aet V of 1920 of notification of the Governor.in.Conneil No. 595, dated 10th August 1920, same into force on 1st October 1920; but Exhibit D. the notification under section 249 relied on by the prosecution, had been published on the 15th July 1920; and it is argued that the Municipal Council having at the latter date no powers under the Act, its notification could have no legal effect and could

ereate no obligation, for breach of which petitioner could be punished. The lower Courts answer that petitioner was in no way prejudiced by such premature publication is elearly inconclusive, when the question arises in connection with the application of a penal provision and a strict construction of the law is required. Here reliance is placed, firstly, on section 366 (a) of the Act of 1920 which provides that, until the Chairman and the Councillors to be newly appointed or elected under that Act come into office, the Chairman and Councillors under the previous Act of 1884 shall have all the powers of the Chairman and Councillors under the former. Section 366 (a), however, as its wording of the substantive part of the section shows, merely provides for modification in the provisions of the new Act in their application to the term of office and election and appointment of the Councillors and Chairman for the first time after the commencement of the Act or of powers under it before the date to be notified under section 365. In the alternative, reference had been made to the proviso to the last-mentioned section, under which rules, bye-laws and regulations authorized under the new Act could be made at any time after the publication of the assent to it of the Governor-General on the 15th June 1920. But this did not justify the issue of Exhibit D 29th June 1920. For Exhibit D is not a rule, because under section 303 (3) rules ean be made only by the Governor in-Council; it is not a bye-law, because, if its subject matter can be indentified with any of those enumerated in section 305, it was not published or confirmed in the manner prescribed in sections 309 and 310; and it is not a regulation, because section 312 providing only for the manner in which regulations may be published, power to make them is on the Municipal Council, not generally, but only in connection with certain specified provisions, see for instance, sections 25 and 130, in which section 249 (1) is not included.

In these circumstances, it is not possible to uphold as valid the Council's notification, Exhibit D, which petitioner is charged with infringing. The foundation for his conviction thus failing, his petition must be allowed and he must be acquitted. The

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fine, if paid, including the amount levied as licence, fee, will be refunded on his application.

KRISHWAY, J .- This case raises the question of the validity of a notification issued by the Municipal Council of Cancanore in July 1920 under section 249 of the new District Municipalities Act, Madras Act V of 1920. The notification is marked Exhibit D and was issued in ascordance with a resolution passed by the Council constituted under the now repealed Act of 1884 bringing into application the licensing powers given by the new Ast with effect from the 1st of October 1920, the date on which the Act was brought into force by the Governor-in Council by notification in the Fort St. George Gazette of the 10th August 1920 as provided in section 365 of the Act. The accused has been prosecuted and convicted under section 338 for selling grain wholesale and for storing it for such sale without taking out licenses as required by the notification. It is contended for the accused that the notification had no legal effect as it was issued by a Conneil which was not sonstituted under the new Act but by one constituted under the repealed Act and which had no power to pass the resolution to levy licensing fees or to publish a notification to that effect.

Without a valid and proper notification under section 249 the liability to take out licenses for any of the purposes specified in Schedule V of the new Act will not, of course, arise in any Municipal area for the Act makes the publication of the notification in the manner provided for in the section and the lapse of 60 days thereafter, necessary pre requisites for bringing into force the licensing provisions. It is, therefore, important to consider whether Exhibit D was a valid notification.

Reading section 245 by itself it is manifest that the Council referred to in it is the Council constituted under the new Act according to the provision of Chapter II thereof. That Council is the body given authority by section 249 of the Act to decide how far it would bring into force the licensing power given by the Act. The Council constitued under the old Act was a different legal entity and could not exercise the power under section 249 unless there is indeed any other provision of law giving the

Council the power to so act. It is contended by the learned Public Prosecutor that section 366 of the Act is such a provision and in fact he relied shiefly on the last part of clause (a) in it as giving power to the old Council to issue the notification in question. That clause gives power to the Governor-in-Council to determine, after the new Act had been brought into force, the date on which the Chairman and Councillors of the old Council should go out of office and the newly elected Chairman and Councillors should some into office; and then it says that until they so some into office, the Chairman and the Councillors of the old Council should have all the powers and be subject to all the duties, respectively, of the Chairman and Councillors under the new Act. It is contended that this last provision validated the Notification Exhibit D. But, unfortunately, in this case the Courcil bad acted before the new Act was brought into force, their Resolution and notification being in July as already stated, that is, some months before the Act was put in force. No doubt, the power to issue a notification under section 249 is a power given to the new Council under the new Act but the power itself came into existence only when the Act was brought into force and not before. It is impossible, then, to see how the old Council could have properly exercised that power which did' not exist on the date on which it purported to exercise it. It is evident from the language of clause (a) that by it the Legislature was making provision for carrying on the Municipal Administration during the interregnum between the coming into forse of the new Act and the assumption of office by the new Chairman and The clause, as I under-Councillors. stand it, has nothing to do with any anterior periods, for before the new Act came into force there was the old Act in full force under which the old Council was free to act.

The only provision of the new Act that gave power to the old Council to act in anticipation of the Act being brought into force is the proviso to section 365 which enabled "rules, bye-laws and regulations" to be made under the new Act as soon as it had received the assent of the Governor General. The notification, Exhibit D, was, no doubt,

SESHA PRABHU, U. EMPEROR.

issued after the assent of the Governor-General had been given and if section 365 could be held to apply to it, it would be a valid proceeding. Apparently, the Council asted under that section and in fact the Appellate Court has upheld its validity under that section. But I am unable to support the view as the notification in question eannot apparently be brought under any one of the terms "rule, bye law, or regulation" used in the section. These words are not defined in the Act but Chapter XIV dealing with the making of them shows what is meant by each—seetions 303 to 305 show, that rules are those made by the Governor-in-Council. Section 306 shows bye-laws are made by the Conneil but that section specified the purposes for which bye-laws can be made, of which the purpose of the notification in question here does not seem to be one. The matter is made elear by referring to section 309 which prevents a bye-law from having effect till it is approved of and confirmed by the Governor-in Council and section 310 which shows the method of making it and publishing it. These conditions do not apply to the action of the Council under section 249. Section 312 shows regulations are those made by Municipal Authorities and not by the Council and they can be as the in such manner published Council determines. The method of their publication shows elearly that the word regulation cannot refer to the notification under section 249 which that section itself directs to be published in a particular manner. I am, therefore, of opinion that section 365 cannot be used to validate the action of the Council in the issuing of the notification, Exhibit D.

It was suggested that if the liability to take out the license is not treated as one imposed by any rule, bye-law or regulation there may the a difficulty in applying section 338 even to eases where proper notification had been issued under section 249 and that there will be no provision for punishment for disobedience. This argument is, I think, not sound for I consider that the necessity to take out licenses when a proper notification is issued arises under the Act itself and section 338, which speaks of the Act as well, will apply. In

my view the Act imposes the liability subject to the condition about the notification prescribed in section 249. But when that condition is not properly fulfilled, as I hold is the case here, section 338 does not apply and the conviction of the accused must be set aside.

It was also argued for the petitioner that the trade carried on by him in grain was not a wholesale trade but a retail one. Oa this point, I agree with the lower Court that the trade was a wholesale one as the patitioner is found to have sold grain by the bulk without breaking the bage, in quantities of 1 to 6 bags at a time to retail dealers. The term "wholesale" as used in Schedule V of the Act is not defined in the Act and we have therefore, to apply to the word the meaning that is ordinarily given to it by the public and by traders in general. That is the view taken by the lower Court and I agree with it and, taking that view, the petitioner's trade was well within the scope of the term "wholesale" trade. Though the petitioner fails on this point, he has succeeded on his first point and his conviction is, therefore, quashed and the fine and licence fees, if they have been paid by him, will be refunded to him.

M. C. P.

Conviction quashed

MABANDA D. GAUERE.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 1249 of 1921. November 17, 1921.

Present: -Mr. Justice Broadway.

MAHANDA AND OTHERS-PLAINTIFFSAPPELLANTS

versus

Musammot GAUHRE AND ANOTHER-

Custom-Non-proprietor-Right of residence-Daughters-Widow-Re-marriage-Husband's estate, right in.

Under the general custom of the Punjab the daughters of a kamin or non-proprietor, have a right to reside in their father's house until they marry or die, whichever event first takes place.

According to the general custom of the Punjab as prevalent among agriculturists on the re-marriage of a widow her rights in her deceased husband's

estate come to an end.

Second appeal from the decree of the District Judge, Gardaspur, deted the 21st March 1921, affirming that of the Munsif, 2nd Class, Pathankot, District Gardaspur, dated the 15th March 1920.

Lala Mehr Chand Mahojan, for the Appel-

lants.

Sheikh Umar Bakhsh, for the Respondents.

JUDGMENT.—Counsel agree that on the re-marriage of a widow her rights in her deceased husband's estate come to an end according to the general custom of this Province as prevalent among agriculturists. As the Courts below have dealt with this case as one of eastom it is clear that castom is and must be the rule of decision.

On the re-marriage of Musammot Gauhre she forfeited her rights in her deseased husband's estate-including, passsarily, her right to reside in the house in dispute. She has, however, two daughters by her former husband and under the general enstom of this Province these daughters have, admittedly, a right to reside in their father's house until they marry or die whichever event first takes place. plaintiffs, therefore, have no immediate right to possession. Mr. Umar Bakhsh contends that in the case of a house in a village the law or enstom is different but has eited no authority for this proposition, and I am unable to sonsede it. The house is situated in a village and the deceased was a kamin, in any ease, a non-proprietor, whose rights seased and reverted to the landlord on his demise without eustomary

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heirs. I am unable to see any reason for holding that rawals are governed by Muhammadan Law and not sustom. The most the plantiffs can get in this suit is a deslaration that the widow Musammat Gauhre has forfeited her right of residence in this house by her re-marriage—with this decree Mr. Mahajan is content—so long as the daughters are alive and unmarried they appear to be entitled to retain possession, as admitted by Counsel for appellants.

The order as to the dismissal for failure to pay additional Court-fees was wrong; section 10 (ii). Court Fees Act, has been lost sight of by the Courts below as also have the provision of Order VII.

rule 11, Civil Procedure Code.

I assept this appeal and grant the plaintiffs a decree declaring that Musammat
Ganhre has forfeited her right of residence
in this house owing to her re-marriage.
A decree for possession is not granted
as, owing to the existence of the daughters
still unmarried, the plaintiffs are not entitled
to immediate possession.

Parties will bear their own sosts in this

Court.

Z, K. & J, P.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL PROM ORIGINAL DECREE No. 216 OF 1919.

August 22, 1921.

Present:-Justice Sir Asutoch Mookerjes, Kr., and Mr. Justice Panton.

SARAT OHANDRA MAITI AND OTTERS—
DEFENDANTS—APPRICANTS

versus

PLAINTIFFS - RESPONDENTA.

Adverse possession—Criminal Procedure Code (Act V of 1898), s. 143—Attachment, effect of—Continuance of possession of true owner—Decree, setting aside of—Misdescription of defendant as minor—Consent of certificated guardian to act as guardian ad litom, when can be presumed—Civil Procedure Code (Act XIV of 1832), s. 443—Givil Procedure Code (Act V of 1804), O. XXIII, r. 4'(8)—Courts' decision, basis of—Admission, statement as to, in julyment—Aggrisval litigant, remaily of.

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When a property is attached under section 146 of the Criminal Procedure Tode, it passes into legal custody and, during the continuance of the attachment, such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong-doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revives in the eye of the law [p. 435, col. 2]

The intervention of the public authorities for the preservation of peace, operates in the same way as the vis major of a flood, and the constructive possession of the land is thereafter, if anywhere, in the true owner. [p. 4:5, col 2.]

There can be no continuance of adverse possession when the land is not capable of use and enjoyment by the rightful owner. [p. 436, col. 1.]

Where a decree was obtained against a defendant in a suit in which he had been misdescribed as a minor and a guardian ad litem was appointed, although he had in fact attained majority, a suit subsequently instituted by him to set aside the decree should be dismissed on the ground that he was bound by the decree in the former suit, inasmuch as, though aware of the suit, (because orders for the appointment of a guardian ad litem are made only after notice to the alleged minor and the proposed guardian, he still allowed the guardian to conduct the defence on his behalf as guardian for the suit. [p. 437, col. 1.]

In the absence of a provision in the Civil Procedure Code of 1882 corresponding to Order XXXII, rule 4, sub-rule 3) of the Code of 1908, where a certificated guardian was proposed for appointment as a guardian ad litem under the former Code, the Court might, unless he declined the appointment, presume his consent. [p. 439, col. 1.]

The decision of a Court must rest, not upon suspicion but upon legal grounds established by

legal testimony. [p. 440, col. 1.]

Where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment. [p. 441, col. 1.]

A statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the Appellate Court, especially in the absence of an affidavit by the Vakil who appeared in the Court of first instance. [p. 441, col. 1.]

Appeal against the decision of the Subordinate Judge, Midnapore, dated the 28th June 1919.

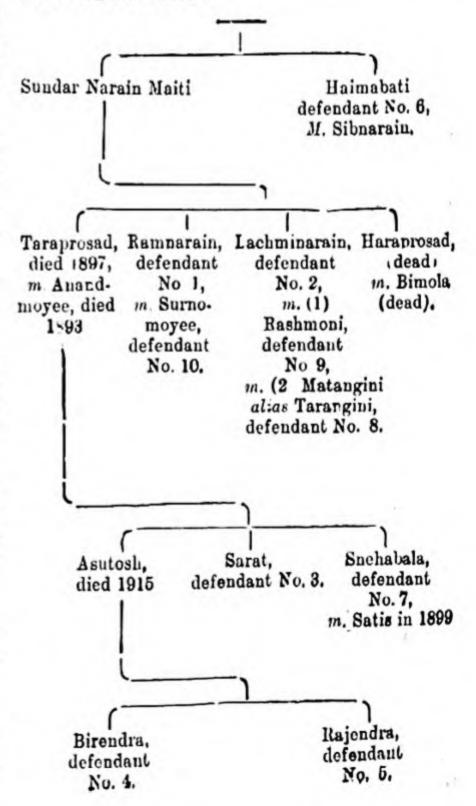
Babus Mahendra Nath Ray and Santoch Rumar Pal, for Defendants Nos. 3 to 5, Appellants.

Mr. J. O. Haera, Babus Mahes Chandra Banerjee and Pramatha Nath Banerjee, for Defendants Nos. 7 to 12, Appellants.

Dr. Dwarka Nath Mitter, Babun Probodh Chandra Chatter ee and Rama Frasad Mooker, ee,

for the Plaintiffs-Respondents.

JUDGMENT.—The subject-matter of the litigation which has resulted in this appeal is a large tract of what is called Jalpai land of the abolished Salt Depart. ment, situated in the district of Midnapur within the Zemindari of the Raja of Mahisadal. On the 8th July 1864 one Sunder Narain Maiti obtained a settlement from the Zemindar in respect of an estimated area of 400 bighos within specified boundaries. After the death of the original grantee, his son Taraprosad Maiti, on the 10th November 1874, took a confirmatory lease of 513 bighas, approximately, for the benefit of the family he was the renior member, The relationship of the members of this family may be gathered from the following genealogical table :-



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The Maitis defaulted to pay rent, with the result that on the 2 th August 1903 the Zamindars obtained a decree for rent against them. The decree was put into execution, and at the auction-sale which followed, the landlords became the purchasers on the 16th January 1904 The sale was confirmed on the 18th February 1934 and possession was delivered on the 10th April 1904. On the 30th January 1909 the plaintiff obtained settlement from the Raja. The defendant, however, disputed her right to take possession. This led to the institution of prosesdings under sections 107 and 145 of the Criminal Procedure Code which terminated in an order made on the 28th Saptember 1912 for attachment of the disputed lands under sestion 146 of the Criminal Procedure Code. The plaintiff, thereupon institut. ed the present suit on the 9th October 1917 for deslaration of her title the attached land under the lease granted to her on the 30th January 1939 and sums of money held to the Collector as Receiver from the date of his appointment. There were two sets defendants to the suit, namely, defendants Nos. 1 to 5 and defendants Nos. 7 to 12. The first set repudieted the claim on the ground that it was barred by limitation and that the deeres for rent did not affect their rights under the lease of the 10th November 1874. The second set urged that they held tenancies subordinate to the lease of the 10th November 1874 and were consequently entitled to remain in cosupation, notwithstanding the sale held on the 16th January 1904 in execution of the deerse for arrears of rent. The Subordinate Judge overruled these contentions and deslared the right of the plaintiff to direct possession of the disputed lands; the decree also made a consequential order as to the amounts held in deposit in the treasury. The defendants have appealed against this decree, and separate arguments have been addressed to the Court on behalf of the two sets of defendants who have united in one appeal. The grounds which emerge for consideration may be formulated as follows: first, that the suit is barred by limitation; secondly, that the decree for rent made on the 26th August 1903 did not operate as a valid rent decree, as three of the persons interested in the tenancy created under the lease of the 19th

November 1874 were not represented before the Court in the rent suit; and, thirdly, that the tenancies set up by the second-set of defendants were real and not fictitious as held by the Subordinate Judge.

As regards the first point, we are of opinion that the plea of limitation cannot prevail, in view of the decision of this Court in Brojendra Kishore Roy v. Bharat Chandra Roy [Abdul Razze] (1). That ease is an authority for the proposition that when a property is attached under section 146 of the Oriminal Procedure Code, it passes into legal enstody, and during the continuance of the attachment, such sustody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revived in the eye of the law. These results are dedacible from the decisions of the Jadicial Committee in Trustees and Agency Company v. Short (2), Secretary of State v. Krishna. mani Gupta (3) and Basanta Roy v. Becretary of State for India (4). The intervention of the public authorities for the preservation of peace, operates in the same way as the vis ma,or of the finds, and the constructive possession of the land is thereafter, if anywhere, in the true owner. While the Collector holds possession for the benefit of the rightful owner, no possession on the part of the wrong doer, eap, by legal fiction, be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner. From this standpoint, no question of limitation really arises, because less than twelve years elapsed between the confirmation of the rent sale on

^{(1) 31} Ind, Cas. 242; 22 C. L. J. 283; 20 C. W. N. 481.

^{(2) (1888) 13} App Cas. 793; 58 L, J. P. O. 4; 59 L, T. 677; 37 W. R. 438; 53 J. P. 182.

^{(3) 29} I. A. 104; 29 C 5:8; 6 C. W. N. 617; 4 Bont, L. R. 537; 8 Far. P. O. J. 269 (P. C.).

^{(4) 40} Ind. Cas. 887: 44 I. A. 104: 44 C. 858: 1 P. L. W. 593; 82 M. L. J. 505; 2: C. W. N. 642; 15 A. L. J. 893; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 810 (P. C.).

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the 18th February 1904 and the attachment by the Magistrate on the 28th September 1912. If during the attachment, the seisin or legal possession is in the true owner, the attachment does not amount to either dispossession of the owner or the discontinuance of his possession. But it has been urged that this view earnot be reconciled with the decision in Deo Narain v. Webb (5). This may be sonceded; it must not be overlocked, however, that the decision in that ease was pronounced in 1900, when the judgment of the Fall Bench in Kolly Churn Sahoo v. Secretary of State for India (6) was still considered good law. That Full Bench decision was overroled by the judgment of the Judicial Committee in Secretary of State v. Krishnamoni Gurta (3). The substance of the matter is that the doetrine that that there can be no continuance of adverse possession when the land is not espable of ure and enjoyment by the rightful owner, which is now regarded as an elementary proposition by reason of the successive decisions of the Judicial Committee in Trustees and Agency Company v. Short (2). Secretary of State v. Krishnamoni Guita (3) and Basanta Roy v. Secretary of State for India (4) was by no means familiar when the ease of Deo Narain v. Welb (5) was decided; that erse cannot consequently be treated as binding authority, as it overlocks a fundamental principle enunciated by the Judicial Ocmmittee. We thus see no resson to depart from the decision in Brojendra Kishore Roy v. Bharat Chandra Ecy [Abdul Razac] (1), and the first ground must be overruled untenable.

As regards the escond point, it has been urged that the decree for rent made on the 26th August 1993, did not operate as a valid rent decree, as three of the persons interested in the terancy at that time were not represented before the Court in that suit. These three persons were Asutosh Maiti (the late father of the fourth and fifth defendants in this suit), Saratchandra Maiti (the third defendant in this suit). and Bimala (the widow of Haraprasad Maiti). As regards Acutosb, the objection taken is that at the date of the institution of the rent suit, he had in reality attaired majority, but was misdescribed as a minor represented by his unels and certificated Ramparayan guardian Maiti (the first defendant in this suit). As regards Saratchandra, who was a miror at the date of ocmmencement of the rent suit, the objection taken is that his unele and certificated guardian Ramnarayan Maiti was appointed bis grardian for the suit without concent. As regards Bimala, the objection taken is that the was not joined as a party to the rent-suit, though the interest of ber husband in the tenancy must have devolved on her by right of inheritance.

As regards the objection in respect of Acutoch Maiti, a question has been raised regarding the admissibility of the resital in the guardianship certificate, of the date when he would attain majority. Reference has been made to the decisions in Satis Chunder v. Mohendro Lal (7) and Gun, ra Kuar v Ablakh Pande (8) to show that such evidence would not be admissible under section 35 of the Indian Evidence Act. There cases were doubted in Monindra Mohan Roy v. Ram Krishna (9) where the recital in a guardienship certificate was held admissible under section 32 (5), on an interpretation of the section which reseives support from the decision of the Judicial Committee in Mohomed Syedol Ariffin v. Yesh Ool Gark (10) and conforms to the earlier decisions in Ram Chandra Dult v. Jogeswar Narain Deo (11), Dhanmull v. Ram Chunder Ghose (12) and Oriental Government Security Life Assurance Company Limited v. Narasimha Chari (13), But we sannot overlock the fast that in the present case the recital was based presumably on the statement of the applicant for guardianship, ramely, Ramnarain Maiti, who is a party to the suit and could have beenexamined as a witness in this litigation : Achyutananda D . V. Jagannath Das (14).

(!3) 25 M. 183; 11 M. L J. 379.

^{(5) 28} C. 83; 5 C. W. N. 160.

^{(6) 6} C. 725; 8 C. L. R. 90; 4 Shome 1. R. 15; 3 Ind. ec. (N. E) 470.

^{(7, 17} C. 849; 8 Ind. Dec. (N. 8.) 1110.

^{(8) 18} A. 4:8; A. W. N. (1893) 155; 8 Ind. Dec. (N. 8) 1025.

^{(9) 28} Ind, Cas 565; 21 C. L. J. 621.

^{(10) 33} Ind Cas 401; 43 I. A. 256; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678 P. C).

^{(11) 20} C. 758; 10 Ind. Dec. 'N. s.) 511.

^{(12) 24} C. 26; 1 C. W. N. 270; 12 Ind. Dec. (N. B.) 841.

^{(14) 27} Ind. Cas. 739; 21 C. L. J. 96; 20 C. W. N 122,

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however, other evidence on the point, and we shall engeneently prosest on assumption that at the data of the institution of the rent suit, Autosh had already attained majority and was misdescribed as a minor. It is indisputable that he had notice of the sait, because orders for the appointment of a guardian ad litem ara made only after notice to the alleged miane and the proposed guardiau. In such eirsum. stances, the principle of the desision in Ramachari v. Duraisam: Pillii (15) applie. In that ease, a defendant had been misdescribed as a minor and a guardian ad litem was appointed, although he had in fact attained majority. A suit subsequently instituted by him to set saids the deeres was dismissed, on the ground that he was bound by the desree in the former suit, inasmush, though aware of the suit and the execution proseedings which resulted in the sale, he still allowed his elder brother to conduct the defence and the proceedings on his behalf as guardian for the suit. This conclusion is manifestly well founded on reason and is supported by the desisions in Ganga Ram v. Mihin Lul (16), Tanguturi Jaganna lham v. Seshagiri Rao (17), Enuga Suntarama Reidi v. Bermada Pattabhiramireddi (18) and Net Lill Saho) v. Sheikh Kareem Buz (19). We need not consider the effect of the institution of a suit by a person as the next friend of a plaintiff who is described as a minor, but is really a major. Upon that point, the Courts have been divided in opinion Taqui Jan v. Obardulla (20) and Shanmuga Ohstty v. Narayana Aiyar (21) favour a liberal view and sanstion the nesssary amendments to validate the sail; Sheorania v. Bharat Singh (22) and Saranna v. Seshayya (23) adopt, on the other hand, a stricter view. In the ease before us, there is abundant evidence

that Asutosh was aware of the frent-suit and of the execution proceedings consequent on the decree made therein. He never took steps to challenge the propriety of the decree up to the time of his death, which took place in 1915. In our judgment, the decree made against him was not invalidated by the circumstance that he was misdescribed as a minor when he had in fact already attained his majority. The objection fails in so far as it is based on the ground that Asutosh was not properly before the Court in the rent sait.

As regards the objection in respect of Saratchandra Maiti, it has been urged that he was not properly represented in rent suit, as Ram Narain Maiti, certificated guardian, was appointed guardian for the suit, notwithstanding that, upon service of notice, he did not appear signify his asseptance of the office ad ltem. It may of guardian stated at the outset that the order. sheet in the rent-suit is not available at this distance of time, and it is not possible, from an inspection of the record, to assertain whether Ram Narain responded to the notice served upon him and whether the order for his appointment as guardian ad litem was made with his consent. The fact remains that the rent suit was desreed ez parte and there was no appearance on behalf of the defendants when the suit came up for final disposal on the 26th August 1913. This does not conclusively prove that there was no appearance on behalf of the defendants at an earlier stage. But let us assume that Ram Narain Maiti, the proposed guardain, did not appear in response to the notios : served' upon him and yet he was appointed guardian ad litem of his nephew and ward, Sarat Chandra Maiti. The appellants contend that such appointment was void and inoperative and that, consequently, Sharat Chandra Maiti must be considered not to have been represented at all at the trial. The validity of this contention must be tested with reference to the provisions the Civil Procedure Code of 1882 which was in force when the rent, suit was tried. Section 443 of the Code of 1882 provided as follows:

"Where the defendant to a suit is a minor, the Court, on being satisfied of the

(15, 2t M. 167, 7 Ind. Dec. (N. s.) 474.

^{(16) 28} A; 416; 3 A. L. J. 187; A. W. N. (1906) 78.

^{(17, 87} Ind; Cas. 887; 20 M, L. T. 479.

^{(18) 42} Ind. Cas. 421; (1917) M. W. N. 425; 6 L. W. 272.

^{(19. 28} C. 636, 12 Ind. Dec. (N. s.) 456.

^{(20) 21} O. 868; 10 Ind. Dec. (N. s.) 1209;

^{(21) 41} Ind. Cas. 510, 40 M. 748,

^{(22) 20} A. 90; A. W. N. (18)7) 203; 9 Ind. Dec. (N. m.) 417.

^{(23) 28} M, 896; 1 M. L. T. 113.

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fact of his minority shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor and generally to act on his behalf in the conduct of the case."

This was an exact reproduction of section 443 of the Civil Procedure Code of 1877. The following paragraph was added to section 443 of the Code of 1882 by sec. tion 53B of the Guardians and Wards

Aet, 1890 :

"Where an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property, or both, of the minor, the Court shall appoint him, or one of them, as the case may be, to be the guardian for the suit under this section unless it considers, for reasons to be resorded by it, that some other person ought to be so appointed."

Section 443, in this enlarged form, bas now been reproduced as Order XXXII, rule 4. sub-rule (2) of the Civil Prosedure Code of 1908. In the Code of 1908, there is, in Order XXXII, rule 4, sub-rule (3), an additional provision to the effect that no person shall, without his consent, be appointed guardain for the suit. was no such provision in the Code of 1882; but it has been held in the ease of Jadow Mulji v. Ohhogan Raichand (24) which was followed in Vasules Morbhat Kale v. Krishnaji Ballal Gokhale (25), that the Civil Procedure Code did not empower a Court to appoint a person against his will to be a pext friend or or her guardain ad litem of a minor. Sir Michael Westropp, C. J., observed that the words "no other person fit and willing to act as guardain for the suit" in section 455 of the Code of 1877 (as amended section 73 of Act XII of 1879) indicated that the Legislature did not intend to force the office of guardain ad titem on any person in incitum. The same words were reproduced in section 456 of the Ocde of 1882 and now find a place in Order XXXII. rule 4, sub rule (4) of the Code of 1209. These remarks, however, were made with reference to the appointment of a person as guardain ad litem who was not a sertificated guardain. Consequently, the observations cannot be asumed to have been

^{(25) 20} B. 534; 10 Ind, Dec. (N. s., 921,

intended to apply to a person who had, on his own application, been appointed a guardian of the minor "by competent authority." Indeed, in the case of Issur Ohunder v. Nobo Kristo (26) it was ruled. on the authority of the decisions in Dhondiba v. Kusz (27) and Babai v. Maruti (28), that as no order for appointment of a guardian ad litem shall issue without the consent of the party appointed, if no relative or friend of the minor can be found who is willing to take out a certificate and appear as guardian, the Judge should appoint an officer of Court or some respectable nomines of the minor. This proceeds on the assumption that a person who, on his own application, hes been appointed guardian of the person or property of a minor will be willing to discharge his duties towards his ward by acceptance of the office of guardian for the suit. The position under the Oode of 1882, after its amendment in 1890, thus was that there was no specific prohibition against the appointment of a person as guardian for the suit without his consent though there were judicial desisions, such as those mentioned in Krishna Chan Ira Mandal [Narendra Chandra] v. Jogendra Narain Roy (29), which interpreted the Code to signify that a person who was not a certificated guardian should not be so appointed without his consent. Where the person proposed to be appoint. ed was a certificated guardian, the Court was bound to appoint him unless it considered, for reasons to be recorded, that some other person ought to be so appointed. If no such reasons transpired on the applieation made by the plaintiff or on a representation made by the proposed guardian, the normal course for the Court to follow would be to make the appointment. This view cannot be taken as regards the provisions of the Code of 1908, which contains an express provision in Order XXXII, rule 4, sub-rule (3) that no person shall without his consent be appointed guardian for the suit. This has been held to apply to all

^{(24) 5} B. 306; 8 Ind Dec. (N. s.) 202

^{(28) 7} C. L. B. 407. (27 6 B. H. C. R. 219.

^{(28) 11} B H C. R 182. (29) 27 Ind. Cas. 189; 20 C. L. J. 489; 19 C. W. N.

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persons proposed to be appointed guardian ad litem whether they be or be not certificat. ed guardians of the minor; Annada Prasad v. Upendra Nath Dey (30), Second Appeal No. 2130 of 1919, decided by Mookerjee and Panton, JJ., on the 5th August 1921. In the absence of a provision in the Code of 1832 corresponding to Order XXXII, rule 4, sub-rule (3) of the Code of 1908, we may reasonably hold that where a certificated guardian was proposed for appointment as guardian ad litem, the Court might, unless he deelined the appointment, presume his consent. From this point of view Sarat deemed to have been Chandra must be represented by his certificated guardian as guardian ad litem in the rent suit. This is clearly not a case like that of Tekait Krishna Prasad v. Moti Chand (31) where proceedings were taken in Court without notice to any one representing the minor. The decision in Narsing Narain v. Jahi Mistry (32) also is distinguishable. There the mother of the infant was proposed for appointment as guardian ad litem of her infant'son; she did not respond to the notice served upon her and yet the Court proceeded to appoint her, although the father was the certificated guardian : see also Rughubar Dyal Sahu v. Bhikya Lal (33) and Beni Prasad v. Laija Ram (34). The objection against the decree in the rent-suit thus fails in so far as it is based on the ground that Sarat Chandra was not properly represented before the Court,

As regards the objection in respect of Bimala, there are no materials on the record to show whether she was in joint enjoyment of the interest of her husband in the leasehold property. The tenancy stood, as we have seen, in the name of Tara Prasad Maiti under the lease of the 10th November 1574. After his death in 1897, the landlord brought a suit for arrears of rent against the male members of the family, namely, the two sons of Tara Prasad and his two surviving brothers Ram Narain and Luchmi Narain: Khetter Mohan Pal v. Fran Kristo (35). In

(86 · 26 C. 677; 13 Ind. Dec. (N. s.) 1033. (87) 10 Ind. Cas. 116; 14 C. L. J. 180. (88) 52 Ind. Cas. 804 28 C. W. N. 590.

mittee in Dhurm Das Pandey v. Sham :

Soondri Dibiah (42) and of a Fall Bench

of this Court in Suresh Ohunder v,

(80) 65 Ind. Cas. 18; 34 C. L. J. 293. (81) 19 Ind. Cas. 293; 40 I. A. 140; 40 C. 685; 17

O. L. J. 572; 17 O. W. N. 637; (1913) M. W. N. 487; 11 A. L. J. 517; 15 Bom. L. R. 515; 14 M. L. T. 87; 25 M. L. J. 140 (P. C.).

(32) 13 Ind Cas 414; 15 C. L J. 3. (33) 12 U, 89; 8 Ind. Dec. (N. s.) 49.

(34) 35 Ind Cas, 63; 38 A. 452; 14 A. L.J. 438.

(85) 8 O, W, N. 871,

such circumstances, the vital the tenure was completely is, whether represented by the defendants record. Upon that aspect of the case, it is plain that the appellants have no substantial grievance. This is clearly a case where the doetrine of representation, recognised in Nitayi Behari v. Hari Govinda Saha (36), Gagan Sheikh v. Abejan Khatun (37), Profulla Kumar Sen v. Salimullah Bahadur (38) and Banbihari v. Khetra Pal Singh (39) may be invoked. If we examine the constitution of the rent-suit, we find that Ram Narain and Luchmi Narain, the two brothers of Tara Prasad, were joined as defendants. Ram Narain was described as the certificated guardian of Asutosh and Sarat. None of them contested the slaim. The interest of Ram Naraio as a co-sharer of the tenancy was identical with that of his nephews. The evidence shows that the defendants were aware of the suit, the decree and the execution proceedings. They did not contest the claim, because there was no defence available. Although many years have elapsed since the decree was made and the sale was held, no endeavour has ever been made to re open the proceedings : Ganpat Lal v. Bindbasini Prashad Narayan Singh (40); and in the present litigation it has not even been hinted that the arrears elaimed in the rent suit were not due in fact, or that the decree was erroneous other wise unjust in any particular. sush eireamstatess, we should look, not so much to the outward form of the p'oesedings in the suit as to the substantial justice of the case, as was done by the Judicial Committee in Hari Saran Moitra v. Bhubanes wari Debi (41) where reference is made to the decision of the Judicial Com.

^{(39) 13} Ind. Cas. 785, 16 C. W. N. 259, 38 C. 923. (40 56 Ind. Cas. 274; 47 I. A. 91; 47 C. 924; 18 A. L. J. 655; (1920) M. W. N. 882; 12 L. W. 59; 39 M. L. J. 103, 2 U. P. L. R. (P. C.) 103, 24 C. W. N. 954, 28 M. L. T. 330 (P. C.).

^{(41) 15} I. A. 193; 16 C 40; 12 Ind. Jur. 373; 5 Sar. P. C. J. 198; 8 Ind Dec. (N. s.) 37.

^{(42) 8} M I. A. 22 4 6 W. R. P. O. 43, 1 Suth P. C. J. 147; 1 Bar. P. C. J. 271; 18 E. B. 484.

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Chunder Deb (43). Tested from this point of view, there is no foundation for the argument that the tenancy was not adequately represented in the rent-suit and that the decree made therein did not operate as a rent decree. The second ground urged by the appellants cannot, consequently, be maintained.

As regards the third point, it has been urged that the tenancies set up by the second set of defendants were real and rot fictitions as held by the Subordinate Judge. The pedigree set out above shows that defendant No. 7 is the sister of defendant No. 3, defendants Nos. 8 and 9 are the wives of defendant No. 2 and defendant No. 10 is the wife of defendant No. 1. These defendants allege that they are tenants under their relations, and that the tenancies were created in their favour shortly after the settlement was obtained from the Zemindar. Defendants Nos. 11 and 12 elaim to hold usufructuary mortgages executed in their favour on the 5th July 1902 by defendant No. 10 and defendant No. 8 respectively. The Schordi. nate Judge has held that the alleged tenancies had no real existence and were created by the tenure holders in favour of the female members of their family with a view keep down the amount of cesses leviable on the assets as also to save a fragment in event of an execution sale. tenancies are mentioned in a Road Cess return submitted by Tara Prasad Maiti on the 24th June, 1875 and this may lend some support to the first bypothesis just mentioned. The eircomstances that the tenancies were all in favour of the ladies of the family and that the rents were unusually small in comparison with the rent payable to the Zemindar are undoubtedly grounds for suspicion. But as was said by Sir Lawrence Jenkins in Mina Kumari Bibi v. Bijoy Singh (44) the decision must rest. not upon suspision but upon legal grounds established by legal testimony. The Subordinate Judge has kept this principle in mind and has earefully traced the history these tenancies. of each of He bas shown that there is no satisfactory evidense of possession by the alleged lessess: This, indeed, was the erusial test, and it is significant that none of the female defendants has ventured to give evidence in support of her claim, while both Ram Narayan and Lakehi Narayan have kept away from the witness box, although they are the only persons who sould have been expected to give valuable evidence from personal knowledge, as to the creation and enjoyment of these tenancies. Nor have the account-books been produced to show that the cultivation was carried on by tenants settled on the land by the ladies and that the ladies themselves received the profits. It is not necessary to review in detail the evidence relating to each of there tenancies, which has been commented upon minutely by Counsel on both sides and has been carefully scrutinised by us. It is sufficient to state that our attention has not been drawn to any material misstatement of the effect of the evidence as set out in the judgment of the Subordinate Judge. We hold, accordingly, in concurrence with the Subordinate Judge, that tenancies in the names of the ladies were fictitious and that they were never in possession as tenants under the tenureholders. The third ground, consequently; fails like the first and the second.

Finally, a question has been raised as to the identity of the lands in suit with the lands comprised in the lease of the 10th November 1:74 and the sale certificate of the 18th February, 1904. This question was raised in the eleventh issue in the Court below. The Subordinate Judge states in his judgment with reference to that issae that 'the disputed lands are admittedly included in the tenure and so they are included in the sale certificate." The appellants have, however, contended that this statement must have been made by the Subordinate Judge under a misappre. hension and that no such admission was made before him. But this allegation is an unproved assertion which we are not prepared to accept. In the case of Damodar Narayan v. Dalglish (45) it appeared from

L. J. 508; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 344; 15 A. L. J. 382; 19 Bom, L. R. 424; (1917) M. W. N. 473 (P. C.).

^{(43) 14} C, 204; 7 Ind. Dec. (N. s.) 135. (44) 40 Ind. Cas. 242; 44 I. A. 72; 44 C, 662; 25 C.

^{(45) 9} Ind. Cas. 913; 38 I. A. 65; 38 C. 432; 13 C. L. J. 512; 15 C. W. N. 345; 9 M. L. T. 364; 8 A. L. J. 441; 13 Bom. L. R. 396; (1911) 2 M. W. N. 182 (P. C.).

SEDH MAL O, JOTI PARSHAD.

the judgment of the Sabordinate Judge that at the trial before him it admitted with regard to some of the lands in suit that those lands were the private lands of the proprietor; the case proceeded before the Subordinate Judge and was dealt with by him on the footing of that admission. On appeal, this Court went behind the admission. Sir Arthur Wilson observed that the High Court was in error in going behind the admission and reopening the question whether the smaller area was the private land of the propristor. Again, in Nellavadiou v. Subra. mania Pillai (46) Mr. Justice Sadasiva Iyer observed that a statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the Appellate Court, specially in the absence of an affidavit by the Vakil who appeared in the Court of first instance. It is plain that in eases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for restification or review of the judgment. This course was not pursued in the case before us, nor is the proof of the allegation that the Trial Judge was under a misapprehension. We mast, consequently, hold that the appellants cannot be permitted to re-open the question in this Court. But we may add that we heard the appellants, upon the merits, on this part of the ease, and we did not feel at all impressed that there was any substance in the contention that the lands in suit were not lands included in the lease and the sale certificate.

The result is, that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

B. N. & J. P.

Appeal dismissed.

(46) 88 Ind, Cas. 617; 31 M. L. J. 267; 40 M. 637.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 23C4 of 1918.

December 7, 1921.

Present:—Mr. Justice Chevis and

Mr. Jusites Campbell.

SEDH MAL AND ANOTHER—PLAINTIFFS

—APPELLANTS

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JOTI PARSHAD AND ANOTHER—
DEPENDANT :- RESPONDENTS.

Contract Act (IX of 1872), s. 17 Expl.—Fraud— Covenant not to engage in business—Contract in contravention of covenant—Concealment,

M., was employed by the defendant firm as a clerk under an agreement one of the conditions of which was that he would not engage in any business of his own or join any other firm so long as he remained in the service of the defendant firm. Subsequently, he joined with S for the purpose of entering into certain transactions with the defendant firm, and induced the latter to enter into certain contracts with S and himself, without disclosing the fact of his being a party to the contracts to the defendant firm. In a suit upon the contracts:

Held, that the contracts were vitiated by fraud inasmuch as M. had induced the defendant firm to enter into the contracts by the active concealment of a fact of which he had knowledge and which he was bound to disclose to the defendant firm, viz., that he was entering into the contracts in contravention of the terms of his agreement with the defendant firm. [p 442, col. 1.]

Second appeal from the decree of the District Judge, Delhi, dated the 20th June 1918, reversing that of the Subordinate Judge, Second Class, Delhi, dated the 21st May 1917.

Lala Moti Sagar, R. S., for the Appellants. Mr. Des Raj Sawiney, for the Respondents.

JUDGMENT:—Madan Mohan Lal, one of the plaintiffs in this suit, was a elerk of the defendant firm, Joti Pershad Beni Pershad; under a written agreement, one of the conditions of which ran as follows: swae dafter maskur ki aur kisi duere daftar ya kisi khas shakhs ya firm ya sati apna hoi kam nahin karunga.

The suit was by Sedh Mal and Madan Mohan Lai for recovery of damages for breach of sontract to deliver goods. The indente on which the suit was brought were given by Sedh Mal and Madan Mohan Lai to the defendant firm for the supply of six cases of piece goods. The defendants declined to give delivery because Madan Mohan Lai was

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their elerk at the dates of the indents, and when sued by the plaintiffs, pleaded that they had been induced to enter into the contract by fraud and that Madan Mohan Lal had represented that the purchasers of the goods were entire strangers.

The first Court gave a decree for damages, but on appeal the learned District Judge held that the contract was voidable by reason of frand.

The question for decision on second appeal is, whether, on the learned District Judge's findinge, fraud is established within the meaning of section 17 of the Indian Contract Act. The District Judge has found that the partnership, Sedh Mal and Madan Mohan Lal, was formed merely for the purpose of entering into the transactions in question, Sedh Mal living in Calintta, and also that the indents were written by Madan Mohan Lal in English and put up by him to Joti Pershad, defendant, for signature, and that Madan Mohan Lal consealed from the latter the fact that he was the Madan Mohan Lal entered in the indents.

view of the condition of service Ιa re produced above, which we interpret as meaning that, so long as Madan Mohan Lal remained in the defendants' service, he bound himself not to engage in any private business of his own, we hold with reference to the explanation in section 17 of the Indian Contract Act that it was the du'y of Madan Mohan Lal at the time when the indents were put up for signature to tell Joti Pershad that he was the Madan Mohan Lal of the indent, and to inform him also that, in eantravention of the other condition that he would not do the business of any other firm, he had entered into a partnership with Sedh Mal.

Thus, the ease clearly becomes one in which a party to a contract has induced another to enter into a contract by the active concealment of a fact, of which he, the former, had knowledge or belief. The District Judge's finding, therefore, that fraud had been practised upon Joti Pershad and that the contract was voidable by him, is fully justified.

We dismiss the appeal with costs.

Z, K.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 83 OF 1921.
June 10, 1921.

Present:—Syed Wazir Hasan, A. J. C. ABDUL GHANI—PLAINLIFF—
APPELLANT

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ASHIQ HUSAIN AND ANOTHER - DEPENDANTS -- RESPONDENTS.

Evidence Act (1 of 1872), ss. 95, 97-Construction of document-Ambiguity-Patent or latent-Extrinsic evidence-Court, duty of.

Where in a grant of land there is a repugnancy between the terms of the grant and any plan or diagram the general rule is that the former will prevail. But this is subject to the qualification that where the plan or boundary is a part and parcel of the description itself, the general rule ceases to apply. [p. 444, col. 1.]

The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it is latent. [p. 445, col. 1.]

Where a deed of conveyance of a house contained an ambiguity, in respect of the description of the property conveyed of such a nature that one portion of the description referred to the entire house and another portion referred only to a portion of the house, and both read together did not apply correctly either to the whole house or to a portion of it:

Held, that the case was covered by the provisions of section 97 of the Evidence Act and that extrinsic evidence was admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention was to convey the house in its entirety or only a portion of it. [p. 445, col. 1.]

Appeal from a decree of the Additional Subordinate Judge, Lucknow, dated the 14th February 1921, upholding that of the Additional Mansif, Lucknow, dated the 2nd August 1920.

Mr. Zahur Ahmad, for the Appellant. Mr. P. O. Gupta, for the Respondents.

JUDGMENT.—The plaintiff Abdul Ghani, elaimed title to a 7-annas share in a block of houses partly delineated in pink and partly in green colour on the plan Q attached to the decree of the Court of first instance. He admitted the defendants' title to the remaining nineannas in the same properties. The relief prayed for was a partition of the houses commensurate to the shares stated above. The proportion of the shares respectively

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owned by the parties was readily admitted on both sides and at an early stage of the proceedings the plaintiff's title quathe parcels shown in pink was asknowledged by the defendants—Vide English proceedings dated the 11th May 1920. The result was that the parties went to trial on a single issue concerning the plaintiff's title in respect of the portions marked green on the plan Q.

wholly negatived by the Court of first instance. Some success, however, attended his appeal to the lower Appellate Court. The decree of the last mentioned Court fixes the eastern boundary of the small houses at a line which is drawn within the parcel coloured green and described by the letter J'-J." This modification of the decree of the Trial Court is acquiesced in by the defendants, but the plaintiff being aggrieved by the rest of the decree of the lower Appellate Court has some to this Court in second appeal.

The title to these houses in their entirely originally vested in one Khurshedi Khanam. Both the parties to the litigation derive their respective interests in the properties in suit from her. The plaintiff traces his title back to Khurshedi Khanam through one Fida Hasain in whose fayour the lady executed a sale-deed on January 9th, 1907, (Erhibit B1).

There are six grounds specified in the memorandum of appeal to this Court on which the desision of the lower Appellate Court is shallenged, but in substance the principal question to be desided in this appeal is one of interpretation of the deed of sale dated the 9th January 1900. appear from what has already been stated that the only controversy now subsisting between the parties relates to the plaintiff's title to such parcels of structure and ground as are delineated in green colour on the plan, Exhibit Q, prepared by the Commissioner under directions of the Court of ent of bedeette won bne strateni terfi decree of that Court. The desision of this entroversy solely depends upon the answer to the question, - Was the portion shown in green colour conveyed by Khurshedi Khanam to Fide Hassin under the dead of January 9, 1900 P

The material portions of the deed in question may be reproduced here-"jo ki do gita makan puthta ek manzıla mas arasi mahduda tail mae kamra mas dukan..... mamluka wa maqbuea manmuqira...hai..... unhin dono gita makan maskur kobadast Fida Husain ke bai aur farokht kia" (Whereas the two pacca and one storied houses together with land as per boundaries given below, including the room with the shep are owned and possessed by the executant. the same two houses are hereby sold to Fida Husain). Then follow at the foot of the deed specifications of the bound. aries of the makan awwal kalan (the first large bouse) and of the makan doem khurd (the second small honce). The smaller bouse indicated in pink at the Exhibit Q has been dropped out of controversy and need no longer be sonsidered.

Extrinsic evidence, mainly consisting of the plan prepared by the Amin and his two reports dated the 20th April 1920 and 21st May 1920 was accepted by the Trial Court for the purpose of elucidating what was comprised within the limits fixed by in the deed. boundaries spesified the my opinion, This evidense WAS, ID rightly admitted. It falls within the rule stated by Lord Davey in the case of Balkishen Das v. W. F. Legga (1): "The ease must, therefore, be decided on a consideration of the contents of the dosuments themselves with such extrinsic evidence of surrounding eirsumstances as may be required to show in what manner the language of the document is related to existing facts," The rule so laid down was affirmed by the Privy Council in the case of Mauna Kuin v. Ma Shue La (2).

The result of the enquiry has been recorded by the learned Subordinate Judge in the following words:—"Exhibit B1 must, therefore, be read as confining the larger house sold to Fida Husain within the

^{(1) 22} A. 149; 4 C. W. N. 153; 2 Bom, L. R. 528; 27 I. A 59; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. s.) 1180 (P. C.).

^{(2) 42} Ind. Cas. 612; 45 C. 320; 15 A. L. J. 825; 83 M. L J. 644; 8 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 86; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 830; 9 L. B. R. 114; 11; Bur. L. T. 21; 44 I. A. 286 (P. C.).

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houndaries A D4 E. F.X6. X3X4 with the sahan marked Alpha (2) by the Court below." This finding as to what parcel or percels are included in the boundaries set out in the deed itself is a pure finding of fact and must, therefore, be accepted by me as conclusive. What then is the result of the finding? It is that, according to the description given by the definition of the boundaries, only a small portion and not the whole of the 'larger' house was conveyed to Fida Husain by the deed of 9th January 1900. This portion is delineated in pink solour at the bottom of the plan, Exhibit Q, and comprises only the shop and the kamra mentioned by the learned Subordinate Judge in the following quotation taken from his judgment:-"It was probably for this reason that the shop and the kamra were salled in Exhibit Bl the larger house, namely, for the reason that they formed part of the larger house." This is a reasoning which it is somewhat difficult to appreciate but, be that as it may, one thing is perfectly manifest -a discrepancy arises between the parcels as described in the body of the deed and the portion defined by the boundaries given at the foot of the deed. I have already quoted the language by which the property intended to be conveyed is described in the deed. The words "quia makan pukhta ek maneila mae kamra mae dukan" (The pucca one storied house including the room with the shop) may cover the whole house ineluding the shop and the kamra and not merely the latter as the description given by means of the boundaries does.

Theilgeneral rule is, that where in a grant of land there is a repugnancy between the terms of the grant and any plan or diagram the former will prevail. [Horne v. Struben (3).] It is, however, subject to the qualification that where the plan (or the boundary in this case) is a part and parcel of the description itself, the general rule ceases to apply. Now the words "q'ti makan pukhta mae kamra mae dukan (the pucca house including the kamra with the shop) do not, without the words "mahluda"

sail" (as per boundaries given below) between the "qita makan pukhta" (the pucca bonse) and "mae kamra mae dukan" (including the kamra with the shop) convey a description sufficiently certain to amount unmistakable definition of the subject of the sale. The words 'mahduda sail' (as per boundaries given below) are, therefore, an essential past of the description and must be given effect to. In the case of Mellor Walmesley (4) Vaughan Williams observed as follows: - "I sannot, however, agree with the learned Judge that the present ease is one in which the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the sea shore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of slready been certainly that which had described or defined, but are part and parcel of that description or definition. The dimensions in this case, to use the words appearing on page 247 of Sheppard's Touchstone, are an essential part of the description and not a sumulative description in a case in which there is, in the first place, a sufficient demonstration." Another certainty and general rule, is that "Where in a grant the description of the parcels is made up of more than one part and one part is true and the other false, then if the part which is true describes the subject with sufficient assuracy, the untrue part will be rejested as a falsa demonstratio and will not vitiate the grant." [Per Lord Atkinson in Watcham] v. Attorney General of the East Africa Protectorate (a) . In the present case, however, the description of the property given by the boundaries cannot be rejected as a false demonstration for two reasons-(1). The description in the body of the deed without

^{(4) (1905) 2} Ch. 164: 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591.

^{(5) (1919)} A. C. 533; 87 L. J. P. C. 150; 84 T. L. B. 481; 120 L. T. 258.

ABDUL GRANI U. ABBIQ BURAIN,

the words "mahduda zail" (as per boundaries given below) is not sufficiently certain as has been already shown, and (2) those words, in my opinion, are clearly intended to operate by way of limitation of the words "qata ma'an rukhta" (the rucca house) of wider significance: Morrell v. Fisher (6), Taylor v. Farry (7). Both these general rules would zeem to fall within the spirit, if not the letter, of section 95 of the Indian Evidence Act (I of 1872).

1872). What is then the legal position? That there is an ambiguity in the deed in respect of the description of the property conveyed is perfectly elear. "Qata mokan puklita ek manzila mae kamra mae dukan" (the pucca one storied house including the kamra with the shop) may apply to the whole of the larger house but "mohduda sais" (as per boundaries given below) applies only to a portion of the same house and the both read together do not apply correctly either to the whole house or to a portion of it. A case of latent ambiguity, therefore, arises. "There being two sorts of ambiguities of words, the one is ambiguity patens and the other latens. Patens is that which appeareth to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed, that breedeth the ambiguity" (Bacon's Law Tracts, reg. page 23, 99). But whether the ambiguity is patent cr latent the present case seems to me to be wholly covered by the provisions of section 97 of the Indian Evidence Act, 1872, Extrinsis evidence was, therefore, rightly admitted and used for the purpose of solving the question whether by the description of the properly taken as a whole the intention was to sonvey the larger house in its entirety or only a portion of it. The principle that when an instrument contains an ambiguity evidence of user under it may be given in order to show the sense in which the parties need the language employed, applies to a mcdern as well as to an ancient instrument, and where the ambiguity is patent as well as

where it is latent. Where, therefore, in a land-certificate issued by the Crown in 1899 there is a variance between the stated acreage and the area as described by physical boundaries (namely, one mile along a river to a width of a quarter of a mile therefrom), eviderce can te given of user inconsistent with the area intended being that included in the boundaries, so as to establish that that demonstratio." falsa description 18 8 [Watcham v. Attorney General of the East Africa Protectorate (5)!. Lord Sugden in the oft-quoted passage in Attorney General V. Drummond (8) said: "Tell me what you have done under such a deed and I will tell you what that deed means" In Waterpark v. Fennell (9) Lord Cranworth states the rule of law thus :- "It is certain that where parcels are described in old documents by words of a general pature, or of doubtful import, we may, indeed we must, recur to usage to show what they somprehend.

Reliance was, therefore, rightly placed by the lower Appellate Court upon the following facts established by extrinsic evidence in coming to the finding stready quoted:—

(1) Qadir Bakeb, the plaintiff's immediate predecessor in interest, did not in his mortgage suit claim the properties D1, D2, and a large part of D3 all coloured green on Exhibit Q.

(2) Khurshed Khanam, the original vendor, continued to live in the residential house D1, D2, and D3 even after the execution of the deed of January 9, 1900.

(3) The lady subsequently, after an intervalof about ten years, sold these portions to Ahmadi Khanam, defendant No. 2.

The finding of the lower Appellate Court is consequently not vitiated by any error of law or rule of procedure. The appeal, therefore, fails and is dismissed with costs.

(9) (1859) 7 H. L. C. 650 at p. 680; 5 Jur. (N. 8)

(8) (1842) 1 Dr. & War. 253 at p. 369.

1135; 7 W. R. 684; 115 R. R. 317; 11 E. R. 259,

Z, K.

Appeal dismissed,

(7) (1840) 1 M. & G. 604; 188 E. R. 474; 1 Scott N. R. 676; 9 L J. (N. s.) C. P. 198; 4 Jur. 267; 56 R. R. 459.

^{(6) (1849) 4} Ex. 591 at p. 604; 19 L. J. Ex. 272; 14 L. T. (0. 8) 8(5; 80 R. R. 709; 154 E R. 1850.

FRAMJEE SHAPJRJEE GANDHI U. KARM DEVI.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 2269 of 1917.
October 28, 1921.

Fresent: -Mr. Justice Abdul Racof and
Mr. Justice Compbell.
Seth FRAMJEE SHAPURJEE GANDHI

-PLAINTIFF - APPELLANT

versus

Musammat KARM DEVI-DEFENDINT-RESPONDENT.

Contract Act (IX of 1872), s. 211-Principal and agent-Liability of agent-Directions of principal not carried out.

Plaintiff appointed one N. as his agent for the sale of cylinders or tlasks of gas used for the manufacture of aerated waters. One of the terms of the agency was that N. was to return the empty flasks to the plaintiff. After the death of N. plaintiff sued his representatives for an account of the agency. It was found that a certain number of flasks had not been returned by N. and that they were still with customers to whom the gas had been sold:

Held, that the plaintiff was entitled to a decree for the value of the flasks against the estate of N. [p. 417, col. 2.]

Second appeal from a decree of the District Judge, Labore, dated the 23rd April 1917, varying that of the Subordinate Judge, Labore, dated the 11th Ostober 1916.

Lala Moti Sagar, R. S., for the Appellant. Mr. Manohar Lal, for the Respondent.

JUDGMENT .- The circumstances in which this eesond appeal has been preferred are as follows. Seth Framjee Shapurji Gandhi, the plaintiff appellant, was the agent at Lahore of the Panjab Sagar Works and Patent Carbonie Acid Company, Sujanpur, for the sale of carbonic acid gas used for the manufasture of Aerated Waters. appointed one Nathu Ram his sub-agent at Rawalpindi to sell sylinders or flasks of gas. The terms being that the plaintiff paid Nathu Ram Rs. 20 per mensem and defrayed the actual expenses of sale, while Nathu Ram remitted the proceeds of sales to the plaintiff and returned the empty flasks.

This arrangement, which is said to have continued without dispute for several years, terminated on the 19th May 1911, when Nathu Ram secured a direct agency from the company.

Nathu Ram rendered accounts to the plaintiff up to January 1911 which were

accepted, and sent a further statement of accounts from January to May 1911 which were alleged by the plaintiff to be incomplete. Nathu Ram died in September 1913 and his only son Badri Das died six months later.

On the 6th Ostober 1915 the plaintiff sued Musammet Karm Devi, widow of Badri Das, as heir of Nathu Ram, for rendition of accounts of the sub-agency and recovery of such sum as might be found due to him on the accounts being taken. A preliminary decree was passed on the 13th March 1916 directing accounts to be taken, and no appeal was filed against it.

The Trial Court, ther, by order dated 22ud March 1916 appointed a Commissioner to examine the accounts and report the result. The Commissioner reported (a) that Rs. 308-1.9 were due by the sub-agency to the plaintiff, being outstandings due to the sub-agency from customers; (b) that 27 empty gas flasks had not been returned by the sub-agency and were of the value of Rs. 45 each, and (c) that sub-agency fees at Rs. 20 per mensem claimed by the defendant for the period 1st June 1911 and 30th November 1911 were not payable by the plaintiff.

The Commissioner recommended in regard to the flacks that the defendant should endeavour to recover them from the sustamers in whose hands they were said to be and should do so at the expense of the plaintiff, and that if they were not recovered the defendant should pay the plaintiff for them at the rate of Rs. 45 per flack.

The Subordinate Judge did not consider this proposal practical and passed a decree in favour of the plaintiff for Rs. 208.1.9 plus Rs. 1,215 the price of the 27 flasks, Rs. 1,523.1.9 in all, leaving the parties to bear their own costs.

The defendant appealed. The District Judge affirmed all the findings of the First Court on facts, and upheld the decree for payment of Rs. 308.1.9. He found, however, some difficulty in dealing with the question of liability for the flacks, holding that both parties had been negligent, the plaintiff because he must have known that there was a deficiency and took no steps to recover the missing flacks until two years after the death of Nathu Ram, and

FRANJER SHAPURJEE GANDRI U, KARM DEVI.

the defendant because the sub-ageney, knowing in whose hands the missing flasks had been, made no effort to get them back. The learned District Judge considered, in the circumstances, that the question must be dealt with equitably, and was of opinion that the defendant's liability was concluded by her furnishing the plaintiff with a list of the persons to whom the flacks had been supplied and by her giving him such aid in recovering them as was in her power. He decided that the proper source was to set aside the deeres for the oost of the flasks and to leave the plaintiff to recover them from the persons said to be in possession of them, allowing him subsequently to sue the defendant again if he failed to resover them owing to the past negligence of the sub agency or to wrong information being given of their whereaboute.

The First Court's decree accordingly was reduced to one for Ro. 308 1.9, and incidentally (the plaintiff consenting) was altered from a personal decree against the defendant to one against the estate of the deceased Nathu Ram in her hands.

The plaintiff has appealed to this Court asking for the decree of the First Court to be restored and attacking the lower Appellate Court's decision regarding the flasks as wrong in law and equity.

It seems to us that the appeal must succeed. In his original plaint the plaintiff asserted that the sub-agency was under contract to return empty flasks to him at Lahore. The defendant admitted that the flasks were to be returned, but to be returned direct to Sujanpur. The First Court held, in accordance with the report of the Commissioner, that 27 flasks had not been returned to Sujanpur and that the plaintiff had been sharged for them at the rate of Rs. 45 by the Company, his principal. This finding was not challenged in appeal by the defendant and the learned District Judge has recorded that the facts reported by the Commissioner were accepted as true by both parties. The defendant did not plead in the Trial Court that the flasks had been lost on assount of inaction and negligence by the plaintiff, or that nnsuccessful attempts had been made by the sub-agency to recover them. On the contrary she declared, Huntruly, that all had been returned. The defendant accepted the preliminary decree and the pleas now put forward on her behalf that the plaintiff's suit was long delayed are such as should have been raised in appeal against that decree.

Section 211 of the Contract Act lays down that an agent is bound to ecudact the business of the principal according to the directions of the principal, and that when the agent acts otherwise, if any loss be sustained, he must make it good to his principal.

In this case it is admitted that one of the directions of the principal, the plaintiff, was that empty flasks were to be returned and it is proved that 27 flasks were not returned by the sub agents, and that loss was sustained by the plaintiff of the sum of Re. 1,250.

We do not think that, in the present circumstances, when a decree for accounts to be taken has been passed with the object of adjusting finally the claims of the parties against each other, that of the plaintiff regarding the lost flacks is adequately met by a direction that he should go from Lahore to Rawalpindi, endeavour to resover the flasks for himself, and one again if he is unscessful.

We accept the appeal, set aside the decree of the lower Appellate Court, and restore that of the First Court with the modification that the decree shall not be personal against Musammat Karm Devi. The plaintiff is granted a decree for Rs. 1,523-19 and his costs in this Court and in the lower Appellate Court against the estate of the deceased Nathu Ram in the hands of Musammat Karm Devi. We maintain the order of the learned Subordinate Judge that in his Court parties shall bear their own costs.

Z, K, & J. P.

Appeal accepted,

UMMESALMA U. AMJAD HUSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT,

FIRST CIVIL APPEAL No. 6 of 1919. May 18, 1921.

Present: -Mr. Daniels, J. C. and Mr. Dalal, A. J. C.

Musammat UMMESALMA, DEAD, AND
IN BER PLICE Musammat UMMATUL
ASKARI AND OTHERS—P. AINT. FF3

- APPELLANTS

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Sasyid AMJAD HUSAIN AND ANOTHER-DEFENDANTS-RESPONDENTS.

Suit, delay in filing-Presumption.

Procrastination is the usual habit of litigants, and in a case where the parties are closely related there must be constant talk and hope of settlement with the interference of relations or neighbours, who would like to get credit if not money by taking sides. These are all circumstances which would lead to delay in filing a suit, so that in such a case no inference as to the weakness of the plaintiff's claim can be drawn from the fact that the suit is brought just within the period of limitation. [p. 451, col. 1.]

Appeal from a decree of the Subordinate Judge, Rae Bareli, dated the 12th September

1918.

Messre. Haider Husain, Wasi Hasan and Kalbe Abbas, for the Appellants.

Mr. M. Wasim, for the Respondents.

JUDGMENT.-Musammat Ummesalma alias Aghai Begam, a Shia widow, was the original plaintiff who sued the beirs of her husband Amjad Husain and Abbas Husain who are his brothers for the recovery of her dower debt out of the property of her deceased hurband. Her suit was dismissed by the learned Subordinate Judge of Ras Bareli on the finding of one issue that the plaintiff had relinquished her dower-debt in favour of her husband at the time of his death. The plaintiff died after her appeal was admitted by this Court and the appel. lants who are substituted in her place are her parents and second husband,

The story of relinquishment put forward by the defence was somewhat as follows:—
The mother of the plaintiff (in this judgment the plaintiff will mean the original plaintiff)
Musammat Umatul Askari alias Phulkhari was attending her son in law Akhtar Husain on the 8th of September 1914 while he had an attack of cholera. She was also mother's sister of Akhtar Husain. When she saw

Akhtar Husain was sinking she hurried from his house to her own, wailing at her impending loss. The two houses appear to be about a bundred yards apart. Musammat Koelen and Musammat Shahzadi (D. Ws.Ncs.11 and 13) accompanied her from Akhtar Husain's house to see that no harm may come to her while she was so distracted. On the way Saida Begam (D. W. No. 10) and ber son Aeghar Husain (D.W. No. 8) hearing the news came out of the house and followed ont of sympathy. The five persons arrived at the house of Musammat Phulkhari where the plaintiff was and the women went inside the women's apartment while Asghar Husain stood outside in the entrance of the room. The plaintiff hearing of the critical state of her husband expressed a desire to go and see him. The plaintiff was 12 years of age at the time and the wedding (nikah) had taken place two years carlier but the marriage had not been consummated and she had not gone to ber busband's bouse. (rukhsati had not taken place). Such a desire could not be given effect to according to the neual practice among the families of Saiyads to which the parties belong, so the mother considered it advisable to take the opinion of some male members of the family. It appears that the girl's father was absent from home. The mother desired that Nannhe and Iltafat Husain (D. We. Nos. 1 and 7) may be sent for and Saida Begam same out and told her son Asghar Husain to fetch the Nannhe and Iltafat men. When two Husain arrived the girl again expressed her desire to go and see her busbard and added that she wished to relinquish her dower in his presence. Nannhe expressed his opinion that a nikahi girl before her rukheati had taken place could not go to ber husband and suggested that the relinquishment may be made there at the time. Some witnesses add a touch of colour here that Nannhe first said that the nikah between the plaintiff and Akhtar Husain was invalid because they had sucked the milk of the same woman and that, therefore, no dower existed which need be relinquished. The woman thereupon reproved Namhe for alluding to this fact when the girl was in distress. Nannhe then suggested that the relinquishment may be made at the girl's house. The girl thereupon made the relinquichment using the terms proper to the

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ossasion that she and her God there and then relinquished the dower so that her busband may be freed from its burden in the presence of God and that her mother may convey this message to the dying hasband. Musammat Said-un-nisa (D. W. No. 14) was present at the time in the plaintiff's house, having gone there to condole with the plaintiff. The female witnesses who are alleged to be present in the house stated that after this relinquishment Phulkhari broke her own glass bangles and those of her daughter. Phulkhari after this returned to the house of Akhtar Husain accompanied by all the women and men mentioned above with the exception of her daughter and, at the death-bed of Akhtar Husain, informed him of the relinquishment by her daughter. On the way also she had eried out for general information that her daughter had relinquished her dower debt. One man, Mohammad Nabi, (D. W. No. 2) and six women, Khair-un-niss, Asmat un-nisa, Bani Bibi, Khairat Fatima Haidri Begam and Umat-ul-raza, (D. Ws. Nos. 15 to 20) seeing Phulkhari erying on the road as she passed by assempanied ber on her return to Akhtar Husain's house and there heard her communicating to her son in-law the fast of relinquishment of the dower-debt by her daughter. The female witnesses (D. Ws. Nos. 15 to 20) further stated that the plaintiff herself confirmed this fact of relinquishment when they went to house on a visit of condolence on the third day seremony of her husband's death. All the female witnesses examined on commission and not in presence of the Court.

The defence story is supported by a large number of witnesses, but it does not appear to us to be probable under the eireumstaness described by the witnesses. Musammat Phulkhari stated that she remained with her son in law for two days and two nights from the commencement of the attack of cholera until after his death. It is probable that she may not be telling the truth and may have paid several visits to her house to look after her children, one of whom was only a year old at the time. She has also told a falsehood when she represented that the plaintiff was lying ill with fever on that day. The plaintiff who was zamined during the preseding two days

made no mention of any such illness. the same time, it does not appear probable that Musammat Phulkhari should leave the side of her nephew and son in law at the time when he was known to be sinking. This difficulty appears to have been appreciat. ed by the defence and so a suggestion was put forward that she went home in order to break the glass bangles on her daughter's arms. It is a sustom among all the Indian communities to break the glass bangles on the arms of a woman immediately after her hasband's death; but this is not done, as is proved out of the mouths of the defense witnesses themselves, before the husband has actually expired. In fact, such an act done while the husband is in a critical condition would be taken as a bad omen likely to hasten the death of the husband. Musammat Saida Bagam (D. W. No. 10) definitely stated that bangles are never broken before the death of a husband. This statement is definite enough and reference need not be given to the statements of other female witnesses on the subject. According to Nannhe, when he reached the plaintiff's house and was told of her intention to relinquish the dower, he told her that Akhtar Husain ecald not be regarded as her husband because the marriage had turned out to be invalid and there was, in consequence, no necessity to give up the claim for dower. Asghar Husain (D. W. No. 8) stated that on hearing this unkind remark of Naunbe the women in the house eried out, as they naturally would, that it was not the time to sall into question the validity of the marriage. Yet Musammat Saida Begam (D. W. No. 10), Musammat Koelen (D. W. No. 11), Musammat Shabzadi (D. W. No. 13) and Musammat Said-un-Nisa No. 14) make no mention of such an incident. Musammot Phulkhari was about 55 years of age at the time and was not so old that she could go out openly into the street weeping and wailing so as to attract the attention of the neighbours. It is admitted that she belonged to a class of Muhammadans among whom the parda is strictly observed.

It appears to be the practice among the Saiyade of the locality in which the parties reside for a wife or a widow to relinquish her dower debt. This practice, however, is not invariable as may be gathered from eartain instances of the payment of dower.

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The defendants paid a portion of debt. their step mother's dower debt (doenment Exhibit 109). The plaintiff's witnesses have deposed to one suit being brought by a widow named Musammat Jwala Bibi. In the present case there is great likelihood of the pratice having been broken because the plaintiff had not associated with her husband and for two years after her marriage she was kept away from the society of her husband though of an age to go to her husband's house. She rightly expressed her feelings in the lower Court when she stated that though she felt a shock on hearing of her husband's death she bad no great affection for him. It is highly improbable that a girl in that state of feelings towards ber busband would, of her own motion, think of relinquishing her dower debt without any suggestion proceeding from her parents or other elderly members of her family. Another improbability is, that the girl is said to have relinquished her dower in the presence of the relations of her busband when, among Laiyad families to which the parties belong, a married girl whose rukhsati has not taken place does not appear or speak the in presence of her husband's relations. Most of the witnesses to the relinquishment were relations of the girl's husband before whom she would not appear or speak.

Most of the defence witnesses are closely related to the defendants. Nannhe's niese is married to the defendant Amjad Husain and Muhammad Nabi's niece to the defendant Abbas Husain. The niece of the witness Iltafat Husain is married to the witness Nannhe and his son worked as the defendants' attorney for the purposes of this suit in the lower Court. Witness Asghar Husain is a son of witness Saida whose nices is married to the defendant Amjad Husain. Musammat Koelen is mother. in law of the detendant Amjad Husain. Musammat Said-un-nisa is the wife of the witness Nannhe, Musammat nn nisa is wife of the witness Iltafat Husein and Musammat Khairat Fatima is mother in law of the defendant Abbas Husain. It was pointed out by the defendants-respondents' Counsel that Nannhe and Iltafat Husain were also related to the plaintiff but Nannhe's strong bias in favour of the defence in) the witness-box has been noted by the lower Court, and a son of Iltafat Husain has been running this case on behalf of the defendants. It is clear, therefore, that these men would favour

the defendants and not the plaintiff. The principal witness for the defence, Nannhe, has been proved to be an unprineipled person. On the 21st of June 1917 he wrote to the plaintiff's father Ansar Husain recommending that he should sue the defendants at an early date on his daughter's behalf for the recovery of her dower debt. It is obvious that this would take the side of the party which paid him best, and that no reliance could be placed on his testimony. When it suits his purpose he has no hesitation in telling lies to defraud his ereditors. the present case he has stated that amount of his wife's dower was fixed Re. 125 while, during insolveney proceedings relating to his estate, he deposed on oath that his wife's dower was Rs. 70,000 and two gold mohurs and that he had gifted his entire property to her in satisfaction of the dower-debt (copy of statement Exhibit Several defence witnesses bave told falsehoods to serve the purpose of the defence. One Saiyad Haider Mehdi, a respeetable Pleader of the Allahabad High Court, deposed that he seted as the plaint. iff's Vakil at the time of her marriage with Akhtar Hueain. The lower Court has believed this witness. Nambe (D. W. No. 1) Mobammad Nabi (D. W. No. 2) and several defence witnesses deny the presence of Haider Mebdi at the time of the marriage. The defence witnesses have shown their readirees to make any falce statements to long as it would help the case of the defence. To give an instance, Musammat Saida Begam stated that she did not attend the marriage of the plaintiff with Akhtar Husain though she is a woman of the Saiyad family of the same village and related to the plaintiff's deseased husband. We believe that she made such a statement to avoid being questioned why she did not object to the marriage at the time when she alleges that she had known of the plaintiff and Akhtar Husain Laving sucked the milk of the same woman at one time. A perusal of the statements of the defence witnesses has left on our minds an impression of earetul tutoring wherein every contingency

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has been provided for. Under the wrong impression that the communication of her relinquishment to the woman's husband before death is necessary to validate the renunciation, a pathetic story is told of how Akhtar Husain at the point of death opened his eyes to listen to his mother. in-law's words by which he was relieved of the load of the dower-debt, how he wept tears of relief and expired in that happy endition. The female witnesses (D. We. Nos. 15 to 20) who heard of the relinquish. ment from Musammat Phulkhari go further and depose to the ratification of that relingaishment by the plaintiff herself at the time of the third day seremony after death.

The suit was brought just within the period of limitation, Akhtar Hustain having died on the 8th of September 1914 and the suit having been filed on the 4th of August 1917. The learned Sabordinate Jadge was of opinion that this delay indicated that the plaintiff had fallen a pray to certain gamblers in litigation, meaning thereby her present husband and his father, Prograstination, however, is the usual habit of litigants, and in a case like the present, where the parties are closely related, there must be constant talk and hope of settlement with the interference of relations or neighbours like Nannhe who would like to get eredit, if not money, by taking sides, These are all circumstances which would lead to delay in filing a suit, so it cannot be urged that the fact of relinquishment can be the only possible inference of delay.

Whatever may be the value of the evidence produced on behalf of the plaintiff, we are of opinion that the defence evidence, though large in volume, is untrustworthy and hold that the alleged relinquishment of the dower debt by the plaintiff is not proved. We set aside the decree of the lower Court and remit the suit to it under Order XLI, rule 23, for trial of the remaining issues and for decision. Costs here and hitherto shall abide the result.

Z, K.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE MADEAS HIGH COURT. July 18, 1921.

Present :- Viscount Cave, Lord Shaw and Mr. Ameer Ali.

KUTHALI MOOTHAVAR—PLAISTIFF—
APPELLANT

versus

PERINGATI KUNHARANKUTTY-DEFENDANT-RESIGNATANT.

Adverse possession, nature of-Onus of proof.

In order to defeat a suit for possession of immove. able property by the plea of adverse possession, such possession must be adequate in continuity, in publicity and in extent, to show that it is possession adverse to the competitor. But the onus of establishing adequacy, continuity and exclusiveness is upon the adverse possessor. When the holder of title proves that he, too, has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds, [p. 454, col, 2; p. 455, col. 1.]

Appeal from a judgment and decree of the Madras, High Court, dated the 3rd December 1917, so far as it reversed a decree of the Subordinate Judge, Tellisherry.

Mesers. De Gruyther, K. O., Kenworthy Brown and Palat, for the Appellant.

The Hon'ble Sir IV. Finlay, K. C., and Narasimham, for the Respondent.

JUDGMENT. LORD SHAW, - This is an appeal from a decree, dated December 3, 1917, of the High Court of Judicature at Madras, which allowed in part an appeal from a decree, dated March 20, 1916, of the Court of the Temporary Subordinate Judge of Tellisherry. The suit was brought by the present appellant to establish his title to thirty-four hills in the North Malabar District. The desree of the Subordinate Judge was in favour of the respondent with regard to ten of the hills, comprising, roughly stated, the north and north-east portion of the group of thirty-four. No question is raised in this appeal with regard to those ten bills, it being conceded that the defendant has a title thereto.

The still outstanding issue between the parties, however, is as to the remaining group of hills, twenty four in number,

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which may be said in general terms to form the conthern half of the entire group which was originally in suit and to be bounded on the south by the Peruvanna river. With regard to those twenty four bills, the decree of the Subordinate Judge was in favour of the plaintiff, while the judgment of the High Coort favoured the defendant. The plaintiff has appealed to this Board.

The appellant is the head or Karrayan of a Nayar Tarwad or family, in Malabar, called on the record the Kuthali Nayar. The defendant in the suit was, and the respondent in the present appeal became on his death, the head or Karnavan of a Moplah Tarwad in the same District. Shortly put, the question in the appeal is: Are the lands which are the subject of the appeal the property of the Kuthali, the appellant's family, or of the Moplab, the respondent's family?

Although the proceedings are voluminous, their Lordships desire to say at once that the appeal in their judgment must be settled by applying a well-known dostrine of law to the complex and somewhat contradictory mass of evidence as to the posses-

sion of these hills.

Both parties elaim them. Both parties elaim to have possessed them. And upon a balance of the evidence it has been found by the High Court that the respondent's rossession upon the whole outweighs that of the appellant, and that accordingly the respondent is entitled to

prevail.

Upon this subject of possession much importance attaches to the nature of the property itself. It is forest land-apparently very little of it capable of, or at least, up to the present, subject to, cultivation -and growing here and there stretches of timber. It is quite clear that a property of this nature is far removed as a subject of definite possession from lands under conticuous and parament cultivation, compastly situated and capable of being remembered with identification as the lands held and occapied in articulate plots or under leases.

Their Lordships sympathizs with the difficulties which confronted the Courts below, as to the possession of the property under appeal, and they agree with what is apparently the view of both Courts that

such possession has to be interpreted accord. ing to the fairest view of what the property itself was espable of in the way of possession and what, upon a broad view, would be considered an adequate assertion of title by sufficient compation. Along with this observation their Lordehips desire further to remark that they are not certain that they would have been prepared to reverse-although no definite opinion is here given-the conclusion reached by the High Court had the case before the Board been one merely of a question of the balance of evidence as among rival possessors. How nebulous the situation is may be gathered from these passages in the judgment of the High Court:

From 1871, the evidence as to possession consists mainly of certain leases either for entting trees or of the neufruet generally of the hills, for none of the parties seem to have directly exercised any definite acts of possession. Besides these leases, the evidence relates to what is called 'Punam' or fugitive cultivation. Punam cultivation is thus described in the Gazetteer of the Malabar District, Volume 1, paragraph 220: It is a most destructive form of cultivation, with ruinous effects upon forest growth. A patch of forest is cleared and burnt, trees too big to be burnt being girdled and left to die. A erop of hill rise, mixed with which dboll, millet and plantains are often grown, is raised, and the ground is then left fallow for some years, the cultivators, generally bill mer, moving on to another patch to repeat the process. As regards Punam cultivation, the evidence either side cannot be said to very satisfactory, and from the nature of the leases granted for entting trees acts of possession of that character would not themselves be regarded as conclusive evidense in support of the case of either party."

Their Lordships ascept the general deseription of possession as here given.

But when the judgment proceeds:

"But such is the nature of the evidence of possession adduced in the case, and we have to find by comparison of the evidence on both sides, judged in the light of probabilities, who in fact is shown to have been in possession of the property", their Lordships cannot apply the rule there laid

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down. For the Board is of opinion that in the competition of title to this ground the appellant definitely prevails, and that any dostrine of balance where original title was unknown, cannot apply to this case. Upon that subject the High Court expresses itself to the effect that,—

"It is not now possible, apart from these decrees (of 1864 and 1867), to some to any definite conclusion on the merits of the claim of either party so far as title is concerned."

It is thus necessary to consider these decrees, for one or other of them has been treated by the parties as the foundation of their respective titles.

In the year 1834 Kutti Poeker, head of the Moplah family, brought a suit for dispossession of one Kunbassan from the lands, on the ground that a lease of the same for three years from the year 1859 had expired. Kunhassan in defence stated, however, that the lands to which the suit referred were to a large extent over stated, and that in particular the hills, the proparty of which is now under appeal, were possessed by him under a right conferred, not by the Moplah, but by the Kathali family. In these circumstances, the then head of the Kuthalis, one Achutan alias Ashammadathil Nayar, was convened by a supplemental suit as defendant, at that time the head of the Kuthali family, but, for some reason not sufficiently explained, he did not defend the action nor take any steps to protect the Kuthali family interest

The suit proceeded for a period of about three years and was about to be brought to a close by decree, February 13, 1867, when another suit (Original Suit No. 11 of 1867) was raised by Nuchiledathil Krishnan alias Kuthali Chathoth Nayar. It is said that this suit was brought only by a reversioner to the Kuthali rights, and this is true, but it must be noted, first, what was the reason for that litigation, and seeind, what was the true seeps of the suit.

As to the reason, there can be no doubt. It is thus resited in the juigment of November 4, 1868:

Plaint recited that the two groups are the seam property of the Sthanam of Kuthali Nayar to which plaintiff is entitled to succeed on the death of first and third

defendants; that first defendant, the present insumbent of the above Schanam, having allowed third defendant to manage the Sthanam and the latter by his extravaganes dissipated the Sthanam property, plaintiff has already filed Suits Nos. 11/ and 120 of 1863 to remove them from the management of the Sthanam property; that the raid defendants have, therefore, colladed with second defendant and refused to adduce any proof in Suit No. 25 of 1864 in support of the Sthanams' right to the thirty-four hills which the second defendant, has fraudulently included in the suit as portions of his two hills; that if first and third defendants, who possess only a life. interest in the Sthanam property, be allowed to ruin a portion of it by neglecting to defend the suit, a great injury will result to plaintiff's right of reversion, and that be, therefore, prays that a declaration protesting his right may be given under section 15 of the Civil Procedure Code."

If these facts, the substance of which was held to be proved, are assepted, it appears to be plain that the Courts were properly appealed to to prevent a decree being granted against the Kuthali family to its prejudice by reason of neglect amounting to malfeasance upon the part of its head.

Upon the second point, vis., the scope of the suit, there can be no question. Its object was to exclude inter alia the lands which are the subject of this appeal from falling within the scope of the desreain the suit of 1854, by reason of this, that they belonged to the Kuthalis, This was the true issue in the 1867 case, and the last important point in regard to it is that the suit was fought out, and fought out by the proper contradictore, Moplab family. The family was represented by the defendants Nos. 4 and 5, vie., Ibrayi and Amanath. Pocker, the head of the Moplahe, had just died, and Ibrayi and Amanath appeared in his stead and defended the 18;7 suit, maintaining, in opposition to the plaintiff's therein, that the lands in question were infast Moplah property.

In these eirsumstances, it appears to their Lordships not only that the suit of the later year, 1867, was one which definitely dealt with the question of property now

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under appeal, but that it would be unreasonable to endeavour to found rights under a decree of 1864 by ignoring the proceedings of 1867. In any view of the ease, it must be admitted that the later proceedings were at least of an interpretative character; they were directed to the avoidance of mistake as to the ambit or scope of the 1864 litigation, and to igrore them, and to treat the 1867 proceedings either as if they had never been brought or were of no avail is, in their Lordships' opinion, contrary to sound principle. The deseription of the suit itself in the judg. ment of 1867 makes it clear that,-

"This suit is brought to prosure a that two cherikkals deelaring deeree (groups) consisting of thirty four are not included within the boundaries two bills called of second defendant's Pakkath Villiyari for which he has brought a Suit No. 25 of 1864 against third defendant and others and establishing plaintiff's reversionary right to those thirty-four bills

valued at Bs. 1,500."

Puting all the proceedings, therefore, together, the question that remains for the Board on title is to see what is the scope of the judgment in the 1867 proceedings which were conducted between these rival families and in fore contentiose.

Upon that subject the judgment in the Court of the Principal Sudder Amin of Tellieberry, November 4, 1868, is clear and is final. The learned Judge says

that,-"Upon a consideration of there circum. stances I am of opinion that the decree No. 25 of 1864 is not binding upon the plaintiff."

"The next question," he adds, "is ore

of boundaries."

The learned Judge discusses that, and, after referring to the report of a Commissioner who held a local investigation, he

concludes,-

"Upon the above grounds I am of opinion that the middle stream in the Commissioner's plan represents the Alamb river mentioned in the defendant's documents and that the twenty four hills situated on the southern banks of that river constitute the Pannikottur declare that the plaintiff (i.e., the Kuthali family) is entitled to the reversion of the first twenty four hills which are proved to be the enm of Kubeli Sthanam and reject his elaim to the remaining bills (twenty five to thirty four),"

In the opinion of the Board it is thus definitely settled that the title to the twenty four hills, the property of which is under appeal, is in the Kutheli

family.

Their Lordships thick that the High Court erred in not treating the case from this point of view. It is not a case of doubtful title, but of elear title. Had the High Court been of the opinion that the title of the appellant was clear, it is very probable that they would have reached the result on a review of the evidence and of the law about to be stated, that no contrary right to these properties has been. acquired by the Moplah family by reason of possession. The rule stated by this Board in Radhamoni Debs v. Collector of Khulna (1) seems to be very applicable to the present case. It is as followe:--

"It is necessary to remember that the onus is on the appellant, and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done possession during of twelve years in controversy may be conceded evidenced by indeed and is dispute which erded in the Megistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent, to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute which has all or any of these qualities. The best attested cases of possession do not cover the whole period, and apply to small portions of the ground."

thinks that the learned The Board Temporary Subordinate Judge of Tellisherry approached the case correctly from this point of view, and so approaching it the Board, after full consideration, accepts his analysis of the evidence and is of opinion that possession upon the part of the respond. ent of these hills has not been adequate "in continuity, in publicity, and in extent" co

^{(1) 27} C 943 (P. C.); 27 I. A. 136; 4 C. W. N. 597 2 Bom. L. R. 592; 7. Sar. P. C. J. 714; 14 Ind. Dec (N. s) 617.

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as to "show that it is possession adverse to the competitor." That competitor is the appellant, and the foundation of his title is the judgment of 1868 which has just been cited.

Their Lordships cannot part with the case without referring to, and following the dostrine of onus probands in such cases, as laid down by this Board in Secretary of State for Ohelikani India v. Ram 1 Rao (2). Standing a title in "A," the alleged adverse possession of 'B," must have all the qualities of adequasy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Assordingly, when the holder of title proves, as in their Lordships' view he does with some fullness prove in the present case, that he, too, has been exero's. ing during the surrency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destory that adequacy and interrupt that exclusiveness and continuity which is demand. ed from any person challenging by possession the title which be bolds.

Their Lordships will bumbly advise His Majesty that the appeal be allowed, the decree of the High Court set aside with easts, and the decree of the Subordinate Court restored. The respondent will pay the costs of the appeal.

W C. A. Appeal allowed.
Solicitors for the Appellant.—Mesers.
Chapman Walker and Shephard.

Solicitor for the Respondent .- Mr. Douglas Grant.

(2) 85 Ind. Cas. 902; 89 M. 617 (P. C.); 43 I. A. 192; 31 M. L. J. 824; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom, L. R. 1007; 25 C. L. J. 69.

OUDH JUDIUIAL COMMISSIONER'S COURT.

SECOND CIVIL APPRAL No. 151 or 1921. July 13, 1921.

Present:—Syed Wazir Hasan, A J. C. BAH & DUR SINGH AND OTBERS—PLAINTIPES

-APPELLANTS

N. S. SULTAN HUSAIN KHAN

AND OT ERS DEPENDANTS - RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2-

Hindu Law-Alienations by widow-Reversioner, separate suit by-Cause of action.

The estate of a Hindu widow is not a life-estate. She is a proprietor of the estate with a right of alienation subject to certain qualifications. Each alienation by the widow in the exercise of that right must be judged by the circumstances in

which it is made, [p. 457, col. 2.]

An alienation by a Hindu widow of her estate or a portion of the estate is not void ab initio but is only voidable if it transgresses the limitations imposed by the Hinda Law on the power of alienation, The death of the alienor does not necessarily render the alienation inoperative. The death of the alienor widow only enlarges the reversioner's right of barely challenging the alienation into a right of entering into possession of the property covered by the particular alienation. His right to challenge the validity of the alienation is, therefore, a permanent factor of his title to the property which developes from a bare spes successionis into a vested interest as an effect caused by the death of the widow. Further, as the validity or otherwise of each alienation depends upon the circumstances in which it is made and, as these circumstances vary with each alienation, it follows that the reversioner's right to challenge the validity of one alienation is different from his right of impeaching the validity of a separate and independent alienation though both the rights may arise out of the one and the same title. Again, he has a right of election; he may choose to challenge one alienation and assent to another, or he may challenge both or assent to both. He may exercise his right of election in regard to one alienation at one time and in regard to another alienation at another time. [p. 457, col. 2; p 459, col. 1.]

Therefore, a reversioner has a separate cause of action in respect of each alienation made by the widow, and a suit to recover property comprised in one alienation is not barred by Order II rule 2 of the Civil Procedure Code by reason of a prior suit for the recovery of property comprised in

another alienation. [p. 460, col. 1.]

Appeal from a decree of the Subordinate Judge, Unao, dated the 20th April 1921, confirming that of the Munsif, South Unao, dated the 23rd December 1920.

Mr. St. S. Thompson, for the Appellants. Mr. Zahur Ahmad, for Respondents Nos. 1 to 5.

JUDGMENT.—This is a second appeal from the decree of the Sabordinate Judge of Unao dated the 20th of April 1921. affirming the decree of the Munsif (South). Unao, dated the 23rd of December 1920, by which the plaintiffs appellants' suit was dismissed.

One Ishri Singh was the owner of some property, including the property in suit, which is a specific plot No. 2691, measuring 2 bighas and 3 biswas, situate in village Dih, Pargana Hadha, District Unac.

BAHADUR SINGH U. SULTAN BUSAIN KHAN,

Ishri Singh died sometime in 1905 and was succeeded by his widow, Musammat Gundah, who admittedly took a Hindu female's estate in the inheritance of her husband.

Musammat Gundah effected several alienations by way of sale in respect of her husband's property in favour of the defendantsrespondents' ancestor, Nawab Muzaffar Husain Khan. The chronology of the saledeeds is as follows:—

- 1. 31st October 1905.
- 2. 1st February 1903.
- 12th August 1907.
- 4. 2nd October 1907 (Exhibit 1.)
- 5. 16th August 1909.
- 6. 13th August 1910.

Musammat Gandah died about 8 years ago. The plaintiffs appellants and the defendant No. 2, Jawahir Singh, are admittedly the reversioners entitled to succeed to the inheritance of Ishri Singh on the death of his widow, Musammat Gundah.

On the 5th of August 1912 the appellants commerced an action in the Court of the Subordinate Judge of Unao against Nawab Muzaffar Husain Khan by which they challenged the propriety of the alienations above-mentioned except the sale of the 2nd October 1907 which they omitted to include in their elaim. The lands covered by the five cales were specifically mentioned in paragraph 2 of the plaint of that suit and at the foot of the same plaint were set out the five sale-deeds with reference to their dates. The substantial relief prayed for was the possession of these of those lands, the remaining th being owned by Jawahir Singh who occupied the same position in the array of parties of that suit as he does in the present suit (Exhibit A.1). The elaim was decreed on the 26th of February 1913 (Exhibit 3).

On the 7th August 1920 the plaintiffs. appellants instituted the present suit, out of which this appeal arises, against the same Nawab Muzaffer Husain Khan who has since died and is now represented by his heirs, the respondents. By this suit the alienation of the 2nd October 1907 is challenged and possession is sought of \$\frac{3}{4}\$; the of the plot No. 2691 which is the only property conveyed by the sale deed of that date. The main plea set up in defence with which alone I am concerned in this appeal

is the bar prescribed by Order II, rule 2. of the Code of Civil Precedure (Act V of 1908). It is founded on the previous litigation to which reference has already been made. The plea has been accepted by both the Courts below as effective and the plaintiffs' suit has consequently been dismissed; hence this second appeal.

The sole question for determination is, whether or not the present suit is barred by the provisions of Order II, rule 2. The answer to this question depends upon the answer to a further and single question, whether the cause of action of the present suit is the same as the cause of action of the previous suit?

Now, Order II provides rules the function of which is to regulate the frame of suit, and the object which the partisular rule 2 is intended to serve is stated by the Legislature itself in rule 1, which runs thus: "Every suit shall as far a practisable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation conserning them." Therefore, the inquiry whether the bar prescribed by rule 2, sub rule (2), is applicable or not is necessarily influenced by the consideration of the obligation of complying with the avowed object of the Legislature. The principle under lying these provisions of law is the same as is expressed by the maxim, nemo debt bis vezari pro una et eadem causa. The same principle is equally the basis of the rule of res judicata supported by another maxim found. ed on public policy, Interest reipublica ut sit finis litium; Lockger v. Ferryman (1) Bearing there general principles in mind, I now proceed to examine what constitutes the cause of action in a suit of the nature of the present suit.

The first step in the process is to determine the exact and legal characteristics of the estate of a Hindu widow, in rallation to her powers of alienation and the right of reversioner arising therefrom. The estate of a Hindu widow is not a life estate and it is an error to suppose, as seems to have been done in this case, that all alienations effected by her automatically exhaust themselves by the determatically exhaust themselves by the deter-

^{(1) (1877) 2} App Cas. 519; 4 Rettie 32.

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mination of her life as would generally be the case in respect of transfers made by a life tenant. In the case of Goluckmoney Dabee v. Diggumber Day (2) Peel, Chief Justice, observed as follows:—

"It was contended by Mr. Theobold, that the estate of a Hindu widow, when she takes as heir, is a life estate There is always danger of error in proceedings upon rules or terms of one body of law, whilst applying a different law. If by life estate is meant an estate of the same nature, and involving the same consequences, as the life estate known to the English Law, then it is elear that the estate of a Hindu widow, taking as heir, is not that estate, and differs importantly from it." In the case of Sreemutty Jado. money Dabee v. Sarodaprosono Mookerjee (3), Colvile, C. J., said :- "The estate of a Hindu widow is very different from a mere life estate......." Sir Lawrence Peel says: "The estate though sometimes so expressed to be, is not an estate for life; when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do if she had but a lefe estate." In the same judgment the learned Chief Justice refers to the case of Cossinaut Byenck v. Harroosocndry Dosses (4) decided by the Privy Conneil, and says, that it "establishes that the estate of a Hindu widow is something higher than a life estate; that it entitles her to the possession of the property without restriction, and that she has a qualified power of disposition in it the limits of which it is difficult, if not impossible. exactly to define further than by saying that the propriety of any particular exereise of that power must depend on the eircumstances in which it is made, and must be consistent with the general prineiples of Hindu Law regarding such dispositions." In the above quotations the italies are mine. In the well-known case of Collector of Masulipatam v. Cavaly Vencata Narrainapah (5), Lord Justice Turner observed:-"It is olear that under the Hindu Law the widow, though she takes

compared with any estate that passes under the English Law by inheritance, it is an anomalous estate. It is a qualified proprietorship and it is only by the principles of Hindu Law that the extent and nature of the qualification can be determined." These authorities, therefore, establish the following conclusions:—

(1) The estate of a Hindu widow is.

not a life estate.

(2) She is a proprietor of the estate with a right of alienation subject to certain qualifications.

(3) Each alienation by the widow in the exercise of that right must be judged by the circumstances in which it is made.

These propositions have recently been affirmed by the Privy Council in two cases to which reference will be made hereafter, As a logical corollary to the above propositions follows the proposition that an alienation by a Hindu widow of the estate, or a portion of the estate, is not void ab initio but is only voidable if it transgresses the limitations imposed by the Hindu Law on the power of alienation. It further follows that the death of the alienor does not necessarily render the alienation icoperative. These logical deductions were affirmed by the Privy Council in the case of Modhu Sudan Singh v. Rooke (6). In delivering the judgment of the Judicial Committee in that case. Sir Richard Couch made the observation:- "In considering their effect it must be observed that the putni was not void; it was only voidable; the Raja might elect to assent to it and treat it as valid. Its validity depended upon the circum. stances in which it was made. The learned: Judges of the High Court appear to have fallen into the error of treating the putni as if it absolutely same to an end at the death of the widow,"

In the present ease, therefore, the death of Musammat Gundah ereated no alteration in the legal characteristics of the alienations, the validity of each of which depended upon the circumstances in which it was made. The only difference which her death made was the enlargement of.

^{(2) 2} Boul. Rep. 193; 8 Ind. Dec. (o. s.) 542. (8) 1 Boul. Rep. 120; 3 Ind. Dec. (o. s.) 72.

^{(4) 2} Morley's Digest 198; 3 Ind. Dec. (o s.) 907. (5) 8 M. I. A. 529; 2 W. R. 61. (P. O.); 1 Suth. P. O. J. 476; 1 Sar. P. O. J. 820; 18 E. B.631,

^{(6) 25} O. 1; 24 I. A. 164; 1 C W. N. 433; 7 M. L. J. 127; 7 Sar, P. O. J. 194; 13 Ind. Dec. (N. s.) 1 (P. O.).

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the reversioner's right of barely challeng. ing the alienation into a right of entering into possession of the property envered by the particular alienation. His right to challenge the validity of the alienation is, therefore, a permanent factor of his title to the property which developes from a bare spes successionis into a vested interest as an effect caused by the death of the widow. Farther, as the validity or otherwise of each alienation depends upon the eirenm. stances in which it was made and, as these circumstances vary with each alienation, it follows that the reversioner's right to challange the validity of one alienation is different from his right of impeaching the validity of a separate and independent alienation though both the rights may arise out of the one and the same title. Again, be has a right of election; he may choose to challenge one alienation and ascent to another, or he may challenge both or assent to both. He may exercise his right of election in regard to one alienation at one time and in regard to another alienation at another time. Nothing is a surer indication of election than a challenge by suit. The following observations of Lord Davey in the case of Bicy Gopal Mu erji v. brishr.a Mahishi Debi (1) are, in my judgment, conclusive on the point:- A Hindu widow is not a tenant for life, but is owner of her busband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's beirs upon her death. she may alienate it subject to certain conditions being semplied with. Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to effirm it, or he may at his pleasure treat it as a nullity without the interevention of any Court, and he shows his election to do the latter by sommensing an action to recover possession of the property."

The next step is to determine what cause of action means. In the case of Cooke v. Gill (8), Brett, J., said:—
"'Oause of action' has been held from the

5 (7) 24 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 1:3; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 87 (P. C.).

(8) (1873) 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T.

32; 21 W. R. 334.

earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed-every fact which the defendant would have a right to traverse." Lord Esher, M. R., in his judgment in the case of Read v. Brown (9) defined cause of action' in the following words:- "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." The Master of Rolls further explained the above defigition in his judgment in the case of Cohurn v. Colledge (10) and that explanation is apposite to the point under consideration. He said:- 'The words 'if traversed' were inserted to make it clear that the facts spoken of were those which the plaintiff must allege in his statement of claim, as it is now called, or his declara. tion, as it used to be called." This exposition of the term 'sause of action' makes it perfectly clear that it has no relation to defence. It primarily includes such material facts which the plaintiffs must allege to show his right to t e judgment of the Court in his favour. This is substantially the same as what Lord Watson said in the case of Chand Kour v. Partab Singh (11). He said: - Now the cause of action has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff, It refers entirely to the grounds set forth in the plaint as the cause of action; or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. also Mahomed Riasat Ali v. Hasn Banu (12)Palaniappa and Saminathan Ohetty V.

10 Ind. Dec. (N. s.) 787.

^{(9) (1889) 22} Q. B D. 128; 58 L. J. Q. B. 120; 60

L. T. 250; 37 W. R. 131. (10 · (1897) 1 Q B. 702; 66 L. J. Q. B. 462; 76 L.

T. 608; 45 W. R. 4-8.
(11) 16 C. 98; 15 I. A. 156; 5 Sar P. C. J. 248; 12

Ind. Jur. 331; 8 Ind. Dec (N. s.) 65. (12) 21 C. 157; 20 I. A. 155; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique & Jackson's P. C. No. 182;

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Ohetty (13) I have already shown that it is the right of the reversioner to challenge or to affirm an alienation made by the widow, and I have also shown that the validity or invalidity of a particular alienation depends upon the circumstances in which that aliena. tion was made. This right is not in any manner affected by the fast that the reversioner slaims a declaratory relief in the lifetime of the widow and a possessory relief after the death of the widow. It has been held that a judgment in the reversioner's suit for a declaration impeashing the validity of a particular alienation by the widow in her lifetime operates as res indicata in a subsequent suit for possession by him in respect of the property covered by the same alienation after the death of the widow. It follows that his right to impeach any particular alienation is the same in both cases and that is his cause of action with regard to that alienation. I have already said that the plaintiffs asserted their right to challenge the five alienations in the former suit. They have now asserted their right in respect of the sixth alienation. The eause of setion of the two suits therefore, quit different. Strietly speaking, they could have brought as many as there were alienations. But because they joined many causes of action in one suit, as they were permitted to do by Order II, rule 3, there is no rule of law which further compels them to have joined all their causes of action in the same suit.

Though the cause of action has no relation to the defence which may be set up by the defendant, yet it would be an error to suppose that it has no relation to the defendant and his acts preceding the suit. A cause of action is not a theoretical term entirely, picked up from text books and placed on a plaint. In cases of torts, the right of the plaintiff and its infringement by the defendant will generally make up the cause of action In Williams v. Morland (14), sited by Bowen, L. J., in

Brunsden v. Humphrey (15) Littledate, J., said "Generally speaking, there must be a tempotal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case. " Order VII, rule 5, (Act V of 1908), is based on the same principle. It is as follows :--"The plaint shall show that the defendant is or slaims to be interested in the subject. matter and that he is liable to be salled upon to answer the plaintiff's demand." Now, in the present case the defendants' connection with the land in suit is wholly different from his connection with the lands covered by the other sales both in point of time and the subject matter of the alienations. Their act of infringement of the plaintiffe' right quathe property in suit is different from their act or acts of infringement of the plaintiffs' right qua one or the other of the properties previously in suit. "The claim in respect of the personality was not a claim arising out of the cause of action, which existed in consequence of the defendants baving improperly turned the plaintiffs out of possession of Vicavaram. It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the cause of conversion of several thinge. There the act of conversion of the several things is one cause of action and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one elaim and one cause of action" Per Sir B. Peacock in Littapur Raja v. Suriya Row (16). So here one unlawful act of the defendants in regard to one property is different from another unlawful act of theirs in regard to another property. The following three cases decided by this Court are referred to in the jugdment of the lower Court, but they are not in son flist with any of them.

Partab Narain Singh v. Musammat Sargu Dei (17), Mohammed Asghar v. Amjad Ali (18), Abul Kasim Khan v. Jaggu Singh (19).

^{(13) 26} Ind. Cas. 228; 41 L. A. 142; 18 C. W. N. 617; 17 New Law Reports 56; 83 L. J. P. C. 131; (1914) A. C. 618; 110 L. T. 913 (P. C.).

^{(14) (1924) 2} B. & C. 910; 4 D. & R. 583; 2 L. J. (o. s.) K. B. 191; 26 R. R. 5 167 E. R. 620,

^{(15) (1885) 14} Q. B. D. 141; 58 L. J. Q. B. 476; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4.

^{(16) 8} M, 520; 12 I. A. 116: 9 Ind. Jur. 774; 4 Sar. P. C. J. 638; 8 Ind. Dec. (N. s.) 356 (P. C.),

^{(17) 5} O. C. 178. (18; 8 O. O. 889.

^{(19) 5} Ind. Cas. 489, 13 O. C. 19.

IERMANAND C. LAKHMICJAND,

I am, therefore, of opinion that each alienation gave rise to a separate and distinct cause of action and, consequently, the present suit is not barred by Order II, rule 2.

I allow the appeal, set aside the decrees of the Courts below and grant a decree to the appellants for possession of the of the plot in suit, but dismiss their elaim as to mesne profits before the institution of the suit. The appellants will get their costs throughout from the respondents Nos. I to 5 except as regards their elaim for mesne profits.

I may observe that though the judgment of the lower Appellate Court decides the suit on a preliminary point only and I have reversed that judgment, yet there remained no other point in the case which might have necessitated a remand. The only other point in the case was one of legal necessity which was decided adversely to the respondents by the Court of first instance but was not re opened by them in the lower Appellate Court.

Z. K. & J. P.

Apreal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 220 OF 1921. March 15, 1922.

Present: - Mr. Kotwal, A. J. C.
Seth PERMANAND AND AND ANOTHER—
PLAINTIPES—APPLICANTS

tersus

LAKHMICHAND-DEFENDANT

-NON-APPLICANT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13

-Ex parte decree-Application to set aside, who can
make-Minor defendant not properly represented by
guardian, whether can apply.

A minor defendant who is not represented in a suit by a properly appointed guardian is not a party to the suit in the proper sense of the term, and the proceedings in the suit cannot bind him. Under Order IX, rule 13, of the Civil Procedure Code it is the defendant in the suit who may apply to set aside an exparte decree. A minor not represented by a competent guardian not being a defendant, cannot maintain such an application.

Application for revision of an order of the Sab Judge, Seoni, dated the 2nd September 1921, in Missellaneous Case No 9 of 1921.

Mr. W. R. Puranik, for the Applicant, Mr. M. R. Dixit, for the Non-Applicant.

JUDGMENT .- The applicant, Soth Parmanand, instituted against the non-applicant, Lakhmieband, and two others Suit, No. 100 of 1908 in the Court of the District Judges Seoni, and on the 25th January 1910 obtained a decree ex pirte against him. On the 17th February 1921 the non-applicant filed the present petition praying that the ex parte deeree be sat aside on the ground, among others, that he was a minor when the suit was instituted and no guardian for the suit had been appointed. He stated that he came to know of the decree against him only on the 21st January 1921 when he was served with a notice in excention proceedings. The applicant denied these allegations. The lower Court passed an order setting aside the ex parte decree. It found that the non-applicant was a minor when the suit was instituted and the decree passed and that he had no knowledge of the decree till the 21st January 1921. It held that as no guardian was appointed for him the decree so far as he was concerned was a nullity. The applicant applies for revision of the lower Court's order.

A minor defendant who is not represented in the suit by a properly appointed guardian is not a party to the suit in the proper sense of the term and the proceedings in the suit cannot bind him: Rashid-un-nisz v. Muhammad Ismail Khan (1). On the non-applicant's own allegations he was a minor at the date of the institution of the suit and was never a defendant in the suit. It is the defendant in the suit who may apply under Order IX, rule 13. First Schedule, Civil Procedure Code. The non-applicant, therefore, not being a defendant cannot make the

^{(1) 3} Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.).

MIQBUL AHMAD C. PARHAT ALI.

application : Eda Punnayya v. Jangala Kama Botayga (2). In Bhura Mal v. Har Kishan Das (3), Bhagwan Dayol v. Param Sukh Das (4) and Bhagwan Dayal v. Paran Sukh Das (5), where it seems to have been assepted that an application under Order IX, rule 13, lies in cases like the present, the point had not directly come up for decision. I, therefore, hold that, upon the non applicant's allegations, no application by him under Order IX, rule 13, lay. The order of the lower Court is set aside. In view of the fact that the plea was not elearly raised in the lower Court each party will bear his own costs in this and the lower Courts.

J, P.

. 3.

Order set aside.

(2) 53 Jnd. Cas. 184; 37 M. L. J. 399; 26 M. L. T. 827; 10 L. W. 471; (1920) M. W. N. I.

(8) 24 A. 883; A. W. N. (1902) 76 (F. B).

(4) 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179.

(5) 38 Ind, Cas. 366; 39 A. 8; 14 A. L. J. 818.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 196 of 1920. June 21, 1921.

Fresent:—Syed Wazir Hasan, A. J. C. MAQBUL AHMAD—PLAINTIFF—
APPELLANT

versus

FARHAT ALI AND OTHERS-DEPUNDANTS
-RESPONDENTS.

Adverse possession—Partition—Possession held under mistake—Permissive possession—Restoration.

Permissive possession does not rest barely on an expressed agreeement by means of which one party permits another to take possession of his property. It is a question of legal inference from the circumstances of a particular case. [p 463, col. 2; p. 464, col. 1.]

Where on partition being effected between coparceners each by mistake gets into possession of certain plots which have been allotted to the other, and such possession continues even after the mistake is discovered, each must be deemed to hold possession of the plots with equal consciousness that he is entitled to hold possession of them so long as the other party holds possession of his plots, in other words, each holds in lieu of what the other holds, and each is liable to restore the plots which he holds as soon as the other party delivers the plots which that party holds in lieu of the former, [p. 463, col. 2.] The possession held under such conditions is lacking in the permanent presence of the essential element animus domini in the conception of juristic possession. A person who has acquired possession precaris, is not deemed to have juristic possession. He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to the other. The possessory relation in such circumstances is imperfect. It is vitiated by the duty to restore and must, therefore, be deemed as equivalent to permissive possession. [p. 463, col. 2.]

In such a case, where the parties hold possession of the wrong plots in ignorance of the title of the other party, then both must be held to be labouring under a mistake of fact and when restoration of one party takes place to his original position he cannot recover from the other without surrendering the benefit which he derived under the mistaken act. This principle of equity is not limited only to cases of agreements, but extends even to acts committed under a common mistake of fact.

[p. 464, col. 2.]

Appeal from a decree of the Subordinate Judge, Bara Banki, dated the 20th March 1920, modifying that of the Munsif, Ramsanebighat, dated the 27th November 1919.

Mr. Naziruddin, holding the brief of Mr.

Habibuddin, for the Appellant.

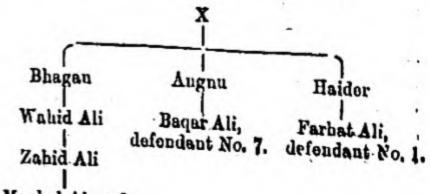
Mr. Kunj Behari Lal, for Respondents, No. 2.

Mr. M. Wasim, for Respondents Nos. 3, 4 (a) 5 and 6,

Mr. S. N. Ahmad, holding the brief of Mr. Mohammad Ayub, for Respondent No. 7.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Bara Banki, dated the 20th March 1920, confirming the decree of the Muncif of Ramsanehighat, dated the 27th November 1919 with a slight modification, which will be considered hereafter. The plaintiff is the appellant in this appeal as he was in the appeal before the Subordinate Judge.

A short redigree may be given at the outset of the judgment to elucidate the relationship in which the main parties to this litigation stand to each other.



Maqbul Ahmad, plaintiff-appellant. MAQBOL AHMAD C. PARHAT ALI.

The defendants Nos. 2 to 6 are transferees from the defendant No. 1, Farhat Ali. Bhagan, Angna and Haider were owners of the patti called Angon comprising a 1 anna 6 pies share in the village Kondra Sukhipur. Pargana Rudauli, District Bara Banki, in equal shares, that is, each owned 6 pies. In the year 189; an application was made to the Court of Revenue for partition amongst the ec-sharers of patti Angnu. Partition of arbitration. effected by means arbitrators prepared two sets of chittis, each set comprising three lots. One set was filed in the Revenue Court and the chitthis of the other set were given to Farhat Ali, Bagar Ali, and Zahid Ali, one eash. The chitthi, therefore, which was delivered to Farbat Ali, indisated the separate property to which he was entitled. Another chitthi similarly indicated the property which was allotted to Bigar Ali and the third chitti showed the property which the arbitrators had allotted to Zahid Ali. The other set of the lots which was filed by the arbitrators in Court was accepted by each of the three brothers. On the 25th August 1896 Angna's chitti was marked lot A, Zabid Ali's chitthi was marked lot B and Farhat Ali's chitthi was marked lot C. Each chitthi was made up of a large number of plots of land. The chitthi which the arbitrators delivered privately to the parties were signed by the arbitrators and in the chitthi so obtained by Zahid Ali there were mentioned, among a large number of other plots, plots Nos 1/1, 69, 102/1 and 260. In the chitthi which Farbat Ali, defendant No. 1, received from the arbitrators appear plots Nos. 25, 106-1, 242 and 254 1. In respect of these two sets of plots there was a discrepancy between the chitthi privately delivered to Farhat Aliand Zahid Aliand the chitthi which these two persons obtained from the Court on the 25th August 1896. Plots Nos. 1/1, 69, 102/1 and 26J were shown in Farhat Ali's chitthi while plots Nos. 25, 106/1. 242 and 254/1 were shown in the chitthi of Zahid Ali. There is no doubt, however, that Zabid Ali and Farhat Ali entered into the possession of the plots in assordance with the chitthi privately delivered to them by the arbitrators. It must also, in the circumstances of the case, be presumed that both Zahid Ali and Farhat Ali having obtained chitthis from the Court were conscious of the discrepancies existing between the two sets of the chitthis.

In 1911 proceedings were started for the correction of the village papers, the result of which was that those papers were altered in accordance with the Court chithis.

The plaintiff-appsllant brought this suit for possession of plots Nos. 1/1. 69, 102/1 and 260 on the ground that he had acquired title to these plots by prescription, alleging that he had been dispossessed of them in 19.5. In the alternative, he claimed posses. sion of plots Nos. 25, 106/1, 242 and 204/1. His claim was contested mainly by the defendants transferees Nos. 2 to 6. The suit was dismissed in its entirety by the Court of first instance but the lower Appellate Court has given the plaintiff a decree for plot No. 1/1. As regards the former set of the plots, the defense was that the plaintiff did not acquire title to those plots by continuous adverse possession for 12 years. As regards the eesond set of plots, the defence of the transferees of those plots was that their possession combined with the possession of their transferor, Farhat Ali, constituted adverse possession, which had run continuously for a period of 12 years as against the plaintiff and that they had. therefore, asquired title to those plots by prescription. This defence as regards both sets of the plots has prevailed except with regard to plot No. 1/1 as bas already been stated.

I will first deal with the question of plots Nos. 69,102/1 and 260. There can be no doubt that the title to these plots, as much as the title to the other set of plots, must be founded on the chitthis which were delivered to Zahid Ali and Farhat Ali by the Court on the 25th 1896 and with reference to those chitthis it is perfectly clear that the plaintiff has no title to these plots. His ease of acquisition of title by prescription has also, in my opinion, been rightly negatived by both the Courts below. Not only has plaintiff failed to prove continuous adverse possession for a period of 12 years over the plots in question as found by the lower Appellate Court but his possession. in the circumstances hereafter to be considered in detail, cannot be constituted to be adverse.

The question of bare possession by the plaintiff of the plots apart from the natura

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and characteristics of it must be determined before taking into consideration the question of his right to recover the other set of plots. The learned Subordinate Judge on this question of possession has considered the oral evidence in support of it, as entirely detached from the documentary evidence bearing on the same point. In criticising the oral evidence be saye, "I agree with the learned Munsif that this evidence is not sufficient to prove adverse possession for 12 years." After recording this finding, he advorts to the consideration of the documentary evidence with reference to which his only comment is as follows:- 'The documentary evidence, if it has any value, relatee only to a period of 8 years." Toese 8 years cover the period between 1934-1911 and the evidence with regard to that period sonsists of khasras and khataunis (Exbibits 5 to 12). It is not disputed before me that these dosuments furnish sufficient proof of the plaintiff's possession over the plots in question during the period to which they relate and this I take it to be the result of the finding of the lower Appellate Court as well. Though the plaintiff failed to establish his continuous adverse possession for a full term of 12 years as required by law, it must be held, in agreement with the lower Appellate Court, that he held possession of these plots for a period of 8 years from 1904 to 1911.

Having determined the question of the plaintiff's possession over plots Nos. 69, 102/1 and 260, I now some to the consideration of his right to plots Nos. 25, 106/1, 242 and 254/1. It has already been shown that these plots had fallen within the chitthi which the plaintiff's father, Zahid Ali, obtained from the Court on the August 18:6. It follows that the plaintiff has a title to these plots and has a right to recover them unless the title has been extinguished by the operation of the law of limitation as pleaded by the defendants and given effect to by the Courts below. Exhibits 13 to 16 are copies of khasras and khataunis relating to those plots in respect of the years 1911 to 1915. There can be no doubt, therefore, that the plaintiff was in possession of the plots in question during that period of time. The defendants' ples, however, is that they had perfected

adverse possession of these plots and consequently acquired title by prescription prior to the year 1911. Their case must be taken to be that their possession commenced from the year 1826 in virtue of the chitthi, which was delivered to Farhat Ali by the arbitrators. The question which I have to decide is, whether the possession of Farhat Ali and his transferees can be regarded, in the circumstances of this case, adverse to the plaintiff, who admittedly had title to these plots under the chitthi which his father Zahid Ali obtained from the Court.

There is, perhaps, no legal conseption more open to a variety of meaning than possession,' said Lord Justice Fry in Lyell v. Kennedy (1). The position of the parties in respect of the plots which they had obtained under the chittis privately delivered to them by the arbitrators in my opinion comes to this. Each party was conscious, in view of the proceedings in Court of the 25th August 1896, that he had no title to the plots but that each had possession of them with equal consciousness that he was entitled to hold possession of the plots in virtue of the private chittis so long as the other party held possession of his plots under the similar chitthis; in other words, each held in lieu of what the other held and each was liable to restore the plots which he held as soon as the other party delivered the plots which that party held in lieu of the former. The possession held under such conditions is lacking in the permanent presence of the essential element animus domini in the conception of juristic possession. According to Roman Law such a possession will only amount to detention. A person who has asquired possession precaris, is not deemed to have jurietie possession. He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to the other. The possessory relation such eireumstances is imperfect. It is vitiated by the duty to restore and must, therefore, be deemed as equivalent permissive possession. Permissive posses. sion does not rest barely on an expressed

(1) (1887) 18 Q. B. D. 796 at p. 818; 86 L. J. Q. B. 303; 56 L. T. 647; 85 W. R. 725,

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agreement by means of which one party permits another to take possession of his property. It is a question of legal inference from the circumstances of a particular case. (Sie Sohm's Institutes of Roman Liw by Ladlie, Second Edition, pages 354 and 355). This characteristic of possession is not limited to Roman Law but is equally a part of the English system of jurisprudence (See Adnam v. Eirl of Sandwich (2), Mr. Justice Markby, in delivering judgment in the ease of Bejoy Chunder Baneriee v. Kally Prosonno Mco'ser ee (3), observed as follows: - By adverse possession I understand to be meant possession by a person holding the land on his own behalf, or some person other than the true owner, the true owner having a right to immediate possession. If by this adverse possession the Statute is set running, and it continues to run for twelve years, then the title of the true owner is extinguished and the person in possession becomes the owner." The important words in this pronouncement are "the true owner having a right to immediate possession." In the present ease none of the parties had a right to the possession of the property which belonged to him under the Coart chitthi and whish was held by the other party under the private chitthi until the former was dispossessed by the latter. The maxim of law is Contra non valentem agere This maxim was nulla currit præscriptio. applied by the Privy Council to the case of Diwan Manuar Ali v. Annodapersad In delivering the judgment of Rai (4). the Privy Council in that case Sir James W. Colvile observed as follows: - 'In these eireumstances it seems to their Lordships that even if, technically, the lands now in question remained, pending the appeal, in Samdal, there was no necessity or duty lying upon the plaintiff to assert his rights Nasiruddin's beirs in those lands until were put into possession, or, at all events until the rights of the parties had been finally determined by the dismissal of the appeal,"

(2) (1877) 2 Q B D. 485; 46 L. J. Q. B. 612.

(3) 4 C. 327 at p. 323; 2 Shome L. R. 106; 2 Ind.

Dec. (N. s.) 207.

(4) 7 I. A. 1; 5 C. 644; 6 C. L. R 71; 4 Sar P. C. J. 88; J Suth. P. C. J. 697; 4 Ind. Jur. 142; 3 Shome L. 1.7; 2 Ind. Dec. (N. s.) 1019 (P. C.).

There is one more aspect of this question, which may now be considered. I have already held that the parties must be taken to have possessed the knowledge of the discrepancy in the two chitthis from the very beginning; but if it is possible to so construe the circumstances of the case as to hold that the parties were in ignorance of the discrepancy, then it would follow that both were labouring under a mistake of fact and when restoration of one party takes place to his original position he cannot resover from the other without surrendering the benefit which he derived under the mistaken act. This is a well-known principle of equity and is, in my opinion, perfectly applicable to the fact of this case. The principle is not limited only to eases of agreements, which are provided for by sections 64 and 65 of the Indian Contract Act (IX of 1872) but extends even to acts committed under a common mistake of fact (See Story's Equity Jurisprudence, section 141). The same principle underlies the provisions of section 86 of the Indian Trusts Act (II of 1882). The defendant, Farhat Ali, and such of his transferees as are in possession of plots Nos. 25, 106/1, 242 and 254/1, became entitled to restore those plots to the plaintiff when he was dispossessed of plots Nos. 69, 102/1 and 260 in or about the year 1912. The plaintiff's suit is admittedly within limitation from that period.

The defendant No. 7, Bagar Ali, has lodged cross-objections in respect of plot No. 1/1. This plot, as already shown, is not in the Court chitthi of the plaintiff's father but is in the chitthi of the defendants' father Apgnu. The plaintiff, therefore, has no title to it and I have already held that no question of adverse possession does arise in this case as amongst these persons. As I am going to award a decree to the plaintiff for the plots which his father obtained under the Court chitthi, it is obvious that be must surrender the posses. sion of plot No. 1/1 which belong to him but belongs to the defendant Nc. 7.

I allow the appeal, set aside the decrees of the Courts below and grant a decree to the plaintiff for possession of plots Nos. 25 measuring 1 bigha 13 biswas, 106/1 measuring 1 bigha 1 biswas, 242/1 measuring 13 biswas,

Bholabam U. Turaram.

and 254/1 measuring 1 bigha 1 biswa, as detailed in paragraph 11 (b) of his plaint, and dismiss his suit with regard to plots Nos. 1/1, 69, 102/1, and 260. The plaintiffappellant will get his socts from the respondent No. 2 and the respondents Nos. 3 to 6 will get their costs from the plaintiff appellant in all Courts. The eross objections of the respondent No. 7 are allowed, as already indieated. He will get his costs from the plaintiff-appellant in this Court but will bear his costs in the lower Court.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAU No. 414 OF 1921. April 5, 1922.

Present:-Mr. Hallifax, A. J. C. BHOLARAM - DEFENDANT - APPELLANT

tersus TUKARAM-PLAINTIPF-BESPONDENT.

U. P. Land Revenue Act (II of 1917), ss. 192, 229 -Lambardar-Remuneration not fixed under s. 192 -Remuneration, any, whether allowable - Admission in First Court, whether affected by denial in Appellate Court.

Section 229 of the C. P. Land Revenue Act, II of 1917, continued the state of things existing under Act XVIII of 1881 in regard to the remuneration of lambardars and the fact that the Deputy Commissioner did not fix the remuneration of a lambardar of a village under section 192 of the Act could not disentitle such a lambardar to the remuneration.

A party cannot deny in appeal what he admitted

in the First Court.

Appeal against a decree of the District Judge, Bhandara, in Civil Appeal No. 50 of 1921 decided on 4th May 1921.

Mr. D. T. Mangulmurti, for the Appellant. Mr. B. V. Pradhan, for the Respondent.

JUDGMENT.—In this suit the lambardar of a village slaimed from a so sharer His remuneration as lambardar for the first three years during which the Land Revenue Act, 1917, was in force. He claimed a sum equal to 5 per cent, of the land: revenue of the village, at which rate this "hagq" had always been paid to him

assording to the sixth of the rules framed by the Chief Commissioner under section 137 of the Land Revenue Ast, 1881. In the First Court the defendant never made even a distant suggestion of a denial that the lambardar was entitled to recover a sum equal to 5 per cent. of the land revenue from him as his remuneration. began by denying that the plaintiff was the lambardar during the years covered by the elaim, but eventually admitted it and expressly confined himself to the single plea that the plaintiff was not entitled to

get any interest.

.(2). The beginning of the judgment of the First Court runs as follows: "The defendant's Pleader now admits that the plaintiff is entitled to Rs. 83.4.0 for three years for his remuneration as lambardar. only point pressed is that no interest can be elaimed by plaintiff and so elaim for Rs. 26-10-0 is denied out of Rs. 109-14-0." The learned Muneif went on to say that there was no law debarring the plaintiff from getting interest and he ought to get it by way of damages, as the defendant was shown by his own pleas to have been refusing to pay, and that the rate elaimed (2 per cent. per mensem) was not unreasonable.

(3). The defendant appealed against the decree on two grounds. The second ground, which was apparently regarded as subsidiary, was that interest should not have been allowed as no demand for payment had been made in writing, and to that extent the defendant susceeded and the decree was modified. The main ground was that the plaintiff was not entitled to get any remuneration at all as lambardar because the Deputy Commissioner had never fixed the remuneration for the lambardar of that village under section 192 of the Land Revenue Act, 1917.

(4). The learned District Judge held that, as the defendant had admitted in the First Court that the plaintiff was legally entitled to recover this money from him. he sould not deny it in appeal, and that, in any case, sestion 229 of Act II of 1917 continued the state of things existing under Act XVIII of 1881 in regard to the remuneration of lambardars. Against this the defendant has appealed. I consider it unnecessary to say more than that I YARUB KHAN C. EARMAN.

agree with the learned District Judge on both points. The appeal is dismissed and the defendant appellant is ordered to pay all the costs incurred in it.

G. B. D. & N. H. Appeal dismissed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 1289 OF 1921.
November 21, 1921.

Present: - Mr. Justice Broadway.
YAKUB KHAN-PLAINTIFF-APPELLANT
versus

RARMAN AND OTHERS-DEFENDANTS-

Pre-emption-Vendee associated with one having inferior rights to pre-emptor-Indivisible transaction-Appellate Court-New point.

If a purchaser having an equal right of preemption associates with himself, in a transaction that is indivisible, a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre emptor to enforce his rights even as to his own share of the purchase. [p. 467, col. '.]

Where the purchase money for a sale is paid by the various vendees in a lump sum without specifying the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed. [p 447, col 1.]

Achhru v. Labhu, 48 P. R. 1907; 81 P. L. R. 1908;

107 P. W. R. 1507, followed

Persons, who, by clothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre emption in respect of the transaction as a whole, cannot be allowed to turn round thereafter and claim to show that their real intention was something quite different from that expressed in the sale-deed. | p 467, col. 2.]

Maghi v. Narain, 20 Ind Cas 31; 6 P. R. 1914; 256 P L. R 19 3; 165 P W. R. 1912, followed.

Zora Singh v. Jogta Singh, 42 Ind. Cas 163: 83 P. R. 1917: 142 P W. R. 1917: Irangowda v Seshapa, 17 B. 772: 9 Ind. Dec (N s.) 507, distinguished

An Appellate Court should decide a new point raised before it, which is purely one of law and which can be decided without any further evidence.

[p. 468, col 1.]

Second appeal from a decree of the District Judge, Attock, at Campbelliur, dated the 11th March 1921, affirming that of the Munsif, First Class, Pindigheb, District Attock, dated the 27th October 1920.

Mr. M. S. Bhagat, for the Appellant. Mr. B. D. Eureshi, for the Respondents,

JUDGMENT -On the 14th of January 1919 one Shera sold 44 kanals 15 marlas of land, situate in Patti Said Khan, village Thalla, for Ra. 650 to Attar, son of Nawab. Karman, Amir and Faja, sons of Subs. On the 13th January 1920 Yakub Khan instituted a suit for possession of the land sold by pre emption. He alleged that he was entitled to pre-empt, firstly, as be was an owner in the village which the vendees were not; secondly, that he was an owner in Patti Said Khan which the vendees were not, and, thirdly, that he was entitled to a share in the shamilat which the vendees were not. He also challenged the correctness of the consideration stated in the deed, alleging that only Rs. 325 had been paid. The Trial Court framed the necessary issues, the first one being, "is the plaintiff's right of pre-emption superior to that of the defendants vendees?" The other issues related to the market. value, the amount paid, etc. It was found that Rs. 650 was the correct amount and that, of the verdess, Altar, son of Nawab, was not an owner in Patti Said Khan, while the other three were. It was also found that the other grounds alleged in the plaint as giving the plaintiff a superior right to pre empt, were not made out. The result was that the Trial Court granted the plaintiff a decree for postession of 4th of the land sold, namely, the fourth share of Attar on payment of Rs. 162 8.0 and dismissed the suit qua the rest of the land.

Against this decree the plaintiff preferred an appeal to the District Judge, alleging that the enit qua the the share of the land had been wrongly dismissed, inasmuch as the three vendees who owned land in Patti Said Khan, had associated with themselves Attar, son of Nawab, who was not a proprietor in that pitti Reliance was placed by the appellant on Achbru v. Labhu (1) and Maghi v. Narain (2). The learned District Judge held that the point raised was a new one, and that it could not be gone into in appeal. While discussing the anthorities relied on, the learned District Judge referred to Irangowda

^{(1) 48} P. R. 1907; St P. L. R. 1903; 107 P. W. R.

^{(2) 20} Ind Cas, 31: 6 P. R. 1914; 256 P. L. R. 1913; 165 P. W. R. 1913.

YAKUB KHAN O. KABMAN.

v. Feshapa (3) and Zora Singh v. Jagta Singh (4), and dismissed the appeal.

Against this decision the plaintiff has preferred a second appeal to this Court through Mr. M. S. Bhagat, and I have heard Mr. B. D. Kureebi on behalf of the

respondents.

In Achhru v. Labhu (1) it was held that if a purchaser having an equal right of pre-emption associates with himself in the purchase a person with rights inferior to those of the pre-emptor, he is not entitled to resist the claim of such pre emptor to enforce his rights even as to his share of the purchase. The facts in Maghi v. Narain (2) were very similar to those in the ease under consideration. There certain land was sold to five persons for R. 1,000. In the deed it was stated that the sale was to the first four vendees as regards four shares and to the fifth vendee as regards the remaining fifth share. for pre emption of the whole property was brought, the transaction being treated as indivisible and the vendor sought to lead parol evidence to show that the sale was a divisible one. It was held that persons, who, by elothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre emption in respect of the transaction as a whole, cannot be allowed to turn round thereafter and elaim to show that their real intention was something quite different. It was also held, following Achhru v. Labhu (1), that where the purchase money for a sale is paid by the various vendees in a lump sum without specification of the amounts paid by the various vendees, the transaction must be regarded as indvisible, though the shares to be taken by the various vendees may have been specified in the dead.

In the present case the dead of sale shows that 1th of the land was sold to Attar and the remaining 1ths to the other three vendees. The amount each of the vendees was to pay is not specified and it seems clear on the authorities cited that the transaction as evidenced by the deed of sale was clearly indivisible. Mr. Kurschi urged that this point had not been specifically raised in the Court below

allowed to lead parol would have been evidence to show that the transaction was a divisible one and that Attar had to pay a specific amount of money out of the total ecusideration. As to the first question, it seems to me that it is not straining the point to hold that this question was raised in the plaint, although not specifically. The plaintiff definitely stated that he had a right to pre-empt which was superior to that of the vendees, inasmuch as he was an owner in Patti Said Khan while the vendees were not. He has saccessfully shown that one of the vendees is not an. The transaction being owner in that Patti. indivisible it would follow that the preemptor's right to possession would be superior to that of the vendees as a whole. Wnether or not the ven less could be allowed to lead parol evidence to show that the sale was in fact one of a two fold charaster is extremely doubtful, having regard to the provisions of section 91 of the Indian Evidence Act. In any event, I would adopt the principles enunciated in Maghi v. Narain (2) and hold that presons, who, by elothing their transaction in a particular form, have induced a pre-emptor to some forward and elaim pre emption in respect of the transaction as a whole, cannot be allowed to turn round thereafter and claim to show that their real intention was something quite different from that expressed in the sale-deed. The desisions referred to by the learned District Judge do not appear to me to be in point. In Zora Singh v. Jagta Singh (4) the plaintiff had sued for pre-emption, basing his right on his relationship to the vendor. After he had led a certain amount of evidence he made an application asking to be allowed to amend the plaint by adding that he was a land owner in the same Thulla while the vendee was not. The application was not specifically granted and it was held that as the plaint had not been amended and the vendees had had no opportunity of pleading to the amended plaint the suit could not be decreed on that ground. As stated above, even if the matter had been more specifically asserted it would not, in my opinion, have been open to the defendants vendees to assert that the transaction was not as the sale deed showed it to be. Irangouda v. Seshapa (3) is also not in point. In that ease the plaint,

and had it been so raised the vendees

^{(3) 17} B. 772; 9 Ind. Dec. (N. s.) 507. (4) 42 Ind. Cas. 263; 83 P. R. 1917; 143 P. W. R.

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as the absolute property of A and the matter was tried on the issue whether A was the absolute owner of the property. The First Court of Appeal found that although A was not an owner be was a permanent tenant. This was held to be a setting up of an entirely new case.

As, in my opinion, the venders could not be allowed to prove by evidence that the sale was in fact one of a two-fold character, the point is purely one of law, which could be decided without any further evidence, and the learned District Judge should, therefore, have decided it.

I accordingly accept this appeal with costs throughout and cetting aside the decree of the Courts below grant the plaintiff a decree for possession of the entire property in suit. The balance of the sale-money, namely, Rr. 487 & 0, must be deposited by the plaintiff by the 21st January 1922. Failing such payment, the decree will be null and void and the suit will stand dismissed.

Z. K. & J. P. & N. H.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 94B or 1921. March 3, 1922.

Present: - Mr. Kotwal, A. J. C. CHATARIA AND ANOTHER - PLAINTIFFS -

AFPELLINTS tersus

DAWLAT AND OTHERS-DEFENDANT:-

Minor-Trespass by guardian-Estate, when liable.

A minor's estate is liable for the trespass committed by his guardian if his act was not on his own behalf but was on that of the minor and the estate of the latter had benefited by it. [p. 468, col.

Appeal against the decree of the Dietriet Judge, Amraoti, in Civil Appeal No. 166 for 1920, decided on 26th November 1920.

Mesers. A. V. Khore and K. K. Gandhe, for the Appellants.

Messrs. O. B. Farakh and N. B. Ehawalkar,

for the Respondents.

JUDGMENT,-Defendants Nos. 1 and 2, minors, are the sons and defendant No. 3 is the widow of one Dalpat, deceased. Defendant No. 3 is the guardian of defendants Nos. 1 and 2. The plaintiff's case is as follows:-Plaintiff No. 2, Ganbhat, in execution of a decree against Dalpat, got attached and sold two felds belonging to Dalpat and purchased them bimself. He then leased the fields to plaint. iff No. 1, Chataria, on the 25th May 1918. Chataria sowed the fields. When the crops were ready the defendants prevented him from removing them unless they were given balf of them. Obataria thereupon under duress gave half the crops and took receipt therefor. This suit is for the value of the crops so given. It is said that defendant No. 3 was throughout acting on behalf of defendants Nos. 1 and 2. Defendant No. 3 did not appear or defend the case on behalf of the minor defendants Nos. 1 and 2. She appeared at a late stage of the ease and merely adopted the pleas raised by defendants Nos. 1 and 2 through their guardian, the Court Reader. Defendants Nos. 1 and 2 pleaded that Chataria held the field as their lessee under a nimbatai contract and gave balf the crops to their mother in accordance with the terms of the contract. They denied that Chataria was a lesses of Ganbhat.

The defendants' pleas were not proved. The lower Courts decreed the claim against defendant No. 3 only. In this appeal the only question is, whether the plaintiffs' elaim for a decree against the estate of defendants Ncs. 1 and 2 on the ground that the estate got the benefit of the crops taken by defendant No. 3 in their names From Sonu allowed. should have been Vishram v. Dhondu Vishram (1) referred Zaruturi Gopalan v. Karuturi in Venkata Roghavulu (2) it would appear that if the mother seted in the interests of the minors' estate and added the crops to that estate the estate would be liable.

(1) 28 B. 380; 6 Bom L. R. 122, (2) 31 Ind. Cas. 574; 40; M. 1932 at p. 635; 129 M. J. 710. DERHARI TRA CO. LTD. U. ASSAM-BENGAL BAILWAY CO., LTD.

The lower Appellate Court states that there is no plea by the plaintiff that she really did so. Paragraphs 2 and 5 of the plaint sufficiently make out that the mother was acting on behalf and in the interest of the minors and that the minors have benefitted by her act. There is no sugges. tion in the defendants' pleas that the mother had comitted the trespass, if any, on her own behalf and for her own banefit and that the minors' estate benefitted thereby. There is no plea and no issue as regards the liability or nonliability of the minors' estate as distinguished from the liability or non-liability of the guardian. All the pleadings suggest, if anything, that the minors' estate got the benefit of the crops taken by the mother. As, however, minors' interests are concerned, I think it necessary to remand the case for a detailed examination of the parties and trial on the points whether the guardian was acting on behalf and in the interests of the minors, and whether the minors' estate benefitted by the crops taken by her. The findings of the lower Courts adverse to the defendants on issues Nos. 1 and 3 will stand. The decree of the lower Appellate Court is set aside. Costs in this and the lower Courts will abide the result.

. G. R. D.

Decree set aside.

OALCUTTA HIGH COURT.
ORIGINAL CIVIL SUIT No. 1293 OF 1916.
January 12, 1921.
Present:—Mr. Justice Rankin.
DEKHARI TEA Co. Ltd.—Plaintips
tersus

AND ANOTHER- DEPENDANTS.

Common carrier—Loss of goods—Loss measureable in sterling—Damages—Rate of exchange, applicable.

Where in a suit for damages against a common carrier for loss of goods by negligence, the loss caused is, in the first instance, measureable in sterling, judgment must be based upon such sterling sum converted into rupees, at the rate of exchange prevailing on the date of the judgment and not the rate prevailing at the idate of the loss. [p. 470, sol. 2.]

Mr. Langford James (with him Mr. S. M. Bose), for the Plaintiff.

Mr. A. K. Roy, for the Second Defendant. JUDGMENT .- In this case the question arises as to the proper principles upon which the damages have to be calculated. The action was tried before me a considerable time ago and I held the second defendant Company to be liable to the plaintiffs on the ground of negligenes and under the provisions of the Indian Carriers Act. The plaintiff Company are incorporated in England and the question arises with regard to '6 packages of tea out of a total cosignment of 343. The tea was being sarried by the defendant Company to Chittegong and the plain purpose of its carrying was that it might be shipped from Chittagong to England and sold there. I am relieved of having to consider any disputed fact as to whether there is or is not a market for tea at Chittagong. If there was it may well be that the measure of damages would have to be assersed accordingly to the rates prevailing in that market. But Mr. Roy for the defendants has relieved me of much unnecessary trouble by pointing out that, upon the facts in this ease, he has no interest save in establishing that the true way of calculating in rupees the damages which the plaintiff can recover is by taking the rate of exchange to-day, that is to say, prevailing at the date of judgment as distinct from, let us say, the rate prevailing at the date of the breach. The exact terms of the submission made by Mr. Roy I have already read out, but I will incorporate them for convenience in this judgment. Mr. Roy's submission was as follows:- "Without prejudice to any right of appeal upon law or otherwise, I am prepared to accept the figure of Rs. 6,339 3.0 as damager, should the following contention fail, namely, that the loss caused to the plaintiff being in the first instance measureable in sterling, judgment must be based upon such sterling sum converted into rupees at the rate of exchange prevailing on the date of the judgment." Mr. Langford James for the plaintiff Company says that the sum of Rs. 6,339-3 0 will content his elients. I am, therefore, relieved, from con. sidering any question as between the rate of exchange prevailing on 21st December 1915. being the date on which this ten wa's

DEEBABI TEA CO., LTD. U. ASSAM-BENGAL BAILWAY CO, LTD.

destroyed by fire and the rate prevailing one or two mertle afterwards, at the date, ranely, on which the tea would normally have arrived in England and been sold in the Erglish market. The question is confined to this -le the rate of exchange on the date of judgment applicable ?- In support of the propreition that the rate of excharge to cay is to be adopted, Mr. Roy has relied upon the fact that the plaintiff Company is incorporated in England. To my mind that is an entirely irrelevant eircumstance. The reference to English prices or the English market srices, if at all, entirely by reason of one or other of two facts, first, that the goods were going to be sold in England and, secondly, that there was no market at Chittagong or short of England upon which damages could be fairly assessed. That England is the place where the Company was ircorporated has no bearing whatscever. Mr. Roy has also relied upon a decision of my learned brother Mr. Justice Buckland given arrarently in November 1919 in a Suit No. 623 of 1919 tetween the Leutsche Asiatiche Bank and D. K. Fania & Co. The decision appears to have been given before the decisions to which I am about to refer and I must draw attention also to the fact that the case there was a case of debt and not of damages. It appears to have been a suit cn a Bill of Exchange and I do not understand that there is any written judgment in which the principles of the metter can be found disenseed.

Now, bearing in mind the question, which is simply whether or not the date of judgment is the date upon which the rate of exchange is for this purpose to be taken. I find that the matter is concluded by recent authority. There is the decision, in the first place, of Mr. Justice Roche in the case of Di Ferdinando v. Simon Smits & Co. (1) which was affirmed unanimously on this point by the Court of Appeal whose decision is reported in L. R. 1920, 3 K. B., page 409 [Di Ferdinando v. Simon Smits & Co. (2)]. In addition to this case there is the decision of Mr. Justice Bailbacke in Barry v. Van Den Hurk (3)

(1) (1920) 2 K. B. 704. (2) (1920) 3 K. B. 409; 83 L. J. K. B. 1039, 26 Com. Cas 57; 36 T. L. R 797; (1920) W. N. 273.

(3) (1920) 2 K. B. 703; 89 L. J. K. B. 899; 123 L. T. 719; 64 S. J. 602; 36 T. L. R. 663.

and there is also the decision of Mr. Justice McCardie in the case of Lebeaupin v. Orispin (4). At one time, American authorities seem to have rendered it doubtful whether the rate of exchange on the date of judgment was not the true rate in the case of an action for debt as distinct from damages; but in my view, as Mr. Justice McCardie bas showr, that proposition is not now in accordance with the best opinion. question before me is, whether the rate prevailing on the date of judgment is the rate applicable in a suit for damager, and as to that the whole body of recent authority is against the contention of the defendant. The reasons given by Mr. Justice Bailhache are very convincing, that the plaintiff may sue immediately a breach takes place, that the damages are then orystalized, that the law will in general take no account of necessary delay in bringing the suit to a hearing. The inconvenierces of taking the rate as on the date of judgment are printed cut by Mr. Justice McCardie very foreibly. The desisions seem to be all one way except for the first desision of Mr. Justice Roote in the case of Kirsch & Co. v. Allen, Harding & Co. (5). That opinion was subsequently altered. I would only add, for myself, that a Court which can only give judgment in terms of one surrecey can never undertake to ensure payment of the exact equivalent at the time of payment of a given quantity of another surrency. The rate of exchange on the day of payment may be an ideal, but it is an impossible ideal: the rate at the time of judgment is not the ideal: it is not necessarily nearer to the rate at the time of payment than the rate of any other day. The contention put forward by the defendant Company most, I think, be overruled. Judgment must, therefore, be given for Rs. 6,339 3.0 in terms of the submission made by Mr. Roy. The plaintiff

w c. A. Order accordingly.

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^{(4) (1920) 2} K. B. 714 at p. 747; 89 L. J. K. B. 1024; 25 Com. Cas. 335; 64 S. J. 652; 36 T. L. R. 739. (5) (19.9 W. N. 701; 36 T. L. R. 59 affirmed on appeal (1970) W. N. 73; 89 L. J. K. B 265; 123 L. T. 105; 25 Com. Cas. 174; 36 T. L. R. 245.

BALGOBIND KUMAE D. BAI BEHAR! LAL MITTER.

PATNA HIGH COURT.

(APPRIL PROM ONIGINAL DECLER NO. 79

(F 1919,

February 20, 1922.

Fresent:—Mr. Justice Contin and
Mr. Justice Rose

Babu BALGOBIND KUMAR AND
LOTHERS—PLAINTIFFS—APPELLANTS

versus

RAI BEHARI LAL MITTER AND CTHESS -D. FENDANTS-BE-PONDENTS.

Bengal Survey Act (V of 1575), s. 41-Settlement Officer, status of-Official acts, presumption as

to, legality of.

A Revenue Officer appointed with the additional designation of Settlement Officer is vested with the powers of a Superintendent of Survey under the Bengal Survey Act, and has the powers of a Collector under section 41 of that Act, and also the power to delegate his functions under the section to an Assistant Settlement Officer and his order has the force of a Civil Court decree as to possession. [p. 472, col. 1.]

Official acts are to be presumed to be legally performed, and where the jurisdiction of an officer is not questioned in the Trial Court, it must be presumed that he acted within his jurisdiction.

[p. 47', col. (.]

Appeal against a decision of the Schordinate Judge, Bhagulpur, dated the 31st January 1919.

Messrs. O. O. Das and Lulmohan Ganguly, for the Appellants.

Messrs. P. K. Sen, Netzi Oh. Ghose, Baikunth Nath Mitter, Bhagawan Frasad Surendra Nath Bose and Subal Chandra Mazumdar, for the Respondents.

JUDGMENT.

Courts, J.—This is a suit for declaration of the plaintiffs' title to, and for possession of, a considerable area of land which is described in the plaint. The plaintiffs are the owners of village Nasun Nawaz, which is usually known as Gamail; the defendant first party are proprietors of a village contiguous on the east of Gamail, named Hathiondha, and the land in dispute is on the boundary of the two villages.

The plaintiffs' ease is that in the year 1902 there was a partition by which this land fell to their share but that at the time of the Settlement it was wrongly recorded in the name of the defendants, and that, on the strength of this wrong record, the defendant first party dispossessed the plaintiffs and then settled the land with the defendants second party. The land is described partly by Settlement numbers and

partly by Batwara numbers. The Survey numbers are 1414, 1415, 1416 and 1417, and the Batwara numbers are 1165 and 1168 to 1175. The land described by Batwara numbers lies principally to the east of the land described by Survey numbers and is coloured red in the map filed with the plaint, the land described by Survey numbers being coloured indigo.

The suit has been decreed only in respect of the land described by Survey numbers which is a small portion of the whole land and the plaintiffs have appealed in respect of the rest.

It appears that, at the time of the Cadastral Survey, there was a boundary dispute between the villages Gamail and Hathiondha which was decided on the 13th June 1901 by the Assistant Superintendent of Survey. By this desigion the bcundary Was dealared to be a black dotted line A C D E F GHIJK LM NOPQ R: this is the line which was adopted at the time of the Cadastral Survey, and it is this line which has been made the basis of the decision of the learned Subordinate Judge, and he has found that east of the line the plaintiffs bave failed to establish possession within 12 years, and that consequently their suit is barred by limitation.

The Assistant Settlement Officer's desision being so very largely the basis of the desision it has been made the first ground of attack by the learned Counsel for the appel: lants, who contends that it was passed without The jurisdiction. learned Subordinate Judge treats the decision as having the force of a Civil Court deeres, and the first point for consideration is, whether this is so or not. It is admitted that if the order is within jurisdiction it has the fores of a Civil Court deerse under section 41 of the Survey Act, but the learned Counsel for the appellants contends that the plaintiffs have not established that the Assistant Settlement Officer had jarisdiction. See. tion 41 of the Bengal Survey Act (Act V of 1875) says that the boundary is to be determined by the Collector assording to actual possession and 'the order of the Collector under this section shall, until it be reversed or modified by competent authority, have the force of an order of a Civil Court declaring the parties to be in dilw sensbroses ni bast ed to noissessed BALGOBIND FUMAR U. RAI BEBARAI LAL MITTER.

The person then who has jurisdiction under section 41 is the Collector, and "Collector" is defined in the Act as an Officer who is generally or specially vested with the powers of a Collector for the purpose of this Act; and "Deputy Collector" includes any Deputy Collector to whom the Collector or the Superintendent of Survey may delegate any of his functions under this Act.

Now, it appears from Notification No. 11574
L. R., dated the 7th December 1914, that
a Revenue Officer appointed with the
additional designation of Settlement Officer
is vested with the powers of a Superintendent of Survey under the Bengal Survey
Act, and it is not disputed that he has
the powers of a Collector under section 41
of the Act. It is also admitted that he
has power to delegate his functions under
this section to an Assistant Settlement
Officer; but what is contended is, that it
has not been shown that in fact there was
delegation in the present case.

The contention is, in my opinion, without force. The point is an entirely new one taken for the first time in appeal before The delegation must have been by an office order and if the objection had been taken at the trial stage it would have been a simple matter to produce the order, or, if the order were destroyed in the ordinary course, as is probable, to have examined witnesses. We are precluded from taking such evidence at the appellate stage and it would, in my opinion, be improper and unfair to remand the ease on this ground. The ordinary rule of law is that official acts are to be presumed to be legally performed and in the present ease the jurisdiction of the Assistant Settlement Officer not having been questioned in the Trial Court, it must be presumed that he acted within his jurisdiction in passing the order of the 13th June 1904. This being so, his order has the force of a Civil Court decree as to possession, so that in regard to all the land west of the boundary line laid down by him it was in possession of the plaintiffs on the 13th June 1904 and all the land east of that line was in the possession of the defendants. The present suit was filed on the 27th of Jane 1916, so that the plaintiffs were notilin presession of the land east! of the

boundary line within 12 years of the filing of the suit, and their suit is barred by limitation in respect of this land unless they can establish that they had since that date dispossessed the defendants. Mr. Das, the learned Counsel for the appellants, frankly admits that he has not established this.

I may note here that in addition to the order of the Assistant Settlement Officer there is a mass of other evidence, both oral and documentary, to show that before the time of the decision of the boundary dispute and at that time, the plaintiffs and defendants were in possession of the land as therein defined. This evidence has been very earefully considered by learned Subordinate Judge but in view of my finding that the order of the Assistant Settlement Offiser has the effect of a Civil Court decree as to possession, it is unnecessary to do more than say that I fully agree with his finding that on this evidence the plaintiffs were clearly not in possession even before the date of that order.

The only other question then is, where the boundary dispute line, which is the same as the Cadastral Survey line, runs. assist us in this, we have four maps, the map attached to the plaint, the boundary dispute map, the Cadastral Survey map and a map prepared by a Commissioner for the purposes of this ease. The learned Subordinate Judge has disearded the Commissioner's map, because he says it started from a doubtful point. In this he appears to be correct, but so far as the line of the Cadastral Survey shown by him on the map is concerned, it corresponds very closely to the plaint map in accordance with which the decree has been passed, and both agree very closely with the Cadastral Survey map and the boundary dispute map. It is in accordance with the plaint map that the decree has been passed, and, accordingly to this, plots, Nos. 1414, 1415, 1416 and 1417 of the cadastral Survey have been decreed in favour of the plaintiffs. This is correct so far as it goes; but it is contended by the learned Counsel for the appellants that it does not go far enough inacmuch as it would appear from the Cadestral Survey map, the boundary dispute map, and the Commissioner's map, that there is a portion of land within Gamail which will include

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some portion of Batwara plots Nos. 1173, 1174 and 1175, in regard to which the

plaintiffs' suit has failed.

Now, it appears from the order of the Assistant Settlement Officer in the boundary dispute that certain plots Nos. 83 to 87 in the map prepared by him are within Gamail, and on a comparison of this map with the plaint map, it would certainly appear that this contention has some force. Without, however, having the line re-laid it is impossible to definitely say whether this is so or not, and the difficulty is that, the question does not appear to have been considered in the Trial Court. It is suggested by Mr. Sen for the respondents that, even if we accepted the fact that this was so, it does not definitely settle the matter, because the order of the Assistant Settlement Officer is dated the 13th June 1904, whereas the sait was filed on the 27th June 1904 and there might have been dispossession within the fourteen days intervering between the 13th of Jane and the 27th of Jane 1904. I do not propose. at this stage, to express any opinion on this point, but I think that if it were to be found that any portion of the Batwara plots Nos. 1173, 1174 and 1175 was included within Gamail at the time of the boundary dispute, it would have a very considerable bearing on the sase so far as these lands are concerned. It is necessary, therefore, to have this matter considered.

In the result, then, the appeal is decreed to this extent only that the suit is remanded for a decision whether any, and, if so, what, part of the land enclosed by the letters M N O P Q R of the map prepared in the boundary dispute (Exhibit B1) is claimed in the plaint, and if so, whether the plaintiff is entitled to any, and what, relief in respect thereof. Costs will abide the result. Both parties will be entitled to adduce evidence in regard to that portion of the suit which has been

remanded.

Ross, J .- I agree.

W. C. A.

Appeal decreed.

CALCUTTA HIGH COURT.

REPERENCE UNDER SECTION 51 (1)

OF THE INDIAN INCOME TAX ACT, 1918

January 17, 1921.

Present:—Sir Lancelot Sanderson, Kr., Chief
Justice, Mr. Justice Teunon and
Mr. Justice Richardson.
CALCUTTA TURF CLUB

versus

SECRETARY OF S ATE FOR INDIA.

Excess Profits Duty Act (X of 1919), ss. 2, 3—Turf Club—"Adventure or concern in the nature of trade'—"Business"—Excess profits duty, liability to pay—Test.

Where a Turf Club admits the public to its stands, paddocks and enclosures on race-days, on payment of entrance fees or gate money; allows persons, who are not members of the Club, to enter horses for the races which it conducts, on payment of entrance fees, allows book-makers to carry on their calling in its enclosures on payment of license fees; allows persons, who are not members of the Club, to make bets through its totalisators and takes a commission, the Club carries on an "adventure or concern in the nature of trade" within the meaning of section 2 of the Excess Profits Duty Act, and consequently carries on a "business" within the purview of section 3 of that Act, in respect of the sums received under the foregoing heads, and is liable to pay excess profits duty ultimate destination of the surplus, if any, received in respect of these matters, is immaterial. The test is, whether the moneys were received by the Club from non-members of the Club and in exchange for something which is given by the Club, and in respect of which profits are made [p 477, cols. 1 & 2.]

Reference made under section 51 (1) of the Indian Income Tax Act, 1918, by the Board of Revenue.

Mr. S. R. Das, (with him Mr. L. P. B. Pugh), for the Royal Calentta Turf Club.

Mr. N. N. Sircar, (with him Mr. N. Goswami), for the Secretary of State.

JUDGMENT.

Sanderson, C. J.—The question which has been referred to this Court by the Board of Revenue, as the Chief Revenue Anthority, is whether the Royal Calcutta Turf Club is liable to excess profits duty under the Excess Profits Duty Act of 1919. The case was stated at the instance of the Royal Calcutta Turf Club and it is as follows:—"In this case, an application has been made by the Secretary of the Royal Calcutta Turf Club, on behalf of the Club, to the Board of Revenue, as the Chief Revenue Authority, under section 51 (1) of the Indian Income Tax

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Act, 19 8, which has been made applicable to excess profits duty by section 15 of the Excess Profits Daty Act, 1919, with the modifications prescribed by rule 31 of the Excess Profits Duty Rules, 19.9, for a case to be stated on the question whether the Club is liable to excess profits duty. It appears from the Collector's record that the Club was assessed to income tax for the first time in 1918 and the Club's liability to income tax is rot disputed, but it is contended that its income does not include any profits of a business, within the meaning of the Excess Profits Duty Act. The grounds for this contention are set forth in a statement of case arnexed to the Club's application, which also sets forth the sources of the Clab's income.

"In the Board's opinion, the Club is liable to excess-prefits duty in respect of the following sources of income, in so far as the sums received under these heads are not paid by

memters of the Club: -

"Entrance fees to the stand, paddosks and enclosures, or gate money.

"Entrance fees paid by owners of horses.

"Book-makers' license fees.

"Percentages on the totalisators.

"Percentages on sweeps on the Derty and St. Leger.

"The care appears to the Board to be parallel to that of the Carlisle and Silloth Goif Club v. Smith (1). That was a case in which a Golf Club admitted persons other than its members, without discrimination to play gelf on its ground on payment of certain fees, and it was held by the learned Judge who tried the ease in the first instance, as well as by the Court of Appeal, that the fees received from such vicitors were income of an adventure or concern in the nature of trade. Royal Calcutta Turf Club similarly admits the public to its stands, paddocks and enclosures, on race days, on payment of entrance fees, or gate money; allows persons, who are not members of the Club, to enter horses for the races which it conducts, on payment of entrance fees; allows bock-makers to carry on their calling in its enclosures on payment of lisense fees; allows persons, who are not members of the Club to make bets through its totalisators, and to buy tickets in the sweep-

stakes on the Derby and St. Leger races conducted by it. Whether the receipts from these sources yielded a profit, after deducting expenses properly chargeable against them, in the accounting period on which excess profits duty is leviable, is a question of fact for determination by the Collector.

"The fast that the members of the Club do not derive pecuniary profit from its or erations and that a part of its income is devoted to charity, do not, the Board thinks, affect its liability to excess-profits duty."

The opinion of the Board was that the Clab was liable to excess-profits daty in respect of the following sources of income in so far as the same received under these heads were not paid by the members of the Clab:

(i) Entrance fees to the stand, paddocks

an l enclosures, or gate money.

(ii) Entrance feas paid by owners of horses.

(iii) Bock makers' license fees,

(iv) Percentages on the totalisators.

(v) Percentages on sweeps on the Derby

and St. Legar.

It was stated by the learned Counsel for the Royal Calentte Turf Club, Mr. S. R. Dis, in opening the Reference, that he anticipated that the last head would not now be relied upon by the Crown and the learned Counsel who appeared as Junior Counsel for the Orown has just informed us that he is instrusted not to press that item. Consequent. ly, this Reference may be taken as if the 5th item was struck out. We have, therefore, to deal with the first four items which I have mentioned. It is to be noted that the Board stated that if it were decided that the Royal Calcutta Turf Club were liable to exsess profits duty there would still be the question whother the receipts from sources which I have yielded a profit after diducting expenses against them in properly chargeable the accounting period, on which expense. profits duty was leviable, and that that would be a question of fact for determination by the Therefore, the only question Collector. which this Court has now to determine is whether, on the facts of this case, the Royal Calcutta Turf Olub is liable to excess profits duty, if there be any excess profits in respect of the four heads. Whether any profits will be assessable to that duty will still remain a question which will have to be investigated by the Collector.

^{(1) (1912) 2} K. B. 177; 81 L. J. K. B. 581; 106 L. T. 573; 25 T. L. R. 252; 6 Tax. Cas, 48.

CALCUTTA TUBY CLUB &. SECRETARY OF STATE FOR INDIA.

The objects of the Club are set forth at length in the case which the Turf Club submitted and the material portions may be stated as follows:—

"The present large operations of the Club are the result of a gradual development. The proprietors of the Club are the present members, none of whom derive or ever have derived any pecuniary profit from the operations of the Club.

"The objects of the club are the control and encouragement of Racing, the conduct of the Calcutta Races, the encouragement of country bred horse breeding, the comfort and convenience of the members of the Club and the general public attending the races in Calcutta and subsidizing of up-country meetings."

After setting out the history of the Club and stating that, originally, there were Stewards of the rases distinct from the Turf Club Stewards, the case proceeds: "Gradually the Turf Club Stewards appear to have assumed control not only of the Club but also of the racing in Calcutta and gradually—how is not known—of up-country racemeetings." From 1880 there has been a continuous increase in the popularity of racing which produces more funds. Bookmakers have been licensed and totalisators provided, both of which form a source of revenue.

"Considerable amounts have been spent on improving the race course, building tanda and the stakes and contrihave been increased. In 1817 butions a lease was obtained from Government of the race course and enclosures at a nominal No income has been rental. retained beyond the sum considered advisable as a reserve to meet special expenditure in connection with racing. The club has always made considerable contributions to charities, but during the war the expenditure on racing was kept as low as possible and certain necessary renewals and improvements were held back, so that there might be as large a surplus as possible. Donations to war sharities were made to the amount of such purplus and the whole of this was given away in charity. The donations of those years do not form a correct guide to

the Club's surplus in other years as ordinarily the expenditure would have been largely increased. A Club house has been held on lease siree 1891, but in the year 1919 it was found that the assommodation the office establishment was insufficient and in view of the rising value of Calcutta properties it was thought advisable to secure the Clab's position by purchase of premises in Russell Street. A very large olerical staff is employed by the Club in addition to the official staff and labour. As before stated, it has been the policy of the Club to spend its annual receipte, after suitable charitable payment, either on inereased stakes and contributions and in improvemente, all with a view to the benefit of racing generally. During the war the policy was to save as much as possible, and give the amount to sharities. Oertainly, since the year 1800, no member of the Club has ever received any preuniary benefit. No profits have ever been divided.' It was then submitted as follows: "It is impossible to say that a Club which has never sought to make a profit and of which the members have not derived and do not seek to derive any pecuniary benefit, carries on a business as described in the Act or at all. It is clear that its operations are not trade, commerce or manufacture, nor have they the remotest recemblance to any of these descriptions. It is understood that it has been proposed that it should be decided whether the Club carries on a business before undertaking the somewhat complicated problems of accountancy to ascertain what are the profits, if any, liable to excessprofits duty and accordingly this statement of the case is submitted for consideration with a view to show that the Olub is not liable to excess profits duty."

The question depends upon section 3 of the Excess Profits Daty Act which is as follows: This Act, shall apply to every business (other than the businesses specified in Schedule I) which is, during any part of the accounting period, either carried on in British India by any person, or owned or carried on in any place in India by a person ordinarily resident in British India." In order to see what is meant by the word business," reference must be made to section 2 of the Act. There we find that

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"business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The question which we have to decide is whether, on the facts of this case, and by reasons of the sums received by the Club from persons who are not members of the Club, in respect of the first four heads set out in the Reference, the Club can be said to be earrying on "business" within the meaning of section 2. On the one hand, the learnd Counsel Mr. S. R. Das and Mr. Pugh who appeared for the Royal Truf Club argued that the definition of "business" in section 2, was an exhaustive definition and that the word "includes" must be read as being equivalent to "means and includes." On the other hand, Mr. Sirear on behalf of the Crown argued that "includes" means "includes." Our attention was drawn to the fact that in other definitions which are to be found in section 2 the word "means" is used; for instance, "assounting period means the twelve months ending on, etc.; "Chief Revenue" authority meins the Board of Revenue; 'prescribed' means prescribed by rules. The learned Counsel for the Crown further argued that if the definition of "business" in rection 2 was intended to be exhaustive, then there would be no reason for the insertion in Schedale I of the Act, of the second and third instances which are given in the list of "excepted business" in that Schedule. In my judgment, it is not necessary for us to deside the question whether the definition of "business" in section 2 is exhaustive : and, indeed, the learned Counsel for the Crown did not invite us to decide that question, for he said that he was content to base his case upon the contention that the Royal Calcutta Turf Olub were carrying on either a trade or an adventure or concern in the nature of trade. In my judgment, the contention of the Crown is correct; consequently, it is not nessessary for us to deside whether the definition of the word "business" in sestion 2 is exhaustive or not.

The opinion of the Board of Revenue was based upon an English case Carlisle and Silloth Golf Oluby. Smith (1) which in the first instance was decided by Mr. Justice Hamilton and afterwards by the Court of Appeal, which upheld the judgment of Mr.

Justice Hamilton [Oarlisle and Silloth Golf Olub v. Smith (2)]. It is true that that is a desision upon the question whether the Golf Clab was liable to pay income tax, but the decision was to a large extent based upon the consideration of the question whether the Golf Club was earrying on "ousiness" within the meaning of the Income Tax Act, 1842 (5 & 6 Viet. c. 35), Schedule D of which specified "The daties to be charged in respect of any trade, manufacture, adventure concern in the nature of trade not entained in any other Sabedale of the Act." These words, it will be seen, bear a close resemblance to the words which we have to enstrae. The facts may be taken from the head-note: "The appellants, an ordinary members' Golf Club,' acquired land under a lease from a railway company and laid out a golf course and erected a Club house thereon. In addition to the members of the Club, who were entitled on payment of annual subscription to play on the links and to other privileges for the current year, a considerable number of visitors were per nitted to use the Club premises and to play on the links in assordance with a provision contained in the lease which required the Club to allow such visitors to play on payment of certain green fees. The total annual expenditure insurred by the Olub in maintaining the links in a proper endition for play exceeded the total amount of fees received from visitors. It was held by the Court of Appeal that the appellants were sarrying on an enterprise which was beyond the scope of the ordinary functions of the Club, and as to which separate accounts might bekept so as to ascertain whether there were any profits, and that any profits derived from the visitors' green fees were, therefore, taxable under Schedule D of the Income Tax Act."

The learned Master of Rolls in the coarse of the judgment said as follows: "It seems to me that there is a real difference between merceys received from members, and applied for the benefit of members and moneys received by the Club from strangers. I cannot draw any distinction between gate moneys, which might be, and I believe sometimes are, reseived by a Golf Club, and

^{(2) (1913) 3} K B 75; 83 L J. K B. 837; 108 L.T. 785; 11 L.G. R. 710; 5, Tax, Cas 198; 57 S. J. 53;; 29 T. L. R. 508.

CALCUITA TURY CLUB U. SECRETARY OF STATE FOR INDIA.

green moneys. In each ease the Club would be assessable."

Lord Justice Buckley said: "If it were necessary (which it is not) to decide whether the Club were earrying on an adventure or concern in the nature of trade," I am of opinion that they were. To determine this question it is not the character of the person who carries on but the character of the concern which is carried on that has to be regarded. If a land-owner laid down upon his land a golf course and charged fees for admission and user—if, that is to say, the links were a proprietary golf links carried on with a view to profit—there can be no question but that the proprietor would be assessable."

sessable." Lord Justice Kennedy said : "But upon the facts appearing in the case, it appears to me that this Club is really earrying on basiness of supplying to the public for reward a recreation ground fitted for the enjoyment of the game of golf, and that the receipts derived from this business are in the nature of profits and gains in respect of which it is liable to assessment for income tax." In my judgment on the facts of this case, the Royal Calcutta Turf Club is carrying on the business of supplying to the public for reward a ground fitted for the purpose of racing-some portion of the public use it for the purpose of racing their horses, namely, the owners of race horses; other members of the public use it for the purpose of earrying on their business, namely, the book makers who resort thereto under licenses which are issued to them for reward by the Royal Calcutta Turf Club; other members of the public use it for watching the races and for the purpose of betting on the races. these, according to the case presented to us, pay money to the Club either in respect of entrance fees at the gates or in respect of fees for the entries of horses in the rases or in respeet of licenses issued to book makers or in respect of the commission which is taken by the Club from the totalisators. In my judgment, upon the facts stated in the case submitted to the Court, it must be held that the Royal Calentia Turf Club is carrying on an "adventure or concern in the nature of trade" and concequently is carrying on a "business" within the meaning of section 3 of the Act, in respect of sums received under the first four heads mentioned in the ease, from persons other than members of the Club.

An argument was founded on an observation made by Hamilton, J., in the Trial Court Carlisle and Selloth Golf Olub v. Smith "Strangers," said the learned Judge, (1). are admitted to the Club house as well as to play upon the sourse and that seems to me a feature outside the ordinary scope of that which this Club is found to be, namely, an ordinary bona fide members' Olub." It was that the enterprises of the Turf Club, from which it derives a profit from public, were all within the scope and purpose of the Club, which is to encourage horse-racing. If that be so, the Turf Club differs all the more from an "ordinary bona fide members' Club" and the present case, therefore, is an a fortiori case.

It only remains for me to deal with one other point which was raised by the learned Counsel for the Olub, and that is that the members of the Olub have not and do not receive any profit out of the transactions which are carried on by the Club, and that the admitted surplus has been, and is, used for the purpose of subsreibing to charities.

It does not seem to me material what is the altimate destination of the surplus, if any, which the Royal Calentta Turf Club reseives in respect of these matters. The test is, whether the moneys are received by the Club from non-members of the Club and in exchange for something which is given by the Club and in respect of which profit is made.

For these reasons, in my judgment, the answer to this Reference should be that the Club is liable to excess profits duty, if upon the accounts being taken, there be any excess profits upon which the duty is leviable in respect of the following sources of income, in so far as the sums received under these heads are not paid by members of the Club; namely, (i) entrance fees to the stand, paddocks and enclosures, or gate money, (ii) Entrance fees paid by owners of horses, (iii) book makers' license fees, (iv) parcentage on the totalisators.

The Royal Calcutta Turf Olub must pay the costs of this Reference. We direct that a copy of our judgment be sent to the Board of Revenue.

RICHARDSON, J.—I agree. W. C. A. FIRM OF BAI BAHADUS HABJI MAL-MELA RAM U. FIRM OF KIRPA RAM-BBIJ LAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1000 of 1917.

October 28, 1921.

Present:—Mr. Justice Abdul Racof

Present: - Mr. Justice Abdul Racof
and Mr. Justice Campbell.
THE FIRM OF Rai Bahavur HARJI
MAL MELA RAM, THROUGH
JOG RAJ, THEIR MANAGER - DEFEND.NT

-APPELLANT

tersus

THE FIRM OF KIRPA RAM BRIJ LAL,
THROUGH NARINJAN DAS, MANAGER
—PLAINTIFF, AND THE FIRM OF SUKH
DEV BAKHSH, THROUGH BHAIRON
PARSHAD—DEFENDANT—
RESPONDENTS.

Partnership-Accounts, partial-Dissolution.

In regard to suits by one partner against another for a partial account, the general rule as applied in India, is that if the account is sought in respect of a matter, which, though arising out of a partnership business, or connected with it does not involve the taking of general accounts, the Court will, as a rule give, the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances. [p 479, col, 2.]

Where a partner withholds the profits of a concern from a member of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits, and such a suit cannot be dismissed for the reason that the plaintiff does not claim a dissolution. [p 480, col. 1.]

Second appeal from a decree of the District Judge, Lyallpur, dated the 7th February 1917, modifying the preliminary decree passed by the Senior Subordinate Judge, Lyallpur, on the 11th March 1916.

Lala Moti Sagar, R. S., and Dr. Nand Lal, for the Appellant. Bakhshi Tek Ohand, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit for accounts. The following facts will disclose the nature of the suit:—

Three firms, namely (1) Kirpa Ram Brij Lal, plaintiffs (2), Rai Bahadur Harji Mal-Mela Ram, defendant No. 1, and (3) Seth Sukh Dev Bakhah, defendant No. 2, by a dated the 19th October 1913, agreed

to a certain portion of the income of

their respective ginning and press factories. As regards both the fac ories one document was executed, but it is apparent from the document that there were two separate agreements relating to the gipping factories and the press factories respectively. The agreement relating to the press pool was for three years commencing from the 20th October 1913 up to the 20th October 1916. It was provided, however, that any partner would be at liberty to dissolve it by giving notice on the 15th June of any year. The agreement as to the ginning factories was for two years commencing from the 14th October 1913 and ending on the 14th Ostober 1915 with liberty to dissolve it by giving notice on the 15th Jane 1914. On the 15th Jane 1914 the plaintiff factory gave notice dissolving the ginning pool expressly stating therein that the press pool would continue. The plaintiff states that the press pool continued according to the agreement, but the defendant No. 1 by his conduct put an end to it on the 15th June 1915. The plaintiff firm, therefore, instituted the present suit on the 13th Ostober 1915 for the settlement of partnership assount of the press pool from the 15th June 1914 to the 15th June 1915.

The defendant No. I resisted the suit on the allegation that by the notice of the 15th June 1914 both the ginning and press pools were dissolved, and that, therefore, the plaintiff was not entitled to sue for the settlement of account for the period between the 15th June 1914 and the 15th June 1915. In the alternative, he pleaded that even if the press pool was not dissolved the plaintiff was not entitled to sue for a partial settlement of account without sning for the dissolution of the partnership and that as he could not sue for the dissolution of the partnership during the term of the agreement, the suit was premature.

The Court of first instance held that the notice of the 15th June 1914 did not put an end to the press pool, as it was expressly mentioned in the notice that it was to continue. The Court also held that neither by the consent of the partners nor by the conduct of the defendant No. 1 was the partners ship dissolved on the 15th June 1915 as alleged by the plaintiff. As to the right of the plaintiff to maintain the suit for a partial

FIRM OF BAI BAHADUR HARJI MAL-MELA RAM U. FIRM OF KIRPA BAM-BRIJ LAL,

settlement of accounts during the continu ance of the partnership the Court held that as the assounts for the season 1914 15 sould be settled without reference to the accounts for the season 1915 16, the suit was maintainable. A preliminary desree under Order XX, rule 16, Civil Procedure Code, was accordingly passed by the Trial Court for the setilement of assounts of the press pool for the season 1914-15.

Against this decree both parties appealed. The defendant's appeal impugned the decree of the Trial Court for the settlement of assounts, and reiterated the objections relating to the maintainability of the suit. The plaintiff's appeal challenged the decision of the Trial Court relating to the continuance of the press pool, and maintained that the partnership had been dissolved by the conduet of defendant No. 1 on the .5th June 1915. The lower Appellate Court accepted the plaintiff's appeal and modified the preliminary decree of the lower Court by declaring that the partnership had dissolved on the 15th June 1915, and that the account was to be taken from the 15th June 19:4 to the 15th June 1915. The other appeal on the above findings necessarily failed and was dismissed with sosts.

.The defendant has some up in second appeal to this Court and it has been contend. ed on his behalf that the finding of the lower Appellate Court to the effect that the partnership as to the press pool had dissolved on the 15th June 1915 by the conduct of the defendant No. 1, was arrived at without any evidence. The learned Judge Court below has recorded the following find-1bg:-

'It is quite obvious that the plaintiffs only dissolved the cotton ginning pool and not the press pool. The conduct of defendant No. 1 showed quite clearly that he intended that the press pool should also be dissolved. He did not give notice as required by the agreement, but his conduct was equal to a notice. Such notice could only have effect from 15th June 1915 and not earlier. So I hold that the ectton pressing pool must be considered as dissolved on 14th June 1915."

The finding as to the dissolution of the press pool partnership on the 15th June 1915

is based almost entirely on the correspond" ence between the parties. We have examined the lettere, Exhibits P4, P5, P6, P7, P8, Po, PlO and Pll, but we have failed to find anything in those letters, which may support the finding of the learned Judge. In our opinion, there is no evidence in support of this finding. We are, therefore, constrained to hold that the finding of the First Court was correct and that the press pool partnership continued and that it was not dissolved either by the notice of the 15th June 1914 conduct of the or by the defendant No. 1.

The only question that remains for determination is whether, having regard to the fast that at the date of the institution of the suit the partnership had not dissolved, the plaintiff was competent to sue for a partial settlement of accounts for the season 1914-15. In the case of Karri Venkata Reidi v. Kollu Narasayya (1) it was held that

"In regard to suits by one partner against another for a partial assount, the general rule as applied in India, is that if the account is sought in respect of a matter which, though arising out of a partnership business, or connected with it does not involve the taking of general assounts, the Court will, as a rule, give the relief applied for. It will be for the Court to determine under what eireumstances it will be equitable to order a partial assount, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial ascount can be ordered only under exceptional eireamstances,"

The same rule was laid down by a Division Bench of the Allahabad High Court in the ease of Raghubar Dayal v. Sheoram Das .

The case of Fairthorne v. Weston (3) was referred to by the learned Jadges of both the High Courts as supporting their views. Mr. J. P. Singhal in his Law of Partnership in British India has given a summary of cases in which partial settlement of accounts was allowed. It is to be found at pages 344 to 345. At pages 345 to 845 on the authority

^{(1) 1} Ind. Cas. 884; 82 M. 76; 4 M. L. T. 456; 19 M. L. J. 10.

^{(2) 1} A. L. J. 94.

^{(3) (1841) 8} Hare 387; 18 L. J. Ch. 268, 8 Jur. 353; 87 E. R. 432 at p. 434; 64 R. R. 342,

DEBI SINGH U. BANSIDHAR.

of certain English cases mentioned in the foot note the following rule is stated: -

"It is, therefore, clear that where a partner withholds the annual profits of a concern from a member of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits and such a suit shall not be dismissed for the reason that the plaintiff does not claim a dissolution. To hold the contrary, would be contrary to the principles of justice, equity and good conscience; it is the duty of the Courts to bring about the fulfilment of the expectations of the parties, and where a partnership has been entered into for a fixed term, the Courts should not permit a partner to drive the others to a dissolution. Every partnership is formed for the acquisition of gain, and if a partner were allowed to exelude his co-partners from the profits of the business, the very object of the partnership would be frustrated and it would some to a premature end. Where before the expiry of the term, the defendant so conducted himself as to make it impossible to earry on the partnership business, with a view to compel the plaintiff to dissolve the partnership and the latter brought a suit for an account of the partnership dealings and transactions since the last settlement, the Court decreed the suit and overruled the objection of the defendant on the ground, that if the Courts failed to grant the relief prayed for, a person fraudulently inclined might, of his mere will and pleasure, compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contrast."

Now, in this ease it is admitted that the business of the pool was managed by the defendant through his agent, Jog Raj, and that prior to the notice of the 15th June 1914 the accounts were rendered daily and dividends distributed daily, but after that date the defendant's agent stopped the giving of the account daily and the payment of profits. Several letters were written by the plaintiff to the agent, Jog Raj, and to the defendant himself pressing them to render the accounts and distribute the profits, but no heed was paid by the defendant or his agent to those letters. In these cirsumstances, the plaintiff was compelled to institute the suit for settle.

ment of assounts.
In our opinion the authorities referred to

above justified the source adopted by the plaintiff. The decision of both the Courts below on this point is correct and is fully supported by authorities. As already indicated, the decision of the lower Appellate Court as to the dissolution of the partnership on the 15th Jane 1915 is incorrect. We accordingly set aside the decision on that point. The result is, that we accept the appeal to the extent above indicated and restore the decree of the Court of first instance. In other respects the appeal is dismissed. Having regard to the fast that the appeal has succeeded in part and failed in part we make no order as to costs.

Z. K. & N. H

Appeal accepted in part.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 856

OF 1921.

February 7, 1922.

Present: -Mr. Justice Ryves and
Mr. Justice Gokul Prasad.

DEBI SINGH-JUDGMENT-DEBTOR -

APPELLANT

versus

Pandit BANSIDHAR-DEGREE-HOLDER

-BESPONDENT.

Transfer of Property Act (IV of 1892), s. 123-Gift by Hindu-Delivery of possession, whether necessary.

Among Hindus it is not necessary according to section 123 of the Transfer of Property Act that a deed of gift should be accompanied by delivery of possession. [p. 451, col. 1.]

Execution second appeal from the decision of the District Judge, Budaun, dated the 2nd March 1921.

Mr. P. N. Banerii, for the Appellant. Mr. Iqbal Ahmad, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. Bansidhar got a decree on the 30th of January 1917 in a suit which he brought against Debi Singh describing him as a member of a joint family and heir of one Tej Singh, deceased, and claiming a certain sum of money as assets of Tej Singh in the hands of Debi Singh after Tej Singh's death. Debi Singh did not contest that suit and it was decreed ex parts. The decree was in terms

SEWBATAN C. EBISTO MOBAN SHAW,

of the prayer, namely, against the assets of Tej Singh in the bands of Debi Singh after Tej Singh's death. An application for execution of this deeree was filed on the 23rd of January 1920 and sertain property was attached. Debi Singh objected on the ground that he was not the heir of Tej Singh but was his natural son born of a Brahmin woman who was living with Tej Singh and that, as far back as the 28th of January 1905, Tej Singh had made a gift of all the property of which he was then possessed and which had been attached. He, therefore, asked for removal of the attachment on the ground that the property was his own and was not the assets of Tej Singh which had come into his hands after Tej Singh's death. The decreeholder contended that the property was the assets of Tej Singh and had some to the possession of Debi Singh as such after Tej Singh's death. The learned Munsif upheld the objection and ordered the attachment to be removed. The decree. holder appealed and the learned District. Judge has found as a fact that Debi Singh was the natural son of Tej Singh by a woman of another easte and could not susseed to his property as his heir. With reference to the deed of gift, he does not hold that it was not executed. What he says is, that having regard to its terms he thinks that it was not a deed of gift really but was a Will to some into operation after the death of Tej Singh and that, having regard to the fact that no steps had been taken during Tej Singh's life to have the revenue papers altered and to bring the name of Debi Singh on to the Revenue Records, he thinks that it was evidence to show that the deed of gift had never been given effect to. On this ground he allowed the appeal and dismissed Dabi Singh's objection. It seems to us that it was not open to the learned . District Judge to come to this conclusion. This was really a new question which had . not been raised in the Trial Court. The learned Judge seems to be under the impression that among Hindus, a deed of gift, to be valid, must be accompanied by delivery of possession. In this view, he , is mistaken, side sestion 123 of the Trans. for of Preparty Ast, which has been explained in many rulings of this Court,

for instance, Pahlwan Singh v. Ram Bharose (1) which followed Phul Chand v. Lakking (2). It must be remembered that when the deed of gift was executed Debi Singh was a shild of tender years living in the house with his father Tej Singh and his mother. By the execution of the deed of gift followed by its registration, the ownership of the property was transferred to Dabi Singh and the possession by his father was possession on his behalf from that date. In our opinion, therefore, the learned Munsif was right. We, therefore, allow the appeal and, setting aside the order of the District Judge, restore that of the learned Muneif with costs throughout inelading in this Court fees on the higher seale.

J. P.

Appeal allowed.

(1) 27 A. 169; 1 A. L. J. 625; A. W. N. (1901) 222. (2) 25 A. 338; A. W. N. (1933) 70.

ORIGINAL CIVIL SUIT No. 515 or 1914.

January 13, 1921.

Present:—Mr. Justice Greaves.

SEWRATAN-PLAINTINE

Dersus

KRISTO MOHAN SHAW AND OTHERS .

Practice—Order relating to dismissal of suit in default of payment—Order, construction of.

In a suit the following order was passed "Adjourned till at une; Ks. 200 as condition precedent to be paid before at lune. If the money is not paid by the lat lune the suit will be dismissed with costs" The money was not paid by the at lune. On a question arising as to what was the effect of the order:

Held, that inasmuch as the order did not contain the words, "In default the suit will stand dismissed," the suit was not dead and a further order was necessary by the Court before it was dead and that it was open to the Court, if the circumstances appeared to the Court to justify such an order, to further extend the time for making the payment.

Mr. H. U. Masumder, for the Plaintiff.
Mr. N. N. Ghatak, for the Defendants.

JUDGMENT.—This suit appeared on the
Special Board sometime in Desember last.

ERWAJ MUHAMMAD C. AHMAD KHAN.

When the suit was called on, the defendants contended that the suit was dead by virtue of an order passed on the 10th April 1919. That order has never been drawn up. But it appears from the Minute Book that the order was made in these terms :- "Adjourned till let Jane; Rs. 200 as condition precedent to be paid before let June. If the money is not paid by 1st June the suit will be dismissed with costs," The money was not, in fact, paid in by the 1st June, and has not been paid up to this day. On the 4th June, Mr. Mandal, Attorney for some of the parties, wrote a letter to the plaintiff with regard to the drawing up of the order for dismissal. On the 25th June the case came on, and another ease in which a similar order had been made, and in which on the 25th an order for dismissal was made. On the 21st June one of the plaintiffs had died and on the 25th the case was ordered to go out of the list for substitution to be made, and in August of the same year an order for sub. stitution was made. I have been referred to the cases of Script thonography Co. v. Gregg (1), Metcalf v. British Tea Association (2), King v. Darenport (3) and also to the ■BSB of Whistler v. Hancock (4).

It seems to me that the real question is the effect of the order of the 10th April 1919. If that order had contained the words: "In default the suit will stand dismissed," should have thought that as from that date the suit in the circumstances was dead and that, irrespective of subsequent proceedings and any question as to the drawing up of the order, the Court could not revive the suit in the absence of any appeal from the order of the 10th April 1:19. But, I think, baving regard to the terms of the order of the 10th April 1919, a farther order was necessary by the Court before the suit was dead, and that, on an application for such an order, it would be open to the Court, if the eireumstances appeared to the Court to justify such an order, to further extend the time for making the payment. Under the sireumstances, I think, it is now open to

(1) (890) 59 L. J. Ch. 400.

this second appeal has arisen was for a declaration to the effect that a gift of land made by one Musammat Sahibzadi, who

JUDGMENT .- The suit out of which

the Court, in spite of the order of the 10th April 1919 to hold that the suit can proceed. Counsel for the plaintiff tells me that the suit is ready for hearing, and is willing to have it put in the Prospective List. In these circumstances, I will allow the suit to go into the Prospective List. But the order of the 10th April must be complied with, and I give the plaintiff one week to comply with the order. In default of compliance, within one week from this day, the suit will stand dismissed. Costs, costs in the cause. Certified for Counsel.

J. P. & N. H.

Order accordingly,

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 609 OF 1917.
November 12, 1921.

Present: - Mr. Justice Scott Smith and Mr. Justice Abdul Q.dir.

RHWAJ MUHAMMAD AND OTHERS-

Lersus

AHMAD KHAN AND OFBERS-PLAINTIFFS
- REPPONDENTS.

Custom-Succession-Female intervening-Ancestral property-Sister-1 athans of Ludhiana District.

Where a female intervenes in the line of descent she simply acts as a conduit to pass on the property as ancestral property to her sons and their descendants [p. 484, cols. 1 & 2.]

Lehna v. Thakuri, 32 P R. 1895 (F. B.', followed. Among Pa hans of the Ludhiana District sisters and their sons do not succeed in the presence of any collaterals who can prove their relationship to the deceased. [p. 484, col. 2.]

Second appeal from a decree of the District Judge, Ludhians, dated the 7th Decem-

ber 1916, affirming that of the Subordinate Judge, Second Class, Ludhians, dated the 18th July 1916.

Mr. M. S. Bhogat, for the Appellants. Dr. Nand Lal, for the Responden:s.

^{(2) (1882) 46} L. T. (N S.) 31. (3) (1879) 48 L. J. Q. B. 506; 4 Q. B. D. 402; 27

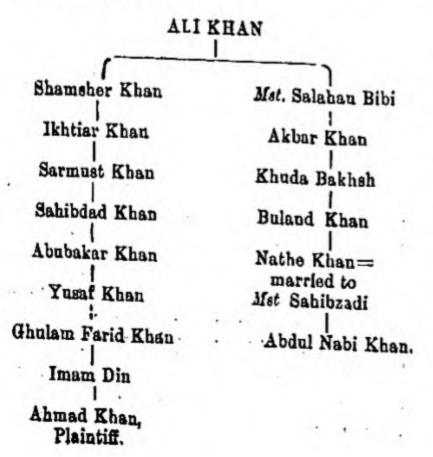
W. R. 798. (4) (1878) 47 L. J. Q. B. 152; 3 Q. B. D. 83, 37 L. T. 689; 26 W. R. 211.

KOWAJ MUHAMMAD U. AHMAD KHAN.

had only a life-estate, as the mother of the last male owner, Abdul Nabi Khan, shall not affect the reversionary rights of the plaintiff, Ahmad Khan, after the death of the dozor. The donees were the daughter's sons of the said lady; or in other words, sons of the sister of the last male owner. It was claimed that Musammot Sahitzudi having only a life tenure could not make a valid gift, that the property should revert to the collaterals of the original donor, and that there was no custom under which sister's sons sould susseed as heirs. The Trial Court decreed the suit and on an appeal by the defendants District Judge confirmed the decree. The defendants have now come up to this Court in second appeal and we have heard Mr. M. S. Bhagat for the appellants and Dr. Nand Lal for the respondents.

A preliminary objection was raised by Dr. Nand Lal that the certificate granted by the District Judge on a question of custom in this case was not properly granted, as the requisites of section 41 (3) of the Panjab Courts Ast were not fulfilled, but after duly considering his arguments on this head we overruled his objection and the case was argued before us at length by both sides on the merits.

The parties are Pathens of Ludhiana District and it has been held that, as agriculturists, they are governed by agricultural custom. The following pedigree-table, which is taken from a fuller table on the record, will illustrate the relationship between them:



The plaintiff's case is that the property in dispute had some to Zusammat Salahan Bibi as a gift from her father, and on the death of Musammat Sahitzadi it should revert to the plaintiff and his brothers as the collaterals of the original donor, and that the sons of Abdul Nabi's sister have no right to get the land after the death of their maternal grandmother, either by virtue of the gift or by succession. The defendants say that they do not know how Musammat Salahan Bibi got the property, they do not admit any gift in her fayour and dispute the right of the plaintiff to sue.

Mr. Bhagat has taken his stand, in his arguments in this Court, mainly on the fact that there is no evidence at all on the resord of a gift having been originally made in favour of Musammat Salahan Bibi, He contends that Abdal Nabi and his ancestors held the land in their own right and not as persons descended from Ali Khan and that, therefore, Ahmad Khan had no locus standi to bring the suit, as he is not a collateral of Abdul Nabi, a female having intervened in the line of ascent connecting Abdul Nabi with Ali Khan. Dr. Nand Lal, on the other hand, argues that the Courts below have concurrently found that the land in suit was acquired by Musammat Sılahan Bibi from her father and as she was not entitled under sustomary law to succeed to land in the presense of her brother, it is a fair inference that a gift in her favour had been made. He urges that the findings, that the land came to her from her father and that it came as a gift, are findings of fact, which must be held to be final. We are prepared to take the finding that Musammat Salahan got the land from her father as a conclusive finding of fast. Mr. Bhagat argued that there was no evidence in support of this finding, but this is not correct. We find that there is evidence, the most important piece being the pedigree table. This finding cannot, therefore, be questioned in second appeal, We must say, however, that the Courts below have not come to any finding at all as to the alleged gift in favour of Musammat Salahan nor is there anything on the record to prove the said gift. We hold, therefore, that the plaintiff cannot succeed in his case

RETANCHAND DHARAMCHAND C. GOBIND LALL.

on the ground that the land must revert to him as a descendant of the original denor, Ali Khan. In this view of the care it becomes unnecessary to consider or disenes at any length the arguments addressed to us by Counsel on both sides on the question whether it is necessary to exhaust the line of desent of Musammut Salaban Bibi both as regards her male and female descendants in the direct line before Ahmad Khan can bring any claim. Mr. Bhagat insisted in this connection that the dones (ecns of the daughter of Nathe Khan and Musammat Sabitzadi) were the direct lineal desserdants of Musammat Salahan and as such were entitled to eneceed, in preference to Ahmed Khan, independently of the gift in their favour made by Musammat Sahitzadi. He relied upon Gurait Singh v. Musammat Frem Kaur (1), Lochhmon v. Ehoguan Sahai (2) and Shchanchi Eh n v. Begam an (3), in support of his contention, Dr. Nand Nal in reply relied on Januat v. Abaulla (4), in which a Division Bench of the Punjab Chief Court has differed from the view taken in Gurdit Sirgh v. Musammat Frem Raur (1). We were asked to refer the question to a Full Bench to have the apparent sorflist between Gurdit Singh v. Musommet Frem Raur (1) ard Janual v. Abdulla (4) set at rest and we would have done so but for the reason that we hold that the original gift in favour of Musammat Salaban bas not been proved and the question involved in the rulings above sited no longer arises in the €BB€.

Coming to euccession pure and simple as a basis of decision in this case, we bave to difficulty in firding that Atmad Khan's claim stards on a firmer focting.

As shown by the pedigree table, the parties are undoubtedly descended from Ali Khap. As regards Musammet Salahan Bibi, a female intervening in the line of dettent, Lehna v. Thabari (5), ie en satherity

(1) 3 Jrd. Cas. EC4; 84 P. R. 1909; 76 P. L. R. 1609; 118 P. W. R. 1909.

(2) 10 Ind Cas. 277; 68 P. R. 1911; 160 P. L. R.

1911; 206 P W. R. 1911.

.3 10 Ind. Cas. 451; 13 P. R. 1914; 186 P. L. R.

1917, 191 P. W. R 1917,

(4) 32 Ind. Cas. 817; 4 P. R. 1916; 25 P. W. R.

1916. , (5) 32 P. R. 1895 (F. B.). for holding that "she simply acts as a conduit to pass on the property as ancestral property to her sone and their descendante." Abdul Nabi Khan was ber last male lineal descendant and on his death his mother His sister or the sons got a life estate. of her sister had no rights in his property according to the enstomary law. It appears from the answer to question No.52, in Donnet's Customary Law of the Lidhiana District, that " sieters and their sons do not succeed in the presence of any collaterals who can prove their relationship to the deceased. instances of sisters or their sons succeeding are very rare." In face of the above statement in the customary law of the distriot, and without an iota of evidence to the contrary, it must be held that the lower Appellate Court's decision that Ahmad Khan, a descendant of Ali Khan, the original owner of the land, has a much better right to the property left by Abdul Nabi than the sons of the latter's sister, is quite correct. This appeal is, therefore, dismissed with costs.

Z. K.

Apreal dismissed.

CALCUTTA HIGH COURT. OBIGINAL CIVIL SUIT No. 2087 CF 1920. January 12, 1:21.

Fresert:- Mr. Justice Greaves. RATANCHAND DHARAMCHAND-PLIINTIFF

versus

GOBIND LALL DUTT-DEFENDANT,

Letters Patent (Cal), cl. 12-Jurisdiction-Agree. ment to mortgage land outside original jurisdiction-Suit for specific performance - Leave to sue.

A suit for specific performance of an agreement to mertgage lands situate outside the ordinary original jurisdiction of the Calcutta High Court, is a suit for land within the meaning of clause 12 of the High Court's Letters l'atent, and the plaintiff is no entitled to obtain leave under that clause to proceed with the suit in the High Court. [p. 4.5, col. 1.]

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Mr. H. D. Bose, (with him Mr. S. M. Bose), for the Plaintiff.

Mr. M. N. Basu, (with him Mr. J. Langford James), for the Defendant.

JUDGMENT.—The plaintiff in this snit asks for (a) leave under clause 12 of the Obarter, (b) for judgment for a named sum, and (c) for an order on the defendant to execute and register a mortgage in his favour, and for ancillary reliefs in respect of these prayers.

The land in respect of which relief is sought under elause (c) of the prayer is situate outside the jurisdiction of this Court, and the defendant urges that this is not a case in which the Court can give leave under clause 12 of the Charter. I think this contention is correct and that a suit for specific performance of an agreement mortgage lands outside the jurisdistion, even if the title is accepted, is a suit for land within the meaning of clause 12 of the Charter, and accordingly that leave cannot be given. I have been referred to the case of Sreenath Roy v. Cally Does Ghose (1). That decision seems to me to cover the present case and with the decision I respectfully agree. In the result, I hold that no leave can be given under clause 12 of the Charter, and the sait cannot proseed so far as regards the reliefs elaimed other than the relief (b) as to which no desision is sought on the present application. The injunction granted on the 28th September last should be dissolved. Defendants to get coats of both the matters in the list to day.

N. H.

Order accordingly.

(1) 5 C. 52, 2 Ind Dec. (s. s.) 663.

SECOND CIVIL APPEAU NO 872 OF 1917.

February 7, 1922.

Present :- Mr Justice Abdul Bacof and Mr. Justice Harrison.

MELA MAL AND ANGTHER-DEFENDANTS-

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GORI AND OTAR 18 - PLAINT: FFS AND RAJ MAL AND ANOTHER - DEFENDANT! -- RESPONDENTS.

Hindu Law-Joint family-Decree against one member, when can be enforced against joint jamily property.

In order to make the other members of the joint family liable under a decree passed against the managing member it ought to be shown that the suit was brought against him in his representative capacity. [p. 487, col. 2.]

Second appeal from the decree of the District Judge, Hoshiarpur and Kangra Districts, dated the 20th January 1917, reversing that of the Senior Subordinate Judge, Kangra, at Dharmeala, dated the 20th July 1916.

Lala Balwant Rai, for the Appellants.

Mr. Mukand Lal Puri, for the Respond. ..

JUDGMENT.-This second appeal has

arisen out of the following fasts: -

One Naud Ram along with his sous Guri. Munshi, Dani, plaintiffe, and Raj Mal, defen. dant No. I in the snit, formed a joint-Hindu family. He died in 1903; On the 7th January 1913 Mala Mal and Shib Dayal, defendants Nos. 3 and 4, traders of Hoshiarpur, filed a suit in the Court of the Subordinate Judge of Hosbiarpur against ... Nand Ram and Raja Mal, defendant No. 1 for the recovery of Rs. 1,270 due on bahi account. Nand Ram having died before the suit, as already stated, the defendants. Nos. 3 and 4 proceeded against Raj Mal alone as the sole defendant in the care. The suit was decreed against Raj Malslone and a deerse for the amount was passed against him. In the execution of the deeres. a debt of Rs. 2,051 due from the estate of the Raja of Goler in the hands of the Court of Wards was attached. The plaintiffs objected to the attachment of 1th of the debt. on the allegation that the debt for which the elaim was preferred had not been incurred

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for the benefit of the joint family and that the decree being against the defendant No. 1 alone could not be executed against The objections were disallowed and them. the 3 h share of the debt was not released from attachment. Thereupon the plaintiffs instituted the present suit for a deelaration to the effect that the sum of Rs. 2,051 due from defendant No. 2 which the defendants Nos. 3 and 4 bad got attached in execution of their deerce against defendant No. 1 was not liable to be attached and sold in excess of the share Raj Mal and that the share of the plaintiffs to the extent of a h ought to have been released from attachment. It was also pleaded that the defendant No. 1 was a man of bad character and of extravagant habits and had incurred the debt for immoral, purposee, and that in any case the decree being egainst defendant No. I alone the shares of the plaintiffs were not liable to be attached in execution thereof.

The suit was resisted by the defendants Nos. 3 and 4 on the following grounds, namely, that the defendant No. 1 was the manager of the joint family, that he had incurred the debt as such along with the father of the plaintiffs for the purchase of articles for a shop which belonged jointly to the plaintiffs, defendant No. 1 and their father. The charges of immorality and extravagance were denied, and the debt due from the estate of the Raja of Goler was alleged to be the joint property of the family.

The Trial Court framed two issues,

namely :-

(1) Was not the debt for which the defendents Nos. 3 and 4 obtained a decree for Rs. 1,270 incurred for the benefit of the joint family comprising plaintiffs and defendent No. 1?

(2) If so, is not the whole debt of Rs 2,051 due by defendant No. 2 to the plaintiffs and defendant No. 1 attachable and liable to sale in execution of the said decree?

The onus was placed on the plaintiffs in respect of both there issues. On the first issue the finding of the Trial Court was that the plaintiffs had failed to discharge the onus and that it was not necessary under

the eireumstances to discuss the evidence of defendants Nos. 3 and 4.

The decision on the second issue naturally followed the decision on the first issue and was necessarily against the plaintiffs.

The suit was accordingly dismissed. On appeal by the plaintiffs the decision of the Trial Court has been reversed and a decree has been granted in favour of the plaintiffs. Here: this appeal.

The following facts may be taken to have either been admitted or found :-

(1) that the sum of R: 2,051 which has been strached, belongs to the plaintiff and Raj Mal, the defendant No. 1; and

(2) that the decree under execution was passed against Raj Mal reconally and not in his representative capacity as the manager of the family.

The first contention put forward by Mr. Balwant Rai in his argument was that the attached debt belonged to the defendant No. I explusively and that the plaintiffs had no share in it. This contention, however, does not appear to have been urged in the Courts below. In fact, from the line taken in defence and from the wording of issue No. 2, it would appear that the said sum was treated by all parties as being due both to the plaintiffs and defendant No. I. We are, therefore, not prepared to listen to this contention put forward in second appeal for the first time.

The second contention of the learned

Vakil was that, inasmuch as the decretal debt had been incurred for the benefit of the joint family, and as the defendant No. 1 was admittedly the manager, the plaintiffs must be held to be liable for the debt, in spite of the fast that the decree under execution had been obtained against the defendant No. 1 alone. This contention is opposed to the well-recogn zad role that where a ereditor sues for a debt due from a joint family and does not join all the members of the family as defendants and obtains a decree against one of the members of the family alone, it cannot be executed against the whole co-parcenary property, unless the person sued happens to be the

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manager of the family and the decree is obtained against him in his capacity as manager representing the family. This rule is clearly stated in almost all the commentaries on Hindu Liw. See, for example. "Principles of Hindu Law by Mulla, III Edition, page 229, paragraph 208" where the principle, deducible from decided cases is thus summed up:

"Where a person seeks to enforce a claim against a joint Hindu family, it is advisible that he should join all the members of the family as defendants. If he sues only one of the members and obtains a decree against him, the decree cannot be executed against the whole co-parcenary property, it can only be executed against the defendants' interest in the property. To this, however, there is an exception which is noted below.

"Exception .- A decree passed against the manager of a joint family as representing the family, provided it be in respect of a debt contracted by him for family necessities or for the family business, may be executed against the whole co-parsenary property. although the other members were not parties to the suit. It is otherwise, if the decree passed is against the manager personally. A desree, even for a family debt, passed against the manager personally, cannot be executed against the whole co parsenary property; it can be executed only against his interest in the property," The same rule is stated by Dr. Goor in his Hindu Code at page 613, paragraph 1359, as follows:-

"If the manager may sue or be saed on behalf of the joint family, it follows that any decree passed in such suit for or against him, would bind the family which he represented. This was the ratio decidendi of the Privy Council decision Sheo Shankar Ram v. Jaddo Kunwar (1).] It is immaterial whether the manager was the father or any other relation, provided he was the manager, and had or was sued in that capacity. This must be clear from the resord. It cannot be presumed."

The same rule is stated by Mayne in his work on Hindu Law, IV Edition, section 324, at page 372, in the following words:

(1) 24 Ind. Cas. 504; 36 A. 393; 18 O. W. N. 969; 16 M. L. T. 175; (1+14) M. W. N. 598; 1 L. W. 645; 20 O. L. J. 283; 12 A. L. J. 1173; 16 Bom, L. R. 810; 41 (2) 8 L. A. 216 (P. O.).

"If the managing member of the family executed a document which would bind the other members, the proper course is to see them all. If the creditor choses, he may only see the person who executed the document. But if he adopts this course, his execution will only take effect upon the share of the execution debtor. He cannot enforce it against all other members (not being the sons of the debtors) merely by proving that the transaction was entered into for the benefit of the family."

In this ease it has not been shown that the debt was insurred for the benefit of the family or that the plaintiffs were any way banefited by the transaction. held in Bhura v. Banarsi has been Das (2) that "there is no presumption that a debt contracted even by the manager of a Hinda family was contrasted for the beneft of the family or firm." Therefore, in each case it ought to be proved that the debt for which all the members of the family are sought to be made liable was insurred for the banefit of the family. Tois question, however, is not very material and eannot affect the main question on which the decision of the present case depends. The main question is, whether the property of the plaintiffs can be attached in execution of a decree passed in a sait to which they were no parties and were not represented by any one. As a general proposition of law there can be no doubt that a desree can be executed only against a person against whom it has been passed, but it is contended in this ease that, although the plaintiffs were not impleaded as defendants in the suit they were substantially represented by defendant No. 1 who was the manager of the joint family. It has, however, been held in numerous eases that in order to make the other members of the joint family liable under a decree passed against the managing member it ought to be shown that the suit was brought against bim in his representative capacity. In addition to the authorities quoted above, the following cases, among others, too numerous to mention, may be sited as fully supporting this proposition:-

^{(2) 80} Ind Cas. 481, 174 P. L. R. 1915, 113 P. W. R. 19.5.

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Virarogaumma v. Samudrala (3), Garurappa v. Thima (4), Sothuratyon v. Muthusomi (5), Bolbir Singh v. Ajudhia I rasad (6), Ram Dayol v. Durge Singh (1) and Lackmi Narain v. Kunji Lol (8).

Mr. Balwant Rai har, however, etrongly relied on the case of Sakharam v. Devii (9), and no doubt the desision in that ease goes a long way to support his confention. The rule is thus stated in the head note:

"Where a debt is insurred by a Hindu as manager of the family for family purposes, the other members of the family, though not parties to the suit, will be bound by the deeree passed against him in respect of the debt; and if in execution of the decree any joint property is sold, the interest of the whole family in such property will pass by the sale."

It has, however, not been shown in this case that Raj Mal had incurred the debt as the manager of the family and for its benefit. An examination of the facts of decided cares leads us to the conclusion that no general rule can be laid down which may be applicable to every care. If. in any particular case, it is shown that the debt was incurred by the Karta of a family for the purposes of the family trade or for its benefit otherwise and be was sued as manager and a decree substantially against the family in the name of its manager, all the members of the family will be liable for the decretal These facts, however, must amount. proved by evidence. It was held Bahgasawmy Iyengar v. Annathurai Iyengar (10) that 'there is no presumption of law that a suit by a manager of a joint Hindu family is in his representative eapacity as manager; and where the question itself is rot raised as to his having represented the family, a Court deerse.

(3) 8 M. 20°; 3 Ind. Dec. (N. 8) 144.

16 9 A. 142; A. W. N. (1883 323; 5 Ind. Dec.

(N 8) 527. 7) 12 A. 209; A. W. N. (1510, 83; 6 Ind. Dec.

(N. 8) 8 2. 8) 16 A. 449; A. W. N. (1894) 169; 8 Ind. Dec.

(N. 8) 292.

(9) 23 B. 372; 12 Ind. Dec. 'N. s.) 247.

(10) 7 Ind. Cas. 341; 20 M. L. J. 852 at p. 853; (1910) M. W. N. 401; 8 M. L. T .204,

will be acting rightly in bolding that he sued in his own personal capacity." The same rule, we take it, will apply in a converse care, namely, where a suit is brought against a manager of a joint family.

Mr. Belwant Rai has referred to three more eases to which we will bris fly refer:-

(1) Boldeo Sonar v. Mobarak Ali Khan (11). This case, in our opinion, does not lay down any different principle. The rule laid down in the judgment is summed up in the head note, which runs as follows :-"A member of a joint Hindu family, not being a son of the debtor, would be bound by a decree and sale of the family property under the deerce, although he was not a party to it, if the creditor or the purchaser, as the case may be, could prove that the debt had been contracted for the benefit of the family or the purposes of a trading business in which they were interested, and if the decree was substantially one against them, although in form it might be against the head member or members of the family, who contracted the debt.

"This would especially be so, if the other eo-parcepers were mirors at the time the debt was contracted and the suit was

brought."

- (2) The facts of the case in Hari Vithai v. Jairam Vithal (12) are clearly distinguish. able from the facts of the present care. The rlaintiffs and their brothers Essji were in joint occupation of certain thikans in a kheti village. Esaji beirg the eldest brother was in possession of the family estate as a marager In that capacity be was sued for arrears of assessment due on the thikans and a decree was obtained against bim. It was accordingly held that the other members of the family were bound by the
- (3) The case of Daulat Ram v. Mehr Chand (13) has been distinguished in the case of Sothwayyan v Muthusami (5), on the ground that the suit was brought upon a mortgage standing in the name of the managing member of the family and was treated as one against the managing member

(11) 29 C. 583.

(12) 14 B. 587; 7 Ind. Dec. (N. s.) 885.

(13) 15 C. 70; 14 I. A. 187; 11 Ind. Jur. 435; 5 Sar. P. C. J. 84; 1 P. R. 1888; 7 Ind. Dec, (N.s.) 682 (P. C.).

^{(4. 10} M 316; 3 Ind. Dec IN 8) 973. (5) 12 M. 325; 4 Ind. Dec. N 8.1 ! 78.

RADHOMAL KESHOWDIS U. HOLOMAL BESUMAL,

in his representative eapacity. The other' bound by the deeree.

In our opinion, the preponderence of authorities is in favour of the decision of the lower Appellate Court. We accordingly dismiss this appeal with costs; the effect of the dismissal being that the desree cannot be executed against the shares of the plaintiffe in the property attached.

Z. K. & M. H.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

BRIVISION APPLICATION No. 21 OF 1918. September 3, 1920.

Present: - Mr. Kennedy, J. C., and Mr. Madgaonkar, A J. C. RADHOMAL KESHOWDAS-

APPLICANT

tersus HOLOMAL KESUMAL AND OTHERS -OPPUNENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 25-Revision-High Court, when can interfere.

Under section 25 of the Provincial Small Cause Courts Act it is not open to a High Court to interfere except where some clear error of law and injustice resulting therefrom are apparent. It cannot interfere merely because, upon the evidence before the lower Court, it would have come to a different finding.

Application for revision against the desision of the Small Cause Court Judge, Sukkur.

Mr. Rolumal Lekhras, for the Applicant.

Mr. Isardas Oodhram, for the Opponent. JUDGMENT -The question before the Small Cause Court was, whether the common intention to pay by way of difference and not by delivery had or had not been proved. The law on the subject is clear. The burden of proof is on the defendants; and such common intention is a question of fact in the, sase of each contract on the evidence : in that particular suit It cannot, therefore, be assumed, even in the ease of the other contracts between the same parties, much less in the case of contracts between different parties.

The line between a contract which is members were, therefore, rightly held to be 'speculative and one in which such common intention exists is not always clear and must be a question depending upon the evidence in each case. How narrow the line may be is easily seen from eases such as Burgerii v. Bhagwandas (1) which went up on appeal to the Privy Council Bhagwandas v. Burior i (2). In that case the High Court and the Privy Council differed as to whether the trans. action was merely speculative as far as one party was concerned, or whether there was such common intention on the part of both. Again, the fast of cover is merely evidence which is relevant but not nesessarily sonslusive; Motichand Magandas v. Keshan Appa, i Kulkarni (1).

In the present 'case, we cannot accept the " contention of the applicant and ask ourselves whether, upon the evidence before the lower Court, we should or should not have arrived at the same conclusion. In this application under section 25 of the Small Cause Courts Ast, the contention of the opponent, must, we think, be allowed that it is not open to ng to interfere except where some elear error of law and injustice resulting therefrom are apparent. There is a certain amount of evidence in the case on which the finding of the Court of Small Causes is sustainable; and, therefore, we do not think that, under section 25 of the Act, we can interfere and set aside the finding that, in this particular contract, there was common intention to pay by differences and not by delivery. The applieation fails and is dismissed with costs.

J. P. & N. H.

Application dismissed."

(1) 20 Ind. Cas. 834; 38 B. 261; 15 Bom. L. R. 718.

(2) '41 Ind: Cas. 284; 42 B. 373; 23 M. L. T. 203; 81 M. L. J. 3)5; 4 P. L. W. 289; 16 A. L. J. 241; 27 C. L. J. 85% (1918) M. W. N. 315; 23 C. W. N. 8.0 20 Bom' L. R. 561; 7 L. W. 577; 11 Bur. L. T. 21.6 ... 45 I. A. 29 (P. C.).

(8) 57 Ind. Cas. 129, 22 Bom. L. B. 406.

MAHOMBD GHASITA O, SIRAJ-DD-DIN.

FULL BENCH.

CIVIL APPR.L No. 1396 or 1918. November 21, 1921.

Present:-Sir Shadi Lal Kr., Chief Justice, Mr. Justice Chevis and Mr. Justice Harrison.

MAHOMED GHASITA - DEPENDANT

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SIRAJ. UD DIN AND OTHERS -- PL. INTIFF! -- RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 115
--"Compensation," meaning of—Suit to recover money
due on contract for materials supplied and work done—
Nature of claim—Limitation.

The term "compensation" in Article 115 of Schedule I to the Limitation Act, denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract, and a suit to recover a specified sum of money on a contract, is a suit for compensation within that Article. [p 4.7, col 1]

Nobocoomar Mookhopadhaya v. Siru Mullick, 6 C. 94: r. C. L. R. 579 3 Ind. Dec. : N s. 61 and Husain Ali Khan v Hafiz Ali Khan, 3 A. 600 (F. B; A. W. N. : 181 33; v Ind. Jur. 142; 2 Ind. Dec. : N. s., 323,

followed

D contracted to erect a building, and employed P as sub-contractor to supply certain materials for, and to do certain work in connection with, the building, for which he was to be paid a consolidated price for both materials and the work done. P. brought the present suit on the basis of this contract to recover the balance of the money due to him, without specifying the price of the materials or the price of the work done, and the question was as to the period of limitation applicable to the suit:

Held, that as the plaint in the suit made no mention of the price of the materials supplied, as distinct from the price of the work done, and contained no reference whatsoever to two claims, the claim was indivisible and could not be split up into two portions, and that, therefore, the period of limitation applicable was that contained in Article 1.5 of Schedule I to the Limitation Act. [p. 49', col 2]

Radha Kishen v. Basant Lal, 22 Ind. Cas. 576; 103 P. R. 1913; 81 P. L. R. 1914; 252 P. W. R. 1913, dis-

sented from.

Second appeal from a decree of the District Judge, Lahore, dated the 31st January 1918, affirming that of the Subordinate Judge, First Class, Lahore, dated the 7th February 1916.

FACTS appear from the following Order of Reference made by Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Harrison, on

the 7th June 1921.

ORDER OF REFERENCE TO A FULL BENCH.

The defendant, Mian Ghasita, hada con-

tract to construct a building at Labore, and employed the plaintiffs to supply Italian marble and other stones and to do all the work to be performed for placing the marble and the stones in their proper places in the building. The suit, which has given rise to this appeal, was for the recovery of a certain sum of morey alleged to be due to the plaintiffs for the materials supplied and the work performed by them. Now, the learned District Judge, upon a consideration of all the evidence, has determined the various questions of facts which arose between the partier, and has fixed the amount which the plaintiffs are entitled to recover from the defendant.

The findings of facts recorded by the learned Judge cannot be assailed on second appeal; and the only question of law which arises in this appeal, is whether the suit is governed by Article 120 of the Second Schedule of the Limitation Act and is consequently within time. Now, it may be stated at once that the claim would be barred by time unless it is governed by the six years' rule as laid down by Article 120 or Article 52 (the period of three years preseribed by the latter Article has been enlarged to six years by the Panjab Loans Limitation Act, 19(4). As the plaintiffs supplied not only the meterials but also the labour it is elear that neither Article 52 nor Article 55 governs the whole of the claim, and a Division Bench of the Punjab Chief Court in Radha Kishen v. Bosant Lal (1) has held that, as no single Article was applicable to the entirety of the elaim, the suit fell within residuary Article 120. The correctness of this decision has been impeached before us, and, as at present advised, we are not inclined to affirm the rule laid down in that judgment.

Now, it is a well-settled rule of law that the combination of several claims in one suit does not deprive each claim of its specific character and description—tide, interalia, Chrinicas v. Hanmant (2), and there is, therefore, no valid reason why the claim, in so far as it relates to the price of the materials supplied by the plaintiffe, should not some within the purview of Article 52,

^{(1) 22} Jud. Cas. 576; 103 P. R. 1913; 81 P. L. R. 1914; 252 P. W. R. 1913.

^{(2) 24} B. 760; 1 Bom. L. R. 799; 12 Ind. Dec. (N. s.) 709(F. B.).

MOHAMMAD GHASITA C, SIBAJ-UD-DIN.

and that relating to the price of the work done should not be governed by Article 56. Assuming, however, for the sake of argument, that the entire claim must come within one Article, we consider that the residuary Article for actions arising out of contracts is Article 1:5, and that Article 1:0 has, therefore, no application to an action based upon a contract,

As the judgment sought to be impeashed was delivered by a Division Bench, we do not think that we would be justified in dissenting from it without referring the matter to a Full Bench. We accordingly refer for the determination of a Full Bench the question, whether the suit as described above is governed by Article 52, Article 56, Article 115, or Article 120.

Mr. Muharram Ali, Chiehti (with him Mesers, Muhammad Amin and Jagan Nath), for the Appellant.

Bakhshi Tek Chani, for the Respondente.

JDDGMENT .- The action, which has led to this reference, was brought by the plaintiff for the recovery of a certain sum of money on the basis of a contract. It appears that the defendant, who had taken a contract to construct a building at Labore, employed the plaintiff as a sub contractor to do the work of flooring in the building. plaintiff was to supply Italian marble and other stones required for the floring, and also to do all the work necessary for constructing the floor, and was to be paid a certain sum of money for every square foot of the flooring done by him. The rate, though varying with the stone used in flooring, did not specify separately the price of the stone and other materials supplied by the plaintiff, and that of the labour required for doing the work. In other words, the parties fixed for each kind of flooring a consolidated rate including the price of the materials to be supplied and the work to be done by the plaintiff.

The action brought by the plaintiff was for the recovery of the balance of the money due to him on the strength of the contract described above: and the question for consideration is, what Article of the Limitation Act governs the claim. Our attention has been invited, in the first instance, to Article 52, which prescribes a period of three years

(enlarged to six years by the Punjab Loans Limitation Ast of 1904) for the resovery of the price of goods sold and delivered to the defendant; and also to Article 56, which lays down a period of three years for a suit to recover the price of work done by the plaintiff for the defendant. Now, as stated above, the plaintiff supplied not only the materials. but also the labour, and it is slear that neither of the aforesaid Articles governs the suit in its entirety. It is, however, nrged that the action comprises two claims, one for the price of the materials supplied by the plaintiff, and the other relating to the price of the work done by him, and that these two slaims should be dealt with separately, and that they are governed by Article : 2 and Article 56, respectively. The rule of law is, no doubt, firmly established that a combination of several claims in one action does not deprive each claim of its specific character and description. The Code of Civil Procedure allows a plaintiff, in certain circomstances, to combine in one action two or more distinct and independent claims, and it is quite possible that one of the claims may be barred by limitation, and the other may be within time. though both of them arise out of one and the same sause of action. In a cese of that description there is no reason why the Court should not apply to each elaim the rule of limitation specially aprlicable therete. It is nowhere laid down that only one Article should govern the whole of the sait, though it may ecceist of several independent claims, and that the suit should not be split up into somponent parts for the purpose of the Law of Limitation,

The question, however, is whether the action as brought by the plaintiff can be treated as a combination of two distinct elaims. Now, the plaint makes no mention of the price of the materials as distinct from the price of the work, and contains no reference whatsoever to two claims. There is only one indivisible elaim, and that is for the balance of the money due to the plaintiff on the basis of a contract, by which he was to be paid for everything supplied and done by him in connection with the flooring of the building at a comprehensive rate. The claim as laid in the plaint is an indivisible one; it cannot be split up into two portions. We must, therefore, hold that it falls

MILEEL U. PUNKI.

neither under Article 52, nor under Article 56.

The learned Advocate for the plaintiff contends that as no ther of the above Articles governs the claim, it should some within Article 120. The judgment in Radha Rishen v. Bosant Lol (1), which is relied about in support to this contention, no doubt, related to a suit for the resovery of a sum of money alleged to be due for the work performed and materials supplied by the plaintiff to the defendant under a contract, and the learned Judges held that neither Article 52 nor Article 56 was applicable to the entire claim. They then made the following observation:—

"There is no other Article specifically applicable, and hence the only Article which

can be applied is Article 1:0."

Now, with all deference to the learned Judger, we are unable to hold that there is no other Article governing a claim of that character. It seems that their attention was not drawn to Article 115, which governs every suit for compensation for the breach of a contract not in writing registered and not specially provided for in the Limitation Act. It is beyond doubt that this Article is a general prevision applying to all actions ex contractu not specially provided for otherwise; and the present claim certainly arises out of a contract entered into between the parties. The word "compensation" in Article 115 as well as in Article 116 has the same meaning as it has in section 73 of the Indian Contract Act, and denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract. It has been held, and we consider rightly, that a suit to recover a specified rum of money on a contract is a suit for compensation within Articles 115 and 116-vide Noboccomer Siru Muliick (d) and Mookhopadhaya v. Husain Ali Khan v. Hafiz Ali Khon (4).

We are accordingly of opinion that the present claim must be regarded as one for compensation for the breach of a contract, and that there is no special provision in the Act which governs the claim. It must, therefore, come under the general provision

(3) 6 C. 94; 6 C. L. R. 579; 3 Ind. Dec. (N. s.), 61. (4) 3 A. 600 (F. B.); A.W. N. (1881) 33; 6 Ind. Jur. 42; 2 Ind. Dec. (N. s.) 323. every action arising out of a contract, not otherwise specially provided for.

Our reply to the question referred to us is, that the suit is governed by the three years' rule as prescribed by Article 115. The case must now go back to the Division Bench for final determination.

Oase remittet to Dicision Bench.

W. C A & N. H.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 1015 OF 1918.
MBy 25, 1921.

Present :- Mr. Justice Abdul Racof and Mr Justice Harrison.

MILKHI-PLAINTIFF-APPELLANT

tersus

Musammat PUNNI-DEFFADART-

Punjab Courts Act (VI of 198), s 41 (31-Appeal, second - Question of burden of proof involving question of custom - Certificate, necessity of.

A second appeal on the question of the burden of proof, when that question involves a question of custom, cannot be entertained without the necessary certificate under the lunjab Courts Act. [p. 493, col. 2.]

Second appeal from a desree of the District Judge, Hoshiarpur, dated the 10th January 1918, reversing that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 3rd November 1917.

Mr. B P. Khosla, for the Appellant.

Mesers Fakir Chand and Amar Nath Chona,
for the Respondent.

JUDGMENT.—The facts giving rise to this second appeal may be summarised as below. One Ghania was a joint holder in 675 konals 15 marlas of lard. He died leaving Musam. mot Punni as his widow. Her name was mutated in the Revenue Records. She applied for partition of her half share. Gopals, the plaintiff in this case, objected that she, as a widow, was not entitled to claim partition. He was referred to the Civil Courts to get the question determined. Accordingly, this suit was instituted for a declaration to the effect that 675 kanals 15 marlus of land being

MILEGI &, PURNI.

the common ansestral property of the parties, the defendant had no right to have it partitioned.

The Court of first instance at first framed the following issue: - 'is not the widow entitled by soustom to obtain particion of a joint khata?" It was first inclined to hold that the case was governed by Bhog Bhari v. Watir Khan (1) and that the burden of proof lay upon the plaintiff to provs that, according to eastom, Musammat Punni had no right to partition. After, however, recording a part of his judgment the learned Subordinate Judge changed his mind as to the burden of proof and framed an issue in the following words: -"Is the widow entitled by sustom to obtain partition of a joint khata?" The object of framing this issue was to throw the borden of proof upon the defendant Musammat Punni. An opportunity was given to Musammat Panni to addues evidence to prove that under eustom she was entitled to elaim partition. learned Subordinate Judge, after going into the evidence given by the parties, came to the conclusion that according to custom Musam. mat Panni as a widow was not entitled to elaim partition. The suit was accordingly deersed and a declaration was granted to the plaintiff according to his claim.

An appeal was preferred by Musammat Panni to the lower Appellate Court. The lower Appellate Court has come to a different conclusion and has held that the case is elearly governed by the rule as to caus probanti laid down in Bhag Bhari v. Watir Khan (1). Evidence was given on behalf of the plaintiff to prove the sustom assord. ing to which a widow would not have the right to claim partition. That evidence has been econsidered by the lower Appellate Court and the conclusion at which the lower Appellate Court has arrived is, that the plaintiff has failed to discharge the burden of proof which lay upon him. In Bhay Bhart v. Watir Khan (1) the learned undges who desided the case made the following observation :-

A widow has a clear, unequivosal, statutory right in virtue of her possession noder the Land Revenue Act to demand partition. Toat Act provides many safeguards against the improper grant of such a

(1) 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. W. R. 1912.

request and where the Revenue Authorities see fit to grant it and a suit is brought in a Oivil Court to restrain such grant, we are quite clear that no considerations of desirability or undesirability should have any weight at all in this Court; and that the question to be considered is the simple one, whether or not the plaintiff has succeeded in proving the existence of this power of restraint under the Customary Law."

The effect of that decision we take to be this that, according to the statutory law, a widow has got a right of partition but that right may be cartailed or limited by a oustom which may be proved by a person who objects to her right of partition. Now, in this case it has been held by the lower Appellate Court that it lay upon the plaintiff to prove that Musammat Panni, though entitled to claim partition, was not entitled to get partition under the custom applicable to her. Under the sireumstances abovementioned, the plaintiff's suit has been dismissed by the learned Judge of the Court below and the plaintiff has come up to this Court in second appeal. In his memorandum of appeal four pleas have been taken. The second ples raises the question of burden of proof. Pleas Nos. 3 and 4 object to the finding of the Court below as regards the question of sustom.

On the appeal coming on for hearing before us a pre iminary objection was taken by Mr. Fakir Chand on behalf of Mus:min it Punni, the respondent, that, inasmuch as the appellant has not produced a certificate, he is not entitled to question the finding as regards enstom. Mr. Khosla, on the other hand, has argued that plea No. 2 raises a pure question of law, inasmuch as it questions the desision of the lower Appellate Court as to the burden of proof. The question which we have to decide ie, whether the question of barden of proof in this case is a pure question of law or it involves a question of eastom as well. From the statements of the facts of the case as given above it is quite clear that the question of burden of proof can in no way be separated from the question of eustom in this case. S, in this case the question of burden of proof clearly involves a question of equatom.

We must, therefore, hold that, for want of the necessary certificate, the appellant is not entitled to argue this appeal. We allow the DWYER D. DWYER.

preliminary objection and dismiss this appeal with costs.

W. C. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 22 OF 1920.
March 30, 1:22.
Present:—Mr. Justice Walsh and
Mr. Justice Stuart.
PATRICK NORMAN DWYER—
PETITIONER—APPELLANT

tersus

HARRIET MARY CECILIA DWYER AND ANOTHER—OPPOSITE PARTIES— RESPONDENTS.

Costs - Murimonial cases - Christians - Husband liable for wife's costs in any event.

In Matrimonial cases the parties should not be ordered to pay their own costs for, although a wife's defence fails, or her counter-charges break down, or she has been proved guilty of adultery, the husband has to pay her costs

The policy of the Matrimonial I aw in England, and it is the same among the hristians in India, has always demanded that the husband shall be responsible for his wife's costs.

First appeal from the decision of the District Judge, Jubbulpur, dated the 17th November 1919.

Mr. R. K. Sorabii, for the Appellant.

Messrs S. O. Mukerji and U. S. Bujpai,

for the Respondents.

JUDGMENT.—This is a hopeless appeal. We can only hope that the parties, in spite of the miserable charges that they have made against one another, will take the learned Judges' advise. There is one respeet in which the learned Judge, it is perhaps well to mention, has departed from the ordinary rule. There is no erossobjection and, therefore, we cannot alter his order, but he should have realised that the regular rule, to which there is practically no exception, is, that even alwife's defence fails, or her though a counter charges break down, or she has been proved guilty of adulters, the husband has to pay her costs. This was not a

MASIE-UN-NISA D. ABMDI-UN-NISA.

case in which the Judge should have ordered each party to pay their own costs. The policy of the Matrimonial Law in England and it is the same among the Christians in India, has always demanded that the husband shall be responsible for his wife's costs. Indeed, the usual practice in every husband's petition is to require bim to deposit a sum for the wife's costs before the petition is allowed to proceed. The reason for that is obvious. The husband has the control of the purse-strings and it may often happen, if he is not ordered to provide security for the wife's costs, that he may secure a decree in an undefended case, because the wife had no money to defend her honour. The appeal must be dismissed with sosts including fees on the higher scale.

J. P.

Appeal dismissed.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 2142 CF 1915.
July 23, 1921.

Present: - Mr. Justice Wilberforce and Mr. Justice Martinean.

Musammat NASIB-UN-NISA-PLAINTIFF
- APPELLANT

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Musammat AHMDI UN. NISSA AND OTHERS - DEFENDANTS - RESPO DENT.

Custom-Succession-Sayads of Kharkhauda, District Rohtak, whether follow custom or personal law-Brother's daughter preferred to sister's son-Alienation, female, right of, to contest.

In matters of succession, the Sayads of Kharkhauda in the Rohtak district, follow custom, although somewhat influenced by their own personal law, and have widely recognised the rights of succession of females Among them there exists a right of representation in favour of females, and the rights of a brother's daughter to succeed are superior to those of a sister's son, and she is entitled to contest alienations, by a widow of the last male owner [p. 4-8, col 1: p. 499, col. 1.]

Kadir Ali v. Sikandar Ali, 60 P. R. 1878: Mir Mumtaz Ali v. Jawad Ali, 8: P. R. 1887; Bunyad Ali v. Faiz Muhammad, 173 P R. 1889; Aman Ali v. Musammat Amina Begam, 48 P. R. 1890; Umat-ul-Ala v. Musammat Said-ul-nissa, 143 P. R 1843, Nasib-ul-nisa v Mansur Ali, 4 Ind Cas 96; 120 P. W. R. 909, Faiz-ud-din v Amam Ali, 8 Ind, Cas. 1090; 143 P. W. R. 1910, followed. NASIB UN-NISA C. ARMDI-UN-NISA,

First appeal from a decree of the Senior Subordinate Judge, Rohtak, dated the 28th May 1915.

Bakhshi Tek Chand, Messre. Shamair Chand, Raj Krishan, Abdul Rashid and Dev Ray Sawhney, for the Appellant.

Mesers. Noor ud Din, Niaz Muhammad. Umar Bakhsh, M. N. Mukerji and B. P.

Khosla, for the Respondents.

JUDGMENT .- The pedigree-table of the family, and those of other families in which instances of succession, have been relied upon are attached to the judgment of the first Court and should be referred to. They are referred to as G-I., G II, etc., in this judgment.

In this case there is a quadrangular dispute relating to property possessed by one Barkat Ali, who died in 1872. This property was, till shortly before the suit, in the possession of Musammat Bismillah Begam, deseased, his last widow, or her donees.

The claimants are,-

(1) Musammot Nasib-un-Nira, the daughter of a predeceased brother of Barkat Ali.

(2) Afzal Ali, the son of sister who survived Barkat Ali.

(3) Musammat Abmdi-un-Nissa, a sollateral in the fourth degree.

The above three claimants have instituted separate suits. The principal defendants are the sons of one Umar Ali who elaimed half of two villages, Kanal and Salakbni, by right and much of the other property by gift Barkat Ali's widow, Musammat from Biamillab Begom.

The parties belong to the well-known litigating family of Sayads residents of Kharkhanda, in the Robtak Districts. There Sayade, although their numbers are small, have on many oceasions beginning from 1876 brought their cases to the Chief Court and the High Court at Labore. As between the plaintiffe, it is common ground that they are governed by general agricultural enetom which, however, allows special concessions to femaler; while the defendants, sons of Umar Ali, contend that they are governed by Muhammadan Law. On this point the Trial Court has held that the strict Muhammadan Law of succession has rarely been acted upon and that the next heir gets the property whatever his or her ger may be. The Judge has further held

that, this being the case, Musammat Abmadi. un-Nisa, as a remote collateral, has no right of sussession in the presence of nearer beirs of Barkat Ali. As far as Musammat Nasib-un-Nisa and Afzal Ali are concerned, the Judge was of opinion that it had not been proved that a predeceased brother's daughter had any right of succession and that such right was opposed Muhammadan Law and oustom. as the sister's son was concerned, he followed previous desisions of this Court, in which such right of inheritance had been upheld, and considered that he was the nearest beir. As, however, Afzal Ali, in a plaint of 1896, bad admitted Muszm. mat Nasib un Nies to have equal rights with himself, the Judge considered that he was bound by this admission and that, therefore, Musammat Nasibon Nisa Afzal Ali were entitled in equal shares in the property, the share of Afzal Ali being reduced to 1/24th owing to the presence of other members of his family who did not sue. As far as the half share of Kanal and Salakhni lands was concerned, it was decided that there was no sufficient proof that it belonged to Barkat Ali; and Musammat Nasib un-Nissa who alone sued for lands lost her ease in this respect. only other remarks necessary regarding the judgment of the Trial Court are, that Afgal Ali's suit in respect of certain houses and the suits of both of the successful plaintiffs were dismissed in so far as they elaimed mesne profits. Against this finding of the lower Court all the parties have preferred appeals, the plaintiffs asking for their full claim and the defendants for the dismissal of the suits as far as the land in their possession is concerned.

The first point for decision is, whether the parties are governed by their personal law in matters of succession or by custom. The lower Court, as we have shown above, same to a somewhat indecisive finding on this point. There can be, however, in our opinion, no doubt whatever that for a very long period the parties have followed eastom. This has been held in a series of desisions beginning with Kadir Ali v. Sikandar Ali (1) and concluding with Qivil

NASIB. UN. NISA C. AHMDI-UN-MISA.

Appeal No. 2295 of 1913 [Ahmadi ul-nissa v. Nasib ul missa (2)]. Other intermediate judgments to the same effect are Mir Mumta: Ali v Jawad Ali (3), Bunyad Ali v. Faie Muhammad (4), Aman Ali v. Mus.mmat Amina Begam (5), Umat u'. Said-ul-nissa (6), Musammat Ala ∇. Ali (7) Mansur ٧. Nassb ul nisa and Friz-ud Din v. Amam Ali (8). The authorities and evidence on this subject are so clear that it is unnecessary to discuss this question in any detail. Niez Muhammad for the defendants has referred us to certain evidence of a period prior to the Chief Court desision, but much of this evidence was produced in the case was decided on appeal in Mir which Mumtaz Ali v. Jawad Ali (3) and much of it is worthless. It is possible, or even probable, that in old times the parties followed their personal law, but we consider that there is no doubt that they have followed sustom for the last 45 or 50 years. There is also no doubt that in matters of sussession they have been somewhat influenced by their own personal law and have widely recognised the rights of succession of females. This is shown by many decisions and still more numerous instances. The first decision on this point was Mir Mumtar Ali v. Jawad Ali-(3) and other notable judgments on the same point are Fair ud din v. Aman Ali (8), Nasib ul nisa v. Mansur Ali (7) and Ahmadiul nissa v. Nasib ul nissa (2.)

We will now proceed to sonsider the main question arising in these appeals, namely, whether under the sustom of the Sayads of Kharkhauda the rights of a brother's daughter are superior to those of a sister's This question sannot be desided upon the mere admission of parties as has been done by the learned District Judge. In the 1896 case reported as Fair ud.din v. Amam Ali (.), Musammat Nasib no-Niss, the descendant of one son, and Afzal Ali and Aman Ali, descendants of two sisters, sued jointly for property left by Musammat Miro,

the widow of Rabmat Ali. In the plaint they described their shares as : -

Musammat Nasib un. Nisa Aman Ali ... Alzal Ali ...

This has been taken by the Trial Court as a clear admission as between Musammat Nasib-un-Nisa and A'zal Ali, the present plaintiffe, of the equality of their shares in the same of any collateral succession. Mr. Tek Chand for Musimmit Nasib un-Nisa urges, in our opinion rightly, that he eannot be held in any way bound by this so called admission. In the first place, it is an admission on a point of law and, in the second place, it was a gratuitous one as for the purposes of that suit, it was in no way necessary to describe the respective shares of the parties. We may also mention that the Chief Court held in this ease, that Afral Ali and Aman Ali had no share. We do not think that the lower Court was justified legally or otherwise in coming to a conclusion upon this admission. It has, therefore, to be seen upon the evidence which party has established a superior right.

Barkat Ali, as we have stated, died in 1872. His brother Sarfraz Ali, father of Musummat Nasib-un-Nisa, died in the Mutiny in 1857. It appears whether he was in reality a rebel, the only information on the point being the statement of Musammat Bismillah Begam herself. An elaborate record containing the names of rebels was sent for at the request of the defendants and this does not include the name of Sarfraz Ali, Some arguments have been based on this point, but they appear to us not justified on the facts and to have no bearing on any point of law or eustom involved. The first question in the case is, whether the succession to Barkat Ali's estate should be considered to have opened at the date of the death of Barkat Ali or at the date of the death of Musammat Bismillah Bagam. If the latter view be accepted, then both Musammat Nasib up Nisa and her rival Afzal Ali are respectively the daughter and son of a predecessed brother and sister. In this sase a brother having admittedly a priority over a sister Musaminat Nasib-un Nisa will succeed. Mr. Tek Chand has referred us to two decisions of their Lordships of the

^{(2) 62} Ind, Cas. 740; 62 P. W. R. 1920.

^{(8) 82} P. R. 1887.

^{(4) 172} P. R. 1889.

^{(5) 46} P. R. 1890.

^{(6) 143} P R. 1893.

^{(7) 4} Ind. Cas 965; 120 P. W. R. 1909.

^{(8) 8} Ind. Cas. 1099; 143 P. W. R. 1910.

MASIB.UN-MISA U. AHMDI-UN-NISA.

Privy Council on Hinda Law, Moniram v. Keri Kolitani (9) and Janaki Ammal v. Narayanarami Aiyır (10) as authorities that the whole estate vests in the widow and that the husband's life is assumed to continue in her person, and that succession, therefore, opens at the date of the death of the widow. The same principle has been followed in a case of custom by this Court in Bhagi v. Muhammad (11). On this view of the ease, which appears to be correct, there can be no doubt as to the superior rights of the brother's daughter as against the sister's son.

The same, in our opinion, is proved to be the result even if Musammat Nasib-un-Nisa be considered as the daughter of a predeseased brother of Barkat Ali, and Afzil Ali, the son of a surviving sister. As Mr. Tek Chand has shown, the right of representation has many ossasions ao held to exist in the family. As far as males are concerned, this was desided in Kadir Ali v. Sikandar Ali (1) and indeed the proposition is not seriously contested before us. There are also many good decisions that this same right οŧ representation exists in favour of females. In Mir Mumtae Ali v. Jauad Ali (3) Afzel Ali, the present plaintiff, himself, and other sister's sons challenged alienations by widows and the right of representation was allowed in favour of the sister's sons. It is hard to see how A'zal Ali can now deny a similar right to a brother's deughter. In Fais.ud-din Amam Ali (8), Mus:mmat Nasib un Nisa herself succeeded collaterally to the property of Musammat Miso widow of Bahmat Ali (pedigree table G.1). The rights of the sister's son Afzaf Ali, etc., were negatived in the presence of Musammat Nasib un-Niss. In Nasib'ul nisa v. Mansur Ali (7) it was again held in favour of Musammat Nasib un Nisa that, in the absence of sons, daughters succeeded like sons and that the right of representation existed in their case.

A similar finding Was arrived Ahmadi ul nisa (2). ٧. Nasib ul nissz This is a very significant judgment and is to the effect that a sister of a pre-deceased male has no rights in the presence of his There are many other good daughters. instances showing the resognition of the right of representation among females. Pedigree G. II shows the family of Musammat Mahfuzan. She succeeded to the property of her father's brother in the presence of collaterals of the fifth degree. A more relevant instance is that illustrated by table pedigree G III. There estate of Azim un-Din was inherited bø his brother's daughter and another brother's grand daughter. It is only by the recognition of the right of representation that the latter obtained 8 share. The instance is illustrated by pedigree table G IV. In this family the estate of Musam. mat Sughra Begam was inherited Najm-ud Dip, a brother of the last male holder, by Musammat Altafan, a widow of another brother, and by Musammat Nasira Begam, the daughter of another brother. Two sisters' sone, Nisar Ali and Bashir ud Din, were alive at the time and neither obtained a share. This, beside showing the right of representation, shows the natural preference, arising from the recognition of this right, to a brother's daughter over a sister's son. Pedigree-table G.V illustrates the family of Mir Abdullah. In this family the two sons, Mardan Ali and Wazir Ali, were succeeded by their daughters, Musammat Fabiman and Musammat Mamtez Bigam. Oa Musammat Fahiman's death her estate was inherited by W.zr Ali's daughter. This itstance is eritieised on the ground that at the time Wazir Ali's widow was still alive, but the fast remains that the property has devolved for many years on Musammat Mumtez Begam without any contest by Asad Ali or his sons. Asad Ali, as has been pointed out to us, was the father-in-law of Musammat Mamtez Begam, but he had other sons who have been vigorous litigants, but have never contested the rights of Musummat Mumtez Begam. The pedigree tables G VI and G. vII relate to eases Numb. u! nisa v. Minsur Ali (7) and Fais.u.L. din v. Amam Aii (8) which have been referred to above and pedigree-table G.VIII is that of the parties concerned in the

(9) 5 C. 776; 6 C. L. R. 32?; 7 L.A. 115; 4 Sar. P. O. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 263; 8 Shome L. R. 198, 2 Ind. Dec. (N. 8) 1102 (P. C.).

(10) 87 Ind. Cas. 161; 89 M. 634; 20 M. L. T. 163; 81 M. L. J. 225; 14 A. L. J. 937; (1916) 2 M. W. N. 188; 20 C. W. N. 1823; 18 Bom. L. R. 856; 24 C. L. J. 30 1 4 L. W. 580; 48 I. A. 201 (P. C.).

(11) 15 Ind. Cas. 784; 212 P. W. B. 1912; 205 P. L.

B. 1912,

NASIB-DN-RISA C. AHMDI-DN NISA.

ease decided by Civil Appeal No. 2295 of 1916 Ahmadi-ul nissa v. Nasib ul nissa **(2)**. Another very strong case in favour of Mr. Tek Chand's elient is that of the succession to the property of Zabar Beg who was succeeded by two sons, a predeseased son's son and a predeseased son's This case is proved by the mutation proseedings printed in paperbook II at pages 194.95. It goes further than many other instances of succession inasmuch as it recognises the rights of females in the presence of nearly related males. None of these instances are of recent date or now open to contract except the last one.

As against this mass of evidence showing the existence of the right of representation in favour of females, Mr. Mokerji, on behalf of Afzal Ali, has been able to refer us to no well anthenticated case in his favour. We do not think it necessary to deal with some very ancient cases deposed to by such biased witnesses as Mozaffar Beg. Musbarraf Ali, Sakbawat Ali and Shamebad Ali. The only ease of which he has been able to give authenticated details is that illustrated by pedigree-table GIX. This merely shows that a sister's son and a sister's daughter succeeded equally. In any ease it helps to establish the right of representation relied upon by Mr. Tek Ohand. Mr. Mukerji eriticised some of the instances ground that other against him on the had consented to the parties affected successions in question. Consent, bowever, strongest indication the recognition of right. On this point we have no hesitation in soming to a finding that representation of right the in favour of females among the Sayads of Kharkbanda at least in the absence of near male heirs, and this being the case Musammat Nasib-un Nisa takes the place of her father Sarfraz Aliand thus becomes the heir to Barkat Ali. We hold, therefore, that she alone is entitled to the whole property. This finding also disposes of the elaim of Musammat Ahmadi-un-Nissa.

The next question for decision is whether a half share in the villages of Salakhni and Kanal belonged to Barkat Ali. As for these villages the lower Court has relied upon documents showing Umar Ali alone mentioned as Lambardar and the oral evidence

of tenants which shows that Barkat Ali had nothing to do with the management of there villages. In 1872 also his three widows stated that he had no right in this land which belonged exclusively to Umar Ali. The Court, therefore, held that both the villages were the exclusive property of Basharat Ali and that Barkat Ali taking advantage of the minority Ali, had a fraudulent entry made in his name. As against these findings Mr Tek Chand has shown us that a lease of Salakhni land was granted originally by Government to Basharat Ali for twenty years in 1837. Basharat Ali was shot as a rebel in 1857 and his property was confiscated. Barkat Ali had remained loyal and had rendered valuable services to Govern. ment. At the end of 18:8, the land of both villages was restored to Barkat Ali and Umar Ali, son of Basharat Ali, as is shown by correspondence and letters printed at pages 2 to 5 of paper book II. The entries in the Revenue Resords were to the same effect and the lower Court is not correct in stating that Umar Ali alone was Lambardar as is clear from the entry on page 10 of paper book II. It is, moreover, established beyond any dispute that the restoration of the land was made to Barkat Ali's family and the grant of a half share was made to him as a reward for his services-vide letter No. 1233, dated 18th May 1858, from the Government of India to the Chief Commissioner, Panjab. From this it is obvious that the opinion of the lower Court, that Barkat Ali obtained this land by fraud, is not justified. We have also perused the oral evidence showing that Umar Ali alone used to manage this land. We do not consider that this evidence is of any value, and, even if true to some extent, it does little to establish the opinion formed by the lower Court. Barkat Ali remained a soldier till 1872, and it was owing to this fact that he had taken little part in the actual management of these lands. We differ, therefore, from the opinion of the lower Court on this point, and hold that half the lands in Salakhni and Kanal were the property of Barkat Ali and that Musummat Nasib-un-Nisa is entitled to them. The gift by the widows of Barkat Ali in favour of Umar Alican have no effect against her.

BAM SUNDAR TEWARI C. KULWANTI KUNWAR.

In connection with the gifts to Umar Ali, we should mention the contention of Mr. Niez Muhammad on behalf of his beire, namely, that although a female may have a right of inheritance it does not follow that she has a right to contest an alienation even by a widow. The subject in general is of a somewhat contentious character but we may say that we agree generally with the remarks of Robertson, J., in Mageud-ul-nisa v. Kanie Zohra (12). These remarks apply with special force in the present case owing to cur finding that Musammet Nasib un Nisa is entitled succeed by the right of representation and as a daughter who succeeds in such capacity has in every way the rights of a male. The right of a male to contest alienations sannot be disputed in this family, as Umar Ali bimself had alleged such right in a ease which was fought up to the Chief Court. There are also many good authorities as to the right of a female heir to contest alienations by widows [see, for instance, Pir Mumtae Ali v. Jauad Ali (3) and Fais ud din v. Amam Ali (8)1. We do not consider that there is any force in this argument.

The only other point requiring any decision on our part is the right of Musammat Nasibun-Nisa to mesne profits from the date of the institution of the suit till delivery of possession. This claim was refused by the lower Court on the ground that the plaintiff's suit was premature and could not be determined in this litigation. We fail to understand the meaning of the learned Judge who obviously overlooked the provisions of Order XX, rule 12, Civil Procedure Code. Indeed, on this point the elaim is not contested by the persons in possession. We hold, therefore, that a decree should have been passed directing an enquiry as to the rent or mesne profits from the institution of the suit until the delivery of possession to the decree holder.

There were other points raised in the source of the appeal before us which either do not require any remark in view of our finding in favour of Musammat Nasibun Nies or have not been pressed by Counsel. Mr. Tek Chand did not press

his case regarding Lashbman's house, nor did he press ground No. 12 of the appeal.

The result, therefore, of this appeal is that Musammat Nasib un Nisa's appeal is accepted and she is given a decree for the whole instead of balf of the property described in the decree of the First Court, and also for the half share claimed of the Kanal and Salakhni lands and for mesne profits from the institution of the suit till date of delivery of possession. The Executing Court will make due enquiry into this amount. We award her the full costs of litigation as her suit has only failed in respect of properties of trifling value. The appeals of the other appellants are dismissed with costs.

W. C. A.

Appeal accepted.

ALLAHABAD HIGH COURT. CIVIL REVISION No. 1:3 OF 1921. April 10, 1922.

Present: -Mr. Justice Walsh and Mr. Justice Stuart.

RAM SUNDAR TEWARI AND OTHERS
—PERITIONESS

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Musammat KULWANTI KUNWAR

AND OTHERS - OPPOINTE P RTIES.

Arbitration - Award - Legal flaw - Party procuring legal flaw cannot take advantage of it.

General principles of law must be applied to arbitration matters as to all others.

Where one of several arbitrators agrees to an award but at the instance of one of the parties wilfully refuses to sign it, though there is a legal flaw in the awa a, the party who procured it cannot take advantage of it.

Civil revision against an order of the Subordinate Judge, Ghazipur, dated the 30th May 1:21.

Mr. U. S. Bajpai, for the Applicants. Dr. M. L. Agarwala, for the Opposite Parties.

Walse, J.-General principles of law must be applied to arbitration matters as to all others. It has been found in this case that the persons objecting to the

C. R. M. CHETTY FIRM U. MUTHU MAHOMED & CO.

who procured it. In other words, that they got the arbitrator to refuse to sign the award. The Court has found that the resolitrant arbitrator agreed to the award. His failure to sign it is undoubtedly a legal flaw, but it is a flaw which the plaintiffs cannot take advantage of, because they procured it. On that ground alone we think that the learned Judge should have decided as he did, although it is true that he has not expressed himself very well on the subject. It is certainly, to my mind, a conclusive answer to revision.

SIUART, J .- I agree.

By THE CCURT.—Application dismissed with costs, including fees on the higher scale.

F. H.

Application dismissed.

SPECIAL SECOND CIVIC APPEAL No. 215 OF 1919.

June 20, 1921.

Present :- Mr S. M. Robinson, Chief Judge and Mr. Justice Dackworth.

C. R. M. CHETTY FIRM-APPELLANT

K. M. M. A. K. MOTHU MAHOMED & CO - RE-FONDENT.

Lower Burma Courts Act (VI of 1900), s. FC-Appeal, special - Whole case whether re-opened - Facts, concurrent findings of, interference with.

The special appeal allowed by section 20 of the I ower Burma Courts Act re opens the whole case, but, as a general rule, the Chief Court will not, in such an appeal, interfere with concurrent findings of fact, unless very good grounds for that interference are made out. [p. £00, col. 2; p, £01, col. 1.]

Special civil second appeal against the judgment passed by the Divisional Judge, Hanthawaddy, mcdifying the decree passed by the District Judge, Hanthawaddy.

Mr. Anklesaria, for the Appellant. Mr. Moore, for the Respondents. JUDGMENT.

Bonson, C. J.—The plaintiff-appellant brought a suit against Pavadai Padayashi

and obtained an order for attachment before judgment on certain Laterite lying on some land of his. The respondent then applied to have the attachment removed, claiming to be the owner of the Laterite by virtue of an agreement with the defendant. His application was rejected and he thereupon brought this suit for a declaration that he was the owner of the Literite, and for damages for wrongful attachment.

Both Courts have held that he is the cwner of the Laterite and have granted him damages for wrongful attachment, but the lower Appellate Court has varied the decree in respect of the damages by a sum of about Rs. 200. A further appeal was then filed in this Court, under section 30 of the Lower Burma Courts Act.

A question has been raised as to whether any appeal lies in regard to the ownership of the Laterite, there being concurrent findings of fact as to this.

It was brought to our notice that the question whether the appeal allowed by section 30 re opens the whole ease or only that portion of it on which the decree of the first Court has been varied is one that is constantly raised and has never been decided by this Court in any case that has been printed. We, therefore, decided to hear Counselon this matter before we continue the

apreal any further.

Under the ordinary law, there would be no further appeal except on points of law or procedure as allowed under section 100 of the Code of Civil Procedure. The Lower Burma Courts Act allows a spesial appeal wherever the decree of the Appellate Court varies or reverses otherwise than as to costs the decree of the Court below. It allows special appeals on any ground which would be a good ground of appeal, if the deerse had been passed in an original suit. The question of concurrent findings of fact as to one or more of the issues arising in the case is not dealt with, and, taking the section as a whole, it is clear that an appeal lies on the whole case. If the decree is varied or reversed, the appeal will lie, and to that extent it must be taken that the whole sase is re opened, but it does not, therefore, follow that the Court should depart from the wellestablished rule as to concurrent findings of fact, and the general rule must always be that the Court will not interfere with PUBLE CHAND ANIE CHAND U. JODE BAJ-BAM KUMAR.

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consurrent findings of pure matters of fast, noless vary good grounds for that interference are made out. In our opinion the Court should be guided by the principles which are acted on by their Lordships of the Privy Council in this matter, and those principles are to be found collected in Woodroffs and Amir Ali's Civil Procedure Jode, Second Edition, at page 441, etc.

In the present case, therefore, we will hear Counsel as to whether this is a case in which we should go into the question of the oxpership of the Laterite which it is open to us to do, if good cause therefor be assigned. It may be that in this case it is not a pure question of fact but rather one of mixed law and fact, and we should have to consider whether all matters arising and necessary for the decision of the question have been considered and weighed.

The appeal will, therefore, he set down for further hearing and he placed first on the list as a part-heard case.

DOCKWORTS, J .- I concor.

W. C. A.

Oraer accordingly.

ALLAHABAD RIGH COURT.

O.V.L REVISION No. 103 of 1921,

March 27, 1922.

Present:—Mr. Justice Ryves.

PURAN CHAND AMIR CHAND—

DEFENDANTS—APPLICANTS

JODH BAJ-RAM KUMAR -PLAINTIPPS-

Jurisdiction—Contract for delivery of goods—Cause of action.

Where a contract for the sale of goods is made in Bengul and the goods are to be sent to Bengul from a place in the U.P., the cause of action for a suit on the contract does not arise wholly or in part at the place in U.P. from where the goods are to be sent but arises at the place in Bengul where the contract is made.

Judge, Small Cause Court, Azamgarb, dated the 4th May 1921.

Mr. S. N. Mukerii, for the Applicants. Mr. K. O. Mital, for the Opposite Parties. JUDGMENT.—The first point taken in this revision is, that the eause of action arose outside the local jurisdiction of the Court. It seems that the contract was made in Bengal and the goods were to be sent to Bengal. The only thing done in Azamgarh was that the goods were despatched from Azamgarh. I do not think it can be said that the cause of action wholly or in part arose in Azamgarh. In this view, the application must enceed with costs. I set aside the decree of the Court below and direct it to return the plaint to the plaintiff for presentation to the proper Court.

J. P.

Decree set asi le.

CIVIL REVISION No. 125 OF 1920.

March 10, 1921.

Present:—Mr. Justice Duckworth.

PALAWAN—Applicant

versus

B. KANU AND OTHE 19—RESPONDENTS.

Promisery-note, writen assignment of, whether valid—Assignee, right of.

A written assignment of a promissory-note is valid, and under the general law, apart from the Transfer of Property Act, such assignment gives to the assignee a right of suit upon the note. [p. 5.18, col .]

Application for revision of an order passed by the District Judge, Pegu, reversing the decree passed by Township Judge, Nganuglebin,

Mr. N. S. A'yır, for the Applicant. Mr. Buriories, for the Respondents.

JUDGMENT.—This was a suit for Rs. 3:63.3, alleged to be due on a promissory note, payable to order, which had been assigned to the plaintiff applicant by the payee by means of a bond. The transaction took place in Pega District.

Toe First Coart decreed the suit, but the learned Judge of the District Coart dismissed it, holding, in effect, that, ionsometh as section 130 of the Transfer of Property Act is not in force in Pegu District, a pro note can only be transferred by

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indorsement and delivery under the provisions of the Negotiable Instruments Act; or, in other words, that in Pegu District, or where the Transfer of Property Act is not in force, a pro-note cannot be transferred as an actionable claim but solely as a negotiable instrument.

In this case there was no indorsement of the note.

The sole point taken up on revision before me is, that the learned Judge erred in law in overlooking the fast that a pro note may be transferred under the general law, as well as under the Transfer of Property Act or by the Law Merchant, or that, in the alternative, the Judge erred in not holding that the principles deducible from section 130 of the Transfer of Property Act should be enforced as rules of equity, justice, and good conscience.

I will deal with the last point first. It seems to me that the real point in such a case as this is, that we have to consider what was the law in India in regard to assignments of "choses in action," before the Transfer of Property Act was brought in at all. I also think that, whereas the Negotiable Instruments Act codified the law relating to pro-notes, in so far as they are Negotiable Instruments, Transfer of Property Act codified the law relating to them as "actionable elaims," which law existed before the latter Act was brought into force. If this is correct, and I consider that it is so, it simplifies the matter under discussion to a great extent.

I am now asked to hold that there are three ways in which a Negotiable Instrument, such as this pro note in suit, may be transferred, viz:—

1. By indorsement and delivery, as a Negotiable Instrument, under section 48 of the Negotiable Instruments Act.

2. By written assignment under section

130, Transfer of Property Act.

3. By transfer under the General Law applicable before the Transfer of Property Act was put into force in India, i.e., by delivery for value or assignment for value, just as a mere chattel may be transferred.

The first method would be good anywhere.
The second method is equally indisputable in places to which the Transfer of Property Act has been extended, but, of source, it would not render the transferee a "holder

in due course." In regard to the third method, there are authorities in support of its existence. Binode Bishore Goswami v. Ashutosh Mukher ee (1) shows that there is a general law, which regulates the transmission and transfer of Negotiable Instruments "as chattels." I refer especially to page 667 of this decision. The case quoted and relied upon by the learned District Judge, Ulagappa Ohetty v. Ramanathan Ohetty (2), was the work of a single Judge, andit does not seem that he exhausted the authorities. The gist of his decision that a man cannot sue on a note which is not indorsed to him, is not, therefore, of great weight, Muhammad Khumaruli v. Ranga Rao (3). and Muthar Sahib Maraikar v. Kadir Sahib Maraikar (4) support the view that this third method of transfer exists. The ease reported in Soucer Lodd Govinda Doss v. Lepati Muneppa Naidu (5) appears to be a parallel case, supporting the contention that a promissory note may be transferred independently of the Aegotiable Instruments Act and the Transfer of Property Act, and that, too, even without a written assignment. I should say that this case deals with a fransfer by the Court of Wards. It was followed in Lodd Govind Das v. Karnam Munusaumi Psilai (6) where also the Court of Wards made the transfer. There can be no doubt that the cumulative effect of these decisions is that a Negotiable instrument may be transferred so as to enable the transferee to maintain a suit thereon by mere transfer, even without indorsement or written assignment. would apparently be much more so when, as here, we have a written assignment.

At the same time, it is odd that I can find no authorities amonget the published decisions of other High Courts.

Here, in Burma, we have a single Judge decision of Manog Kin, J., in T. A. R. A. R. M. Chetty Firm v. S. E. Eolomon (7) dated in 1919, which lays down that a negotiable instrument can be transferred as a negotiable

^{(1) 14} Ind Cas 720: 16 C. W. N 666.

^{(2 32} Ind Cas 821; 3 L W. 171.

^{(3) 94} M. 614.

^{(4) 28} M. 544 15 M. L. J. 384.

^{(5 | 31} M 584; 4 M. L. T. 341

^{(6) 8} Ind. Cas 881; 9 M. I. T. 169.

^{(7) 55} Ind. Cas. 718; 13 Bur L. T. 37; 10 L. B. R.

^{*}Page of 16 C. W. N .- [Ed.]

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instrument by indorsement and delivery, and as an astionable slaim by assignment in writing but that it eannot be transferred by mere delivery, so as to entitle the transferse to sue upon it. The learned Jadge was, of course, dealing with Rangoon case, where the Transfer Property Act is in force, and, so far the present case is concerned, his decision amounted to nothing more than this,that a verbal assignment of promissory. note is invalid. In the same of Babu Goridut Bogla v. Ebrahim Esoof Doopley (2) even a verbal assignment appears to have been contemplated by For, C. J, and Irwin, J.

In the present case there can be no doubt that, if the Transfer of Property Ast was in force in the District, the transaction would be covered by section 130, the fact that no notice was given under the provisions of section 131 being of no consequence. However, the said Ast was not in fores at the time with the exception of certain sections

of which section 130 is not one.

The question, therefore, is whether the written assignment of this pro note was valid, and gave to the plaintiff applicant a title to maintain a suit on the instrument.

I consider that the assignment in writing was valid and that it did give the plaintiff a

right of suit upon the note.

In the case of Basant Singh v. Burma Railways Co. (9) Sir Charles Fox, C. J., assumed that such a transfer of an astionable elaim could be effected within the Herzada District, but it does not appear that his attention was called to the fact that the sections in question were not in force in that District. and, really, he did not have to consider and deside the point. His desision, therefore, is of little assistance with reference to the present

Relying on the principles of the rulings quoted, I hold that this written assignment was valid, and gave the plaintiff a right of suit, quite agart from the Transfer of Property Act, which was not in force, and that this right arose under the general law, referred

to by Chalmers in his work, which is quoted' in the Calcutta Weekly Notes case already referred to above. I am of the opinion that, before the Transfer of Property Act came into force at all, such a right existed, ie, a right of transfer by a written assignment, and that in places to which the sections of the Act concarned have not been extended, such a right still exists. Taking the view which I do, I consider that the learned Judge of the District Court acted illegally and without jurisdiction in deciding the case on this point adversely to the plaintiff applicant, and that this Court is entitled to interfere on revision under section 115, Civil Procedure Code.

ORDER .- The decree of the District Court is set aside and the case is remanded to that Court for a desision on the merits. Respondent will pay the costs of this applica. tion.

W. C. A.

Decree set aside; case remanded.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL No. 10:9 OF 1920. March 31, 1922.

Present: - Mr. Justice Byves and Mr. Justice Gokul Presad. PACHKAURI LAL AND ANOTHER-DEFENDANTS-APPELL: MTS

versus

MUL CHAND AND ANOTHER-PLAINTIFF4-RESPONDENTS.

Negotiable Instruments Act (XXVI of 1831), e. 76 -Hundi-Drawer and drawes same-Presentation not necessary—Damages.

Where the drawer and the drawee of a hundi are the same, the provisions of section 78, clause (d), of the Negotiable Instruments Act, render presentation unnecessary and no question of damage arises in such a case from want of presentation.

Second appeal from a deeres of the District Judge, Cawapore, dated the lat July 1920.

Mr. G leavi Lal and Dr. S. N. Son, for the Appellants.

Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT.—This appeal orises out of a hundi drawn by Bebari Lal Balmakund on the firm of Behari Lal. Balmakund in favour

^{(8: 14} Bur. L. R. 25 at pp 29, 90.

^{(9) 80} Ind. Cas. 278; 8 L. B. B. 298; 8 Bur. L. T. 266,

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of Mul Chand, the plaintiffs agreeing to pay him Rs. 2,000 within ninety days from the 30th of April 1918 with interest at 12 per cent. per annum. The plaintiffs gave the defendants cred t for certain items and sued for Rs. 1,906, the balance with interest.

The main defence of the contesting defendants was the denial of the execution of the hundi; alternatively, it was slaimed that execution by one member of the firm would not bind the other members as the money was not required for or used in the business of the firm.

The Trial Court decreed the suit. On apreal, a forther point was taken, namely, that as the hund: had not been presented the provisions of section 64 of the Negotiable Instruments Act barred the soit. The other pleas raised in the Trial Court were reiterat. ed On this new point the Court below held that this particular hundi was really a promissory note and, therefore, did not fall within section 64 of the Negotiable Instruments Act. In this view we are unable to agree; but it seems to us that the provisions of section 76 elause (d) render presentation upnecessary in this case. According to that section no presentation for payment is necessary "as against the drawer, if the drawer could not suffer damage from the want of such presentation." In this case the drawer and the drawee were the same, and, therefore, both of them knew when the hundi was executed that it was payable ninety days thereafter, and on the expiration of the ninety days, both of them knew that it had not been paid. Thue, no question of damage can arise and the cases cited are, therefore, not applicable.

There remains another point, however, which has not been decided and that is, whether, when Behari Lilexecuted this handi, he was acting for the firm, and whether the money was required for the business of the firm. On this point there is no clear finding by the District Judge, We, therefore, refer an issue to the learned District Judge, namely, did Behari Lal borrow this Rs. 2,000 for the business of the firm Behari Lal-Makurd Lal? No for her evidence will be taken. On return of the finding the usual ten days will be allowed for objective.

tions.

J. P.

Order accordingly.

MADRAS HIGH COURT.
CIVIL A.PEAL No. 14 to F 1:20.
October 21, 1921.
Present:—Mr. Justice Spencer and
Mr. Justice Rameram.
MUTHUSAMI NAICKEN, MINOB, BY
NEXT FRIEDD NAGA NAICKEN
—PLAINTIFF—APPEELANT

PULAVARATTAL AND OTHERS-DEFENDANTS-RESPONDENTS.

Hindu Law-Adoption-Widows-Senior widow-Preferential right-Junior widow, when can adopt.

Under the Hindu Law, in the absence of any direction from the husband, the senior widow has the preferential right to adopt She does not forfeit that right by the mere fact of her having lived apart from her husband for a number of years. [p. 50; col. "; p. '07, col. .]

Where a junior widow wants to make an adoption the p oper course for her is to ask the senior widow to get the consent of the male sapindus to perform the adoption and to perform it herself. [p. 506, col. z.]

Per Ramesam, J—A prohibition by the husband against adoption by the wife cannot be inferred by the mere fact that the husband and wife were living apart. [p 508 col 2.]

Until a senior widow clearly gives up her preferential right of adoption the junior widow tas no

right. [p. 608, col. 2.]

Appeal against a decree of the Court of the Subordinate Judge, Salem, dated the 22nd March 1920, in Original Suit No. 41 of 19:9.

FACTS appear from the judgment.

Mr. T. Rargochariar (with him S. S. Rama-chandra Aiyer), for the Appellant.—The rule of the senior widow's preferential right to make adoption does not apply to Sudras to whom no religious ceremonics are necessary. Puddo Kumaree Debee v. Juggut Kishore Acharjee (1).

The senior widow was living apart from her husbard for 15 years. The text of the Mitakehara restricts the right to wives who are blameless. The text also requires that she must be in attendance and present with her husband.

The decision in Damara Kumara Venkotappa Nayanim Bahadur v. Dumara Ranga Ras (2) should be re-considered. It does not apply to the case of a discarded widow as in this case.

^{(1) 5} C. 615; 2 Shome L. R. 229; 2 Ind. Dec. (x s.)

^{9.9.} (2 50 Ind. Cas. 106; 39 M. 772; 29 M. L. J. 18; 18 M. L. T. 19; (915) M. W. N. 424.

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In any event, a prohibition against the senior widow's adopting should be implied from the facts of this case. The husband would not have given authority to a woman who disearded him and was living away from him for years.

Mr. A. Krishnoswami Aiyar (with bim Mr. S. Fanchapagesa Sastri', for the Respondents.—The rule of preferential right of making adoption vesting in the senior widow applies to Sudras. For all eastes adoption is a religious act though datta homam is not necessary among Sudras.

The preferential right of the senior widow is established by an even course of decision, Damara Rumara Ventatuppa Nayanim Bahadur v. Damara Fanga Boo (2), Kukerla Chukkamma v. Kakerla Punnamma (3), Rakhmabai v. Radhabai (4), Dayana Pandu v Tanu Balaram (5), and Kanjit Lal v. Bi oy Krishna (6).

The text of the Mitakshara which requires the wife who joins her bushand in making the edoption to be blameless refers only to acts of misconduct, such as unchastity. It cannot apply to more voluntary separation from the husband.

As to the implied prohibition, that can not be presumed from the mere fact of the wife's separation. There is no prohibition, express or implied, in this case.

JUDGMENT.

SPENCES, J.—The plaintiff in this suit seeks for a declaration that he is the adopted son of the deceased Ammasi Naicken and is entitled to the properties mentioned in the schedule which belonged to Ammasi Naisken in his lifetime.

Ammasi Naisken died on the 13th November 1915 of a carbunele. It is alleged that, on the morning of the day when he died, he adopted the minor plaintiff, who is the son of the deceased's second wife's brother, and that he associated the second wife, who is third defendant, with him in the act of adoption. It may here be stated that Ammasi Naisken left three wives, Pulvarthal, Sellayi and Poovayammal, and that the first wife has been living apart

from him for about 25 years. As doubts were thrown upon the said adoption, it is alleged that the third defendant went through the essembly of adopting the plaintiff a second time on the 3rd Desember 1917. The Subcrdinate Judge found that the adoption alleged to have been made by Ammasi Naisken was not true, and that the adoption made by the third defendant was true but not valid.

Two questions arise for desision; first, whether the first adoption was true in fast, and, secondly, whether the second adoption was a valid adoption. On the first point I am of opinion that sufficient reason has not been shown for disturbing the finding of the lower Court. The Sabordinate Judge heard the witnesses deposing and he has good reasons for thinking that the deseased Ammaei Naisken did not adopt the plaintiff and that the in favour of the adoption was unsatisfactory. There are several circumstances which throw enspision upon the truth of the alleged adoption. One is, that the deesased was very ill on the morning of the 1 sth November and he died at 5 P. M. His third wife, the second defendant, says that he lost conscioueness on Saturday morning and that he had no control over his tongue. The act of adoption is alleged to have been made at or about the when the pray:schittim earemony was performed and at that time it is apparent that he was in extrenis. The statement of the 2nd witness for the plaintiff that the deceased was sitting up leaning against the wall and that he embraced the plaintiff and delivered him into his wife's hands 19 improbable. Very although the adoption is alleged to have been made on the 13 h of November 1915, the puthicaras statement was sent in on the let February 1915. This is signed by the Kornam who was not present at the alleged adoption but not by the Village Munsif who says he was present. It contains a statement that the obsequies of the deseased were performed by Chenga Naieken, the deseased's elder brother's son, as the agent of the adopted son. This Chenga Naisken has not been examined as a witness to prove that he asted as an agent for the minor; nor has Karuppa Naisken who, according to P. W. No. 2, had

^{(3&#}x27; 27 Ind Cas. 775: 78 M. L. J. 72, 16 M. L. T. 612; 2 L. W. 24; (1915 M. W. N. 19.

^{14) 5} B H. C. R. 181 at p 193.

^{(5) 57} Ind Cas. 118; 44 B 503; 22 Bom, L. R. 890. (6) 14 Ind. Cas. 17; 39 C. 582; 16 C. W. N. 440.

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some for the adoption and is the eldest surviving Sapinda of Ammasi Naisken, been examined as witness. Then, the effect of the adoption was to disinherit all the three widows and a daughter and to make a relation of his second wife succeed to the whole of the deceased's property. when the find We second wife. defendant, propounding this adop. third tion, it suggests that she does so because she is interested in getting the property for her family.

On the second point, which is a question of law, the adoption on the 3rd December 1917 is attacked on the ground that there was no authority received by the second wife, either in writing or orally, from her husband to perform this adoption and that during the lifetime of the senior wife, the senior wife has a preferential right to make adoptions. This has been established by the decision in Damara Kumara Venkatappa Naya. nim Bahadur v. Damara Ranga Rao (2) which followed a decision of Sankaran Nair, J., and myself in Kakerla Chukkamma v. Kakerla Punnamma (3) and the Bombay and Calcutta High Courts have also held that the senior widow has a preferential right of adoption. See Rakhmabai v. Radhabai (4), Dnyanu Pandu v. Tanu Balaram (5) and Ban it Lal v. Bijcy Krishna (6), passage in the Mitaksbara that The treats of this topic has been translated in Major Basu's Yajuavalkya Smriti as follows: "When a wife of the same class (as that of the husband) exists, then religious works are not to be performed by a wife who is not of the same class." Upon this Katyayana comments, "Lot him who has many wives employ one of equal class in the case of the sacrificial fire, and in attendance on himself; but if there be many such, let him employ the eldest in those dutier; provided she be blameless." Now, it is argued that the eldest wife, Pulavarthal, had been disearded by Ammasi Naisken and, therefore, she was not in attendance on her husband and not blameless. An tempt to prove that she was an adulterous wife entirely failed. We only know that she was living apart from her husband for about 25 years, before his death. The question is, whether such separation makes her incompetent to perform the act of adoption, and thus causes the capacity to

make an adoption to devolve upon the second wife. The text of Katysyana seems to me to apply to a case of adoption performed during the lifetime of the adoptive father, when he speaks of a wife being in attendance on himself. It is whether the word adushta or blameless should be interpreted so as to exclude a woman who voluntarily lives separate from her husband without having been guilty of unchastity or misonduct. So far as the facts of the separation in this case are known, there is nothing to attribute blame. worthiness to the elder wife. An adoption made by a widow without consulting the sepindas would be invalid for want of authorisation from them as it has been held that the consent of the sapindas supplies the want of the husband's authority. The other wives are sapindas and it was necessary third defendant to obtain their consent before any adoption could be made. In this case the third defendant sent a notice, Exhibit IV, to the senior wife in which she expressed her intention of confirming the adoption made by her husband and asked for an expression of her views respect of the permission given by next reversioner to her to adopt the plaintiff. When the senior wife has a preferential right of adoption, the proper course for a junior wife who wishes adoption to be made, would be to ask senior wife to get the consent of male sapindas to parform the adoption, and to perform it herself. If she was unwilling to perform it herself, it would then be soon enough to ask her to agree to the adoption ceremony being performed by the junior wife. Exhibit IV is not conched in such terms. It implies that Poovayamal was determined to carry out the coremony of adoption without giving a chance to the senior wife to adopt a son to their husband. Under the eireumstances of the present case, the absence of any relinquishment by the senior wife of her prior right of adoption invalidates the act performed by the junior wife, For these reasons, the second adoption cannot be supported as valid.

The result is, that the appeal is dismissed with sosts. The memorandum of objections is not pressed and is dismissed.

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BIMESAM, J .- I agree. But I wish to add a few words. The first osession on which the adoption of the plaintiff by the deseased Ammasi Naisken was asserted Exhibit A, dated the 31st of January 1916, a petition by the second wife, the third defendant. The petition was nearly two months after the third wife sent Exhibit V and 17 days after the senior wife sent Exhibit G and was practically in reply to them. It seems to me that the delay was really due to the fact that the present adoption was concosted, in reply to the claims made by the other two widows, with the help of the Village Munsif and the Kurnam and the other male relations of the third defendant. It must be remembered in this connection. that the third defendant is the sister's daughter or niese of the fourth defendant who gives the consent. It is also significant that Vaidyanatha Iyer, the family purchit. who is said to have been present at the adoption, does not support the plaintiff's ease. I need not repeat the other reasons given by my learned brother and the Subordinate Judge with which I agree.

Coming to the question of law, the appellant's Vakil argues that the case in Damara Kumara Venkatappa Nayanim Bahadur v. Damara Ranga Rao (2) ought to be re-considered. For the reasons given by my learned brother and also for the reasons given by the learned Judges who decided the case in Dnyinu Pandu v. Tanu Balaram (5), where their Lordships say that an adoption with the concent of sapindas in Madras is not on the same footing as an adoption in an undivided family with the consent of the manager. I do not think it necessary to doubt the correctness of the former desisions of this Court.

Then it is said that, assuming that the senior widow has a preferential right to adopt, the principle does not apply to Sudras, because no religious scremonies are essential for an adoption in the case of Sudras and Puddo Kumares Debice v. Juggut Kishore Acharise (1) is relied on. In the first place it may be mentioned that the decision in Damara Rumara Venkatappa Naynim Bahadur v. Damara Ranga Ruo (2) was a case of Sudras, but the point was not expressly argued. It may be that, for

the validity of an adoption among Sudras

datta homam is not nesessary, but this does not mean that an adoption is not a religious act. Apart from this, as was pointed out by my learned brother and Sankaram Nair, J., in the case in Kakerla Ohukkamma v. Kakerla Punnamma the sepior wife is the wife "whom of duty concern" that is "who officiates in acts of religion and so forth." brooks Digest of Hindu Law, Book IV, Oh. i, Sloke 51. This shows that the acts of duty in which a senior wife has got a preferen. tial right need not necessarily be all religious duties. I, therefore, think that the principle is equally applicable to Sudras as well as the other classes.

The next ground on which it is said that Damara Kumara Venkotappa Nayanim Bahadur v. Damara Ranga Rao (2) does not apply to the present case is that in this case the senior wife is a disearded widow. Verse 88 of Ashara Adbyaya of Yajnavalkya was relied on in Damara Kumara Venkatappa Nayanim Bahadur v. Damara Eanga Rao (2) as one of the reasons on which the preferential right of the tenior widow is based. The translation of that verse as given in Dimara Rumara Venkatappa Nayanim Bahadur v. Damara Ranga Rao (2) runs thus: "When there is a wife of an equal elass present," etc., some stress is laid by Mr. Rangachariar, the learned Vakil for the appellant, on the word "present" in this translation. original Sanskrit is "Satyam" the meaning of "Satyam" is "being in existence" as opposed to death. The translation of this verse in Mandlik's Hindu Law, at page 173, in Major Basn's Edition of Mitakshara referred to by my learned brother the translation of Sir P. S. Sivaswami lyer in I Madras Law Journal (Journal part) 282 all show that what is meant by 'Satyam' is "existing" and not being present near,' (as opposed to being absent elsewhere). The fast, therefore, that the wife in this senior ... elsewhere does not make living taxt of Yajnavalkya inapplicable. Again, the text of Yejoavalkya, the commentary of Mitakshara on it, the verse of Katyayana and the text of Vishnu Balambhatta in the gloss of the Mitakshara and also in Colebrook's Digest, Book IV, the two latter Smritis used the MUTHOSAMI NAICERN D. PULAARVATIAL.

word "Adushta" all these are merely injunctions addressed to the busband as to what he should do during his lifetime, It may be that the husband is at liberty to disobey those injunctions, vide Annapurni Nachiar v. Forbes (7). Bat those injune tions do not touch the relative rights of the widows after the husband's death. These verses clearly prove the superior position of the senior widow. Once such superior position is established her preferential right to adopt after his death follows as an inference. In this particular case the evidence which merely shows that the senior widow was living agart from her husband for the last 25 years, apparently on assount of the second marriage of her husbard, does not justify us in ealling her a "Dushti" or "Nishiddha". As my learned brother has pointed out, the case of unchastity attempted to be made against her has failed. I think no eredence can be given to the evidence of the 6th and 9th witnesses for the plaintiff.

The last ground argued by the appellant on this portion of the case is, that a prohibition against her adopting must be implied from the facts of the case. It does not appear from the Subordinate Judge's judgment that any such point was raised in the Court below, but it is now said that the point was argued. Though, no doubt, a prohibition may be implied and need not always be expressed, such prohibition must be a case of a clear and necessary implieation, and it is not for the Courts to embark on speculations as to what the husband might have done during his lifetime or might have wished if the point was expressly mentioned to bim before hie death. One may well say the facts of this case, the husband, if he ever contemplated adopting during his lifetime, would not have associated the senior wife with him in such adoption. One may, perhaps, also say, that if he had left a Will expressly authorising an adoption he would probably have not anthorised the senior wife to adopt. But, on the other hand, one may also say that he, not having done either of these things

(7) 23 M. 1; 1 Bom. L. R. 6'1; 3 C. W N 730; 26 I. A. 246: 9 M. L. J. 209; 7 Sar. P. C. J. 591; 8 1hd. Dec. (N, 8) 385.

was well content to allow the law to take its course as to what would happen after his death, and that, in the absence of any express prohibition against the senior widow, he left her to exercise the right which she has according to the Sastras. on account of her status as the senior widow. I do not think it is proper for Courts to spesulate on probabilities of this kind for the purpose of inferring an implied prohibition. If the husband was, however, anxious that the senior widow should never adopt for him, he might have left a Will in which he might have stated that the senior widow should not adopt for him, in eye his widows should contemplate adoption for him. In the absence of such an express prohibition from him or some equally elear indication of his intention, an implied prohibition eannot be inferred in this case. It was held in La's'mibai v. Sarasratib:i (8) that a prohibition ought not to be inferred from the mere fast that the husband and wife were living apart. In the ease relied on by the learned Vakil for the appellant in Dnynoba v. Radhabai (9) the much facts wera stronger; the wife was actually living in adultery with another man.

Coming to the third point argued in the ease that Exhibit IV is enough to satisfy the requirements of law in connection with the senior widow, I agrie with my learned brother in thinking that it does not, We are not here concerned with a question of obtaining her assent merely as that of a sapinds. On the other hand, until the senior widow clearly gives up her right to adopt, the junior widow has no such right. The letter in which she states that she had obtained the assent of the sapinda and was merely asking the senior widow's views followed by the silence of the latter cannot be construed to mean that the senior widow has waived her preferential right and authorised the junior widow to adopt. Not until she does any act amounting to this, can the right to adopt devolve on the junior widow. The fasts in this case fall short of this.

^{(8) 23} B. 789 at p. 795; 1 Bom. L. R. 4:0; 12 Ind. Dec. (N. s.) 528.

⁽⁹⁾ P. J. (1894), p. 22.

GANESH PRASAD SAHU &. DUKH HARAK SAHU.

Oce or two points have also been argued before us, namely, that the consent of the sapinda in Exhibit O is not a valid consent. The Subordinate Judge has found it to be so.

But we think it unnecessary to express an opinion on this question, in view of our finding with reference to the right of the senior widow not being waived. If it were necessary, I would agree with the appellant's contention, that there was no to the sopinda misrepresentation made merely because the third defendant was asserting a prior adoption by her husband. But I would hold that Exhibit C is not a valid consent, because, instead of giving the authority as one necessary and proper in the circumstances of the family, which is what a sapinda ought to address himself to, be gives it, in order to give effect to the wishes of the husband thus believing in the alleged prior adoption by the busband which we have already found to be not proved.

I agree that the appeal should be dismissed with sosts. The memorandum of objections is dismissed.

M. C. P.

Appeal dismissed.

ALLAHABAD HIGH COURT. CIVIL REVISION No. 69 CF 1921. February 15, 1-22.

GANESH PRASAD SAHU-DEFEADANT-

te.sus

DUKH HARAN SAHU-PLAINTIPF-

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIX, r. 1, O. XLIII, r. 1 (n) - Injunction - Appeal - Revision - Error in erercise of jurisdiction.

Under Order XLIII, rule 1 (n) of the Civil Procedure Code, an appeal lies from an order issuing an injunction subject to a condition passed under Order XXXIX, rule 1 of the 1 ivil rocedure Code.

No revision lies on the mere ground of an error of judgment of the lower Court in the exercise of

its jurisdiction.

Oivil revision against an order of the Additional Subordinate Judge, Basti, dated the 15th March 1921.

Dr. M. L. Agarwala, for the Applicant. Mr. Harnandan Prasad, for the Opposite Party.

JUDGMENT,-In my opinion this applieation for revision is without force. The Court of first instance made an order for the issue of an injunction subject to a condition. From that order an appeal was filed in the Court of the District Judge and the learned Judge modified the order in so far as it imposed a condition on the opposite party. It is urged that no appeal lay to the Court below, and that, therefore, the learned Judge had exercised a jurisdiction not vested in him by law. In my opinion an appeal did lie to the Court below under Order XLtiI, rule (1) (n). The order of the Court of first instance was an order passed under Order XXXIX, rule 1, and, therefore, an appeal lay from that order to the District Judge. The District Judge, therefore, had jurisdiction to entertain the appeal. Whether in the exercise of the jurisdiction he committed an error of jadgment is not a matter upon which revision can lie. The application for revision is accordingly dismissed with costs.

J. P. & N. H.

HUNT HUAT & CO. v. SIN GEE MOH & CO.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 100 of 1920.
June 16, 1921.

Present: -Mr. Justice Maung Kin and Mr. Justice Pratt.

HUNT HUAT AND COMPANY-

tersus

SIN GEE MOH AND COMPANY— RESPONDENTS.

Contract-Goods, sale of Delivery period all October—Tender and refusal—Breach of contract— Re-sale—Subsequent tender and refusal—Suit for damages—Assessment of damages—Contract Act (IX of 1872), s. 107.

D. bought certain goods from P. and it was agreed that delivery was "to be taken ex-scale in all October 1919" On October 2nd P. called on D to take delivery but D refused: P. repeated his demand on October 4th, and on the 5th threatened to re-sell if delivery was not taken, but D. again refused, whereupon P. sold the goods and called on D. to pay the difference. Subsequently, on October 15th P. informed D. that he would give delivery on any date convenient to P. between October 15th and October 31st, but D. refused to take delivery on the ground that the re-sale having taken place before expiration of the contract period, he had exercised his option to treat the contract as rescinded. P. thereupon brought the present suit claiming as damages the difference between the contract price and the market rate of October 31st:

Held, that under the contract D. had not the option to take delivery whenever he liked in all October; that the goods having been tendered D. by refusing to take delivery had committed a breach of the contract, and P. was entitled to sue for damages on the footing of the market price on October 31st, it being immaterial whether the suit was based on the breach of contract on October 3rd, or on the breach committed on October 18th; that as at the time of the re-sale the property in the goods had not passed to D, P. could not exercise the right of re-sale under section 107 of the Contract Act, so as to enable P. to sue for damages on the footing of the results of the re-sale, and that P. was entitled to recover as damages the difference between the contract rate market rate of October 31st. [p. 512, col. 2.]

First appeal against the decree passed by Young, J., on the Original Side.

Mr. Burior ee, for the Appellants. Mr. Ah Yain, for the Respondents. JUDGMENT.

MAUNG KIN, J.—This is an appeal from a decree on the Original Side of this Court.

The facts are correctly stated in the judg-

ment of the Trial Court as follows :-

By a contract, dated the 20th August 1919, the defendants bought from the plaintiffs 2,000 bags of new white beans delivery to be

taken ez-seale in all October 1919. 2nd October 1919 the plaintiffs wrote to the defendants requiring them to come and take delivery. The defendants refused on the ord, saying the notice was "insane." The plaintiffs repeated their demand on the 4th, and on the 9th threatened to re-sell, if delivery was not taken. On the 10th the defendants descended from investive to explanation and stated that they had all Ostober in which to take delivery and would not take delivery at present. On the lith, plaintiffs wrote that they had re-sold to Mesars. Black & Co., for Rs. 8,278.40 and called on defendants to some and pay the difference. On the 15th the plaintiffs who had hitherto conducted the dispute themselves placed the matter in their lawyers' bands who wrote on that date stating that plaintiffs were willing to give delivery on any day between the 15th and 31st Ostober, convenient to defend. ants and cancelling all previous correspond. ence. The defendants in turn, now placed the matter in legal hands, and on the 18th wrote through their Advocate that the re-sale having taken place before the expiration of the contract time, they had exercised their option to treat the contract as reseinded and stated that they had already so informed them verbally. They, therefore, declined what they ealled plaintiff's new offer. On the 20th October, the plaintiffs wrote, denying that the contract was or could be rescinded and threatening an action for breach of contract if delivery was not taken in accordance with their letter of the 15th. On the 1st Novem. ber they wrote, claiming the difference between the contract price and the market rate of 31st October.

The learned Trial Judge stated in his judgment that it was not disputed that the words in the Bought and Sold Notes, "delivery to be taken ex scale in all October 1919," meant that it was to be taken whenever in all that month sellers called on defendants to do so. He held that the tender by the plaintiffs was made at a proper time and place, and that the buyers having refused to take delivery had sommitted a breach of the contract and could have been saed by the sellers. But he held that the re-sale was of the plaintiffs' goods but not of the defendants, and as before the sellers can exercise the right of re sale under section 107, Contract Act, the property in the goods BUNT HUAT & CO. v. SIN GEE MOH & CO.

must have passed to the sellers; the plaintiffs would not have been able to sue for damages on the footing of the results of the re-sale. I agree with this view. The goods were unascertained goods, and although it may be said that the sellers had appropriated part of the goods in favour of the buyers, the latter never assented to the appropriation. Therefore, at the time of the re-sale the property in the goods sold had not passed to the buyers, and the plaintiffs, the sellers, were not entitled to exercise the right to re sale.

The plaintiffs on the 15th treated the previous tender as bad and made a fresh tender. On the 18th defendants repudiated the contract and committed a breach of it. The plaintiffs then sued on that breach, assessing the damages at the difference between the contract rate and the market-rate of the 31st

October.

The learned Judge held that although the plaintiffs could have sued on the previous breach by the defendants, the second tender did not in any way prejudice their position. He observed that all that happened was that plaintiffs said they would accept defendants' contention, that their tender was improper, that they withdrew their claim for the loss on the re-sale and tendered again, and that the defendants could not prevent plaintiffs from accepting defendants' own contention. See Borrowman v. Free (1). Under the circumstances, the learned Judge saw no defence and granted a decree for the amount elaimed with costs and interest on the judg. ment-debt at the Court rate from the date of deeree till realisation.

In Leigh v. Paterson (2) the contract was for delivery in all Desember. It was held that the seller had the whole month for delivery. This case has been followed in mary other cases in England and India, as

would appear presently.

The plaintiffs tendered delivery on the 2nd Ostober. The defendants refused on the 3rd, as stated before, so there was then a breach of the contract on the part of the defendants. The plaintiffs were then entitled to sue. If that tender can be held to have been treated as of no effect by the consent of both parties, the fresh tender made on the 15th having been refused on the

(1) (1879) 4 Q B. D. 500; 49 L. J. Q. B. 65. (2) (1818) 3 Taunt 540; 129 E. R. 498; 2 Moo. 588; 10 R. R. 552.

18th, the plaintiffe would then be entitled to one. It appears to me that it is immaterial whether the suit is based on the breash of the contract committed on the 3rd or on the breach committed on the 18th, because the damages to which the plaintiffs are entitled will have to be assessed in exactly the same way, that is to say, they would be measured by the value of the goods on the 31st October, that being the dae date of performance. This principle as to the measure of damages was first laid down in 1818 in Leigh v. Poterson (2), the case above cited.

The facts in that case are: - The defendant had agreed to supply the plaintiff with a certain quantity of tallow to be delivered all in December at 65s. per ewt. On Ostober 1st, when tallow was 71s. per ewt., the defendant informed the plaintiff that the goods were sold to another and that he would not execute the contract. On the 31st December the price of tallow was 81s. per owt. It was held that the tender of this should be regulated by the price on the 31st December. The Court said that the contract. being mutually made, could only be dissolved by the consent of both parties The defendant had all the month of December to deliver the tallow in, and the plaintiff is bound to recieve it until after the 31st. The law laid down in this case was affirmed by Phillrotts v. Evans (3).

In that case the contract was made early in January, to supply a quantity of corn to be delivered at Birmingham as soon as vessels sculd be obtained. On the 26th January the defendant gave notice to the plaintiff that he would not accept the corn, if delivered. It was at that time on its way to Birmingham, and on its arrival there, the defendant was required to ascept it, but refused, and upon this action was brought. The question was whether the damages should be ealenlated according to the market price on the 25th January when the notice was given, or the price on the last day when the contract could have been completed, vis., when the wheat was tendered for acceptance. The latter was held to be the proper rule.

In Boorman v. Nash (4) the same rule was laid down.

(4) (1829) 9 B. & C. 145; 7 L. J. (o, s.) K. B. 150; 109 E. R. 54, 82 R. R. 607.

^{(3) (1839) 5} M. & W. 475, 9 L. J. Ex. 88; 1151 E. R. 200, 52 R. R. 802.

HUNT HUAT & CO. U. SIN GER MOH & CO.

In Hochster v. Dela Tour (5) it was laid down that where the defendant has utterly rencunced a contract, or has put it out of his power to perform it, the plaintiff may, at his option, are at once, or wait till the time when the act was to be done. But the measure of damages is the same in both cases, tie, the difference between the contract rate and the market rate on the date.

Mr. Borjorji contends that damages should, in this case, be measured by the value of the goods on the 18th when the defendants definitely repudiated the contract. The above cases show the contention to be unsustainable. See Frest v. Bright (6).

Leigh v. Pater:on (2) has been followed by Scotland, O. J., in Mansuk Das v. Rangayya Chetti (7), and also by the Calcutta High Court in Mackertich v. Nobo Coomar Ray (8).

It may be contended that in Fhillrotts v. Evans (3) and F.o.t v. Knight (6) the plaintiff did not treat the notice of repudiation as a breach of the contrast, and that that was the reason why he was allowed to see on the basis of the value of the goods at the due date. Hochster v. Dela Tour (5) shows that view to be incorrect and Mayne says on this point as follows:- "Even when the plaintiff has exercised his option of treating the contract as reseirded before the time for its completion has elarsed and has commenced bis action before that time, the damages could still be calculated with reference to the date at which it should have been carried out" (page 205 Mayne on Damages, 8th Edition) Sir Frederick Pollcok in his Indian Contract Act says that the election to take advantage of the reguliation of the contract goes only to the question of breach and not to the question of damages, and that the damages are to be calculated with reference to the date of breach only where no time was fixed for asceptance, because there is then no other measure possible. (Contract Act, 4th Edition, pages 562 and 5 3). It follows then that the plaintiffs in this case were entitled to sue for damages on the footing of the market price on the 31st October, whether their suit was leased on the breach of the 3rd of Ostober or of the 18th.

Mr. Barjorji contends that the words "delivery to be taken ex scale in all Ostober 1919," give the option to the hayers to take delivery whenever they like in all Ostober, and that it was not the option of the sellers to give delivery. Although it was not disputed in the Trial Court what the meaning of these words was, Conneel for the appellants can now dispute the correctness of the meaning assigned in that Court, because the point was one of law. I do not, however, agree with the contention. The words appears to me to mean clearly that delivery was to be given ex-scale in all Ostober, and that it was to be accepted when given. I think the point is quire simple. One cannot take delivery, until it is given. the words in question give the fore. sellers the right to deliver at any time during the month of October. Even if Mr. Barjorji's contention in this particular is correct, it does not appear to me to make any difference as to the result of the care. His eliente, the defendants, told the plaintiffs that they would not accept the tender made on the 2nd, and also the tender made on the 15th. The breach was on the part of the defendants in either case, and as I held before, damages would be assessed on the footing of the market rate of the 31st Ostober.

If it was right that the plaintiffs were entitled to claim damages only on the footing of the market-rate of the 18th October, the date on which the defendants were said to have clearly and distinctly broken the contract, the question would arise as to whether the plaintiffs should be allowed to amend their plaint accordingly. But the view I take being contrary to Mr. Burjorji's contention, there is no necessity to decide the question whether amendment should be allowed or not.

I would dismiss the appeal with costs. PR.TT, J.—I agree.

W. C. A.

Appeal dismissed,

^{(5) (1853) 2} E. & B 678; 22 L. J.Q. B. 455; 17 Jur. 972; 1 W. R. 469; 118 E. R. 922; 22 L. T. (o. s.) 171; 95 R R. 747.

^{(6) (1872) 7} Ex. 111; 41 L. J. Ex. 78; 26 L. T. 77;

W. R. 471.

⁽⁷⁾ I M. H. C. R. 162,

^{(8) 80} O. 477; 7 C. W. N. 481,

MA B DOK U. MAUNG PO THAN.

LOWER BURMA CHIEF COURT, ORIMINAL REVISION No. 175B of 1921. August 19, 1921.

Present :- Mr. Justice Pratt.
MA E DOK-PETITIONER

versus

MAUNG PO THAN AND OTHERS -

Criminal Procedure Code (Act V of 1898), s. 250-Compensation - Award of compensation by Magistrate

in case triable by Sessions, validity of.

Where a case ordinarily triable only by a Court of Session is tried by a Magistrate empowered under section 30 of the Criminal Procedure Code, the Magistrate is not competent to award compensation. The special provisions of section 30 which enable a Magistrate to try offences only triable by a Court of Session "as a Magistrate" do not make such offences "triable by a Magistrate" for the purposes of section 250, Criminal Procedure Code.

Revision against the order of the District

Magistrate, Thayetmyo.

Mr. S. S. Halkar, for the Petitioner.

Mr. K. B. Baneri, for the Respondents.

ORDER .- Ma E Dok was ordered by the District Magistrate, Thayetmyo, to pay compensation to the accused in Criminal Trial No. 5 of 1921 for having brought a false charge of an offense under section 376, Penal Code, against them. On revision it is urged that an offence under section 376 is triable by a Court of Session and not by a Magistrate and that, therefore, the District Magistrate had no power to pass an order for compensation under section 250 of the Code of Criminal Procedure. The words used in the section are: "if * * a person is assused before a Magistrate of an offense triable by a Magistrate and the Magistrate by whom the case is heard discharges or acquits the accused." The words "triable by a Magistrate" would prima facis appear to refer to the schedule of statement of offeness in column 8: "By what Court triable" appended to the Criminal Procedure Code. This is the view taken in Schoni and Row's Commentaries and in the Punjab case of Crown v. Qadu (1) in which it was laid down that where a case ordinarily triable only by a Court of Session is tried by a Magistrate empowered under section 30 of the Oriminal Procedure Code, the Magistrate is not competent to award compensation. The special provisions of sec-

(1) 26 P. R. 1902 Cr; 139 P. L. R. 1902.

ASHUTOSH DAS U. MMPBROR.

offences only triable by a Court of Session "as a Magistrate" do not make such offences "triable by a Magistrate" for the purposes of section 250, Criminal Procedure Code. I feel so doubt that this is a correct statement of the law. The object of the Legislature was apparently to exclude offences of great gravity from the provision of section 250. I set aside the order accordingly.

J. P.

Order set aside.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 98 of 1921.
April 8, 1921.
Present:—Mr. Justice Tennon and
Mr. Justice Ghose.
ASHUTOSH DAS—PETITIONES

DETSUS

EMPEROR - OPPOSITE PARTY.

Evidence Act (I of 1872), s. 63—Hearsay evidence—Statement made to investigating Police Officer by third persons, when admissible—Substantive or corroborative evidence.

In a proceeding under section 110 of the Code of Criminal Procedure, the statement of a witness that he heard from certain persons who have not been examined that articles stolen in certain decoities were made over to the accused, is inadmissible in

ovidence, [p. 514, col, 1.]

Where in a proceeding under section 110, Oriminal Procedure Code, a person has not been examined as a witness by the Court the evidence of an investigating Police Officer with regard to the statement made to him by that person is inadmissible in evidence. If, however, the person has been examined as a witness by the Court, the evidence of the investigating Police Officer is admissible. But the statement made to the investigating Police Officer cannot be relied upon as substantive evidence against the accused. It should be used in order merely to contradict or corroborate, as the case may be, the statement made by the witness in Court. [p, 514, col. 1.]

Oriminal revision against an order of the District Magistrate, Bankura, dated the 13th December 1920.

Babus Dasarathi Sanyal, Debendra Narain Bhattacharyya and Lalit Mohan Sanyal, for the Petitioner.

Mr. Ashraf Ali, for the Orown,

JUDGMENT.—In this case the accused before us has been directed, under the provisions of section 110, read with section 118, Criminal Procedure Code, to execute a bond of Rupees 200, with two sureties each in like amount, to be of good behaviour for one year, in default to suffer rigorous

NGA HAN RYI S. EMPEROR.

imprisonment for the same period. The allegation against him was that he was by babit a receiver of stolen properties knowing the same to be stolen.

We have been taken over a considerable portion of the record, and we cannot but some to the conclusion that the trial or enquiry, in the present case has been vitiated by the admission of much inadmissible evidence; for instance, a person of the name of Gayaram, who ears that he and certain others committed dasoity at a place called Hirabati, gave evidence to the effect that be had made over the orgaments stolan in the course of that despity to the accused. That, of course, is admissible. He was further permitted to say that he beard from certain other persons that erticles stolen in three other descrities were also made over to the accused. informants have not been examined. portion of his evidence on which the Magietrate laysetress is clearly inadmissible. Then, at a search of the house of the petitioner, it is stated that a certain toering was found in his house and that toering, it is enggested, was one of the properties stelen in the course of a dacoity at the bouse of one Satis Ganguly in the village of Jagadangs. With regard to this toe-ring the Police Officers were permitted to state in the scarce of their investigation before the said Police Officers that the wife of Satis and the wife of his brother Sasadbar identified this toe-ring as belonging to Satis' wife. Neither of these two ladies was examined. Obviously, the evidence of the Police Officers with regard to the statements made to them by these two ladies is inadmis. sitle. Further, the statement supposed to have been made to the investigating Police Officer by the witness Sasadbar, the brother of Satis, has been obviously relied upon by as substantive evidence the Magistrate against the accessed, while it should have been used in order merely to contradict or corroborate, as the case may be, the etatement made by Sasadhar in the Court of the Trying Magistrate.

We next find that the statement said to have been made by a Pleader of the name of Sujey Das to the investigating Inspector has evidently been treated by the Trying Magistrate as substantive evidence against the positioner, while the statement

Inspector was to be believed, should have been used at most in order to contradict Sujoy Das as regards the statement made by him in the Court of the Trying Magistrate. With regard, further, to the witness Gayaram, it is clear that he was a witness of whose evidence corroboration was necessary. What corroboration, then, is of his evidence as to what he knew of his own personal knowledge the Magistrate has not indicated. We find, further, that even in the evidence of the witnesses who speak to the reputation of the petitioner much hearsay evidence has been admitted.

For these reasons we must set aside the order new compleined of and direct that there has a re trial of this matter in the Court of a Magistrate of the First Class at the head-quarters of the District of Bankura. Such Magistrate to be nominated by the District Magistrate of Bankura, and he one other than the Magistrate in whose Court the order now set aside was made.

Rule made absolute : Re trial ordered.

CEIMINAL REVISION No. 326B or 1920.

January 2, 1921.

Present :- Mr. Justice Maung Kin.
NGA HAN KYI-Accused-Peritioner

versus

EMPEROR—Opposite Party.

Burma Ercise Act (V of 1917), ss. 37, 44—Possession of excisable article, failure to account for—Offence.

A person who fails to satisfactorily account for being in possession of any excisable article, although the quantity he possesses is within the limit allowed for possession, renders himself liable to be convicted under section 37 of the Burma Excise Act. [p. 515, col. 1.]

Reference made under section 438, Oriminal Procedure Code, by the District Magistrate, Hantbawaddy.

JUDGMENT.—This is a reference by the District Magistrate of Hanthawaddy recommending that the conviction and sentence be set aside.

The accorded was found in possession of four quarts of kazaw which he stated he purchased from a certain licensed shop. The Magistrate found that he could no

SIMBON U. IMPEROR.

satisfactorily prove his purchase, which is tentamount to saying that he could not satis' factorily account for his possession. The accused was found guilty under section 37 of the Excise Act and sentenced to pay a fine.

The learned District Magistrate contends that the conviction was wrong on grounds appearing in the following passage in his order of reference:—The Magistrate convicted the accused holding that the burden of proof was for the accused to show that he purchased the kazaw from a licensed shop and each purchaser must be given a rescipt showing that the kazaw parchased is from a licensed shop. There is no provision in the Exist Act or rules regarding the issue of receipts to purchasers. According to the Act any person may possess four quart bottles of country fermented liquor."

The Trial Magistrate held that the presumption allowed by section 44 of the Ast must be drawn against the assumed as he could not satisfactorily account for his possession and that he failed to rebut the presumption.

Because the quantity was within the limit allowed for possession, the accused could not have been convicted under section 30 (a) of the Excise Act. But section 37 provides that whoever without lawful author. ity has in his possession any quantity of excisable article, knowing or having reason to believe that the same has been unlawfully imported, transported, manufactured, oultivated or sollested, or that the preseribed duty has not been paid thereon, shall be punishable. This section is directed against the illicit manufacture, importation, ete, of any quantity of excisable article and it is, in the nature of things, nessassary to provide for a presumption against a person in possession of an excisable article and throw on him the onus of proving that his possession is not illisit, as the matter would naturally be within his special knowledge. So the Legislature provides by enacting sestion 44 that the presumption is, until the contrary is proved, that the accused has committed the offense charged under section 37 in respect of any excisable article for the possession of which he is unable to assount satisfactorily.

The Trial Magistrate has not grounded the conviction upon the fact that the accused must produce but had not produced a receipt from a licensed shop. What he said was:—"To my mind the only safe means to protect purchasers who take liquor home is to obtain a receipt from the vendor for every purchase." Primafacie, this is not a bad suggestion.

The conviction was correct. The papers

will be returned.

The proposition laid down in Queen-Empress v. Tun E (1), that presession of half a quart of country spirit is no offeness and a man is not bound to assount for such mere presession is not wholly correct under the provisions of the present Excise Act.

W. C. A. (1) 1 L. B. R. 43. Paper returned.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 137 of 1921.

March 28, 1922.

Present:—Mr. Justise Ryves.

MR. R. SIMEON—APPLICANT

tersus

EMPEROR-OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476, order under—Complaint—High Court, power of, to interfere—Civil Procedure Code Act V of 1908), s. 115.

Where a Judge, acting under section 476, Criminal. Procedure Code, orders a trial under section 193, Indian Penal Code, a High Court can only interfere under section 115 of the Civil Procedure Code. [p. 516, col. 1.]

A District Judge concluded an order under section 476 charging certain persons with various offences thus:

"A copy of this order will be sent to the District Magistrate...with a request that he will cause proceedings to be instituted against the other three persons...... If the District Magistrate decides to institute proceedings he should inform the C. I D. who investigated the matter:"

Held, that the order was not in the terms of section 476, Criminal Procedure Code: but that it amounted to a complaint, and that it was in the discretion of the Magistrate to take such proceedings as he was advised. [p. 516, col. 1.]

Oivil revision against an order of the District Judge, Saharanpur, dated the 11th November 1921.

Mr. G. S. Boys, for the Petitioner.

Mr. L. M Banerji, for the Opposite Party.
JUDGMENT.—After desiding a Probate
suit, the District Judge of Saharanpur, being
of opinion that there were grounds for suspect

SANTORE SINGE U. RAM FINGE.

ing a criminal conspiracy in connect on with the preparation and execution of the Will propounded, took proceedings under section 476 of the Criminal Procedure Code against Raja Ram, alone, in the first instance, He came to the conclusion that four persons, three of whom are now before me, should be charged with various offences. His order concludes, " A copy of this order will be sent to the District Magistrate. Saharanpur, with a request that he will eause proceedings to be instituted against the other three persons (i. e., other than Mr. Simeon). If the District Magistrate decides to institute proceedings he should inform the C. I. D. who investigated the ease." These words show that the order is not in the terms of section 476 of the Criminal Procedure Code. In the case of Mr. Simeon, the Sub Registrar, the Judge took further proceedings under section 476, Criminal Precedure Code, and ordered his trial under section 193 of the Indian Penal Code. It has been held by the Full Bench of this Court that I can only interfere with such an order under section 115 of the Civil Prcedure Code. No grounds under that section are alleged. But it is said I can and should interfere under the Government of India Ast, on the ground that the trial must be infructuous. It has been said by a learned Judge of this Court that proceedings under section 476 of the Criminal Procedure Code are not in the nature of a dress rehearsal of the trial, and it is quite impossible for me to say at this stage what evidence will be fortheoming against Mr. Simeon. Then, an experienced Judge of the standing of the District Judge of Saharanpur, fully realising his responsibility, orders a trial for perjury committed before himself, I should be very loth to say, assuming that I have the power, that the trial shall not take place. With regard to Daulat Rai and Raja Ram, I think the order of the Judge amounts to a complaint. It is in the discretion of the Magistrate to take such proceedings as he may be advised. The result is that I reject the application.

. J. P.

Application rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 369 OF 1921.

November 16, 1:21.

Fresent:—Mr. Justice Scott Smith.

SANTOKH SINGH AND ANOTHER

—PETITIONERS

DETSUS

RAM SINGH AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145

(1)—District Magistrate, power of, to cancel order under-Revision—High Court, power of, to interfere.

Where a District Magistrate, upon information received, is satisfied that there is no probability of any breach of the prace, he is competent to cancel an order, made by his predecessor, under sub-section 1) of section 145 of the Criminal Procedure Code, and a High Court has no jurisdiction to interfere in revision, as the Magistrate's order is not without jurisdiction. [p. 517, col. 1.]

Manindra Chandra Nandi v. Barada Kanta Chowdhry, 30 C. 112; 6 C. W. N. 417, followed.

Criminal revision against an order of the District Magistrate, Attock, at Campbell pore, dated the 29th December 1920.

Mr. Hukam Chand, for the Petitioners.

Mr. Amar Nath Ohona, for Government

Advocate, for the Respondents.

JUDGMENT .- This is an application for revision of an order of the District Magistrate of Attock, sancelling the prior order of his predecessor under section 145, Criminal Procedure Code. On the 26th November 1920, the District Magistrate recorded his opinion that from the reports sent to him oseasionally by Police Officers it appeared that there was a great apprehension of a breach of the peace on account of a dispute in regard to the temple of Panja Sahib and the houses attached thereto. He, thereordered that notices should be fore. issued to Ram Singh and others, the respondents, directing them to attend Court and file their written statements regarding possession of the property in dispute. This order was passad by Chaudhri Sultan Ahmed on the 26th November 1920. On the 29th December 1920, his suscessor, Mr. Miles Irving, said-

"From information received by me I am satisfied that the party alleged to be aggressors in this case are firmly in possession of the

disputed property."

He went on to say-

"If I found the facts to be as alleged in the complaint the discertion vested in me by the first proviso to section 245 (4) would enable

JAIPAL BHAGAT C. EMPEROR,

me to declare either the complainants or those complained against as in possession at

the time of the preliminary order."

He considered, however, that neither order would assist in the preservation of the peace and resorded his opinion that there was no probability of any breach of the peace unless the complainants' party themselves interfered with the respondents. Hukam Chand on behalf of the petitioners urges that when once the prosesdings are begun the District Magistrate is bound to go on and take evidence as laid down in section 145, Oriminal Procedure Code. He says that Mr. Miles Irving had no jurisdiction to eansel his predecessor's orders in the way he did. I asked him if he had any authority to cite in support of his contentior. but he admitted that he had none. Counsel for the respondents, on the other hand, sites the ease of Maninira Chanira Nandi v. Barada Kanta Chowdhry (1), wherein it was held that a Magistrate has jurisdiction to eancel an order passed under sub-section (1) of section 145, Criminal Procedure Code, and to stay proceedings if he becomes satisfied, whatever the source of information may be, that the state of things does not exist, which alone would give jurisdiction to proceed with the enquiry. It was also held that the High Court could not interfere in such cases as the Magistrate had not acted without jurisdiction.

The authority cited is on all fours with the present ease. Mr. Miles Irving, upon the information received by him, was quite satisfied that there was no danger of any breach of the peace so long as the com. plainants' party kept quiet and did not interfere with respondents' possession of the property in suit. As the District Magistrate was responsible for the peace of the district, he was the best person to judge the state of affairs, and I hold, in accordance with the above authority, that he clearly had jurisdiction to eancel his predecessor's order and, this being so, this Court has no power to interfere with his order.

The petition for revision is, therefore, rejested.

W. C. A.

Revision rejected.

(1) 80 C. 112, 6 C. W. N. 417.

PATNA HIGH COURT. CRIMINAL MISCELLANGOUS REVISION No. 87 or 1921.

December 2, 1921.

Present :- Mr. Justice Jwala Prasad and Mr. Justice Ross.

JAIPAL BRAGAT-PETITIONER

DETRUE

EMPEROR-OPPOSITE PARTY.

Extradition Act (XV of 19031, ss. 7, 9, 15, 18, Sch. I-"Extradition offence"-Absconding from jail, whether such offence-Warrant for arrest of such absconder to District Magistrate, validity of-High Court, jurisdiction of, to interfere in case of invalid warrant-Treaty prohibiting extradition in certain cases, effect of.

Absconding from jail is not an "extradition offence" as described in the First Schedule to the Extradition Act, and, as section 7 of the Extradition Act applies only to extradition offences, a warrant issued under that section by an authority in a Foreign State for the arrest of a person so absconding in British India is wholly illegal and without jurisdiction, and the arrest of that person in British India is without any authority. [p. 518, col. 2.]

The procedure for requisitioning the surrender of any person accused of having committed any offence, not necessarily an extradition crime, is laid down in section 9 of the Act but the requisition in such a case has to be made "to the Government of India or to any Local Government," Where such requisition is not made and the warrant is addressed to the District Magistrate. the latter has no jurisdiction to make an arrest

under it. [p. 619, cols. 1 & 2.]

Although section 15 of the Extradition Act empowers the Government of India and the Local Government to stay any proceeding taken under Chapter III of the Act, and to direct any warrant to be cancelled and the person arrested to be discharged, yet in a case where action is taken under the Act under a warrant which is not valid, the jurisdiction of the High Court to interfere is not necessarily ousted. [p. 519, col. 1.]

Rudolph Stallmann, In re, 12 Ind. Cas. 273, 89 O. 164: 15 O. W. N. 1053: 14 C. L. J 375: 12 Cr. L. J. 505, Emperor v. Huseinally Niazally, 7 Bom. L. R.

453 at p. 487: 2 Cr. L J. 439, referred to.

Where a Treaty with a Foreign State prohibits extradition for offences not specified therein, such prohibition overrides the provisions of the First Schedule to the Extradition Act by virtue of section 18 of the Act; but where there is no such provision in the Treaty, section 9 of the Act would not in any way derogate from the Treaty. [p. 519, col. 2.]

Oriminal revision before the Hon'ble High Court questioning the legality of the detention of the petitioner in enstody in pursuance of the order of the Sub-Divisional Officer, Betliab.

Mr. 9. P. Varma, for the Petitioner.

The Government-Advocate, for the Oppo. aite Party,

JAIPAL BHAGAT U. BMPEROB.

JUDGMENT.

JWALA PRASAD, J. (November 23, 1921) - The ease raises a very important question relating to the power of the High Court with respect to fugitive offenders. The petitioner was arrested in Nepal on a charge of abstment of marder and was put in Birgunj Jail within the jurisdiction of Nepal Government. He, however, managed to escape from the jail and came to the neighbouring British territory in Bheriharwa, within the jurisdiction of the Bhaura Police Station. The Sub-Inspector of Bhaurs, on 12th April 1921, reported the above fact to the Sub-Divisional Officer of Bettiah requesting him to communicate with the Hakim of Birgunj and to pass an order for the arrest of the petitioner. On 14th April the Hakim of Birganj wrote to the Sub-Divisional Officer of Bettiah requesting him to have the petitioner arrested and promising to send the evidence of nationality and criminality to the Sub-Divisional Officer of Bettiah. Thereupon, under the orders of the Sab-Divisional Officer the petitioner was arrested on the 16th April 1921 and was remanded to Jail Hajat till the 1st May 1921. He remained in jail till the 31st May 1921 when he was released on bail under the orders of the Sessions Judge of Muzaffarpur. On the 11th June 1921 the Hakim of Birgunj forwarded to the Sub-Divisional Officer of Bettiah the evidence of nationality and eriminality referred to in his letter of the 14th April 1921. The British Envoy at the Court of Nepal cent the extradition warrant under section 7 of Act XV of 1903 (Indian Extradition Act) dated the 1st August 1921 to the District Magistrate of Champaran for the arrest and delivery of the petitioner to the Nepalese Officer of the Birgunj Amini Court. The petitioner was then arrested on the 2nd September 1921 and was remanded to Hajat pending arrangements for eccort from Nepal Authorities.

His petition for bail having been rejected on the 3rd September 1921, the Sub-Divisional Officer cancelled his order of the 2nd September and eent his report and finding to the District Magistrate to be forwarded to the higher authorities under section 3 (3), clauses 6 of the Extradition Act. The District Magistrate forwarded the papers of the case to the Commissioner of the Tirbut Division by his letter No. 8176 dated the 30th September 1921 pointing out that

the order of the Magistrate sending the case to the District Magistrate for reference to the higher authorities under section 3 (3), elause o was wrong, as well as his omission to report the detention of the assused for more than two months. The District Magistrate thought that the case was governed by section 7 of the Extradition Act, that the assueed was arrested under eestion 10 of the Act, that the Magistrate was bound to execute the warrant and to forward the petitioner to the Nepal Authorities as directed therein, and that the petitioner's only sourse was to move the Local Government under section 15 of the Act The Commissioner agreed with the District Magistrate and returned the papers to him with the result that the matter has not been referred to the Loca! Government and the petitioner is now in Bettiah Jail to be forwarded to the Nepal Authorities. In the meantime, the petitioner same up to this Court with a pstition challenging the jurisdiction of the Bettiah Magistrate to arrest him and detain him in the jail as stated above. A rule was accordingly issued by this Court upon the District Magistrate to show cause and the ease has now come before us.

The warrant in execution of which the petitioner has been arrested is expressed to have been issued under section 7, Ast XV of 1903 (The Indian Extradition Ast), and is to the District Magistrate of addressed Champaran, Motibari. It runs as follows "whereas Jaipal Bhagat, being a Nepalese subject, assured of absconding from jail, has fled from Nepal to British territory, and is at present in your jurisdistion, this warrant is to authorise you to arrest and deliver the above named person to the Nepalese Officer of the Birganj Amini Court at Birganj in Nepal". Section 7 applies only to an "extradition offence." "Extradition offence" has been defined by section 2 of the Act to mean any such offence as is described in the First Sebedule". Absending from jail is not one of the offences mentioned in that Schedule. Therefore, section 7 has no application at all and the warrant in question issued by the British Envoy at the Court of Nepal for the arrest of the petitioner is without jurisdiction. The report of the District Magistrate to the Commissioner referred to above shows that the petitioner was arrested under the provisions of section 10 of the JAIPAL RHAGAT U. EMPESOR.

Code; but that section scald only apply if the warrant under section 7 was legal; but, as shown above, the warrant was wholly illegal and without jurisdiction. Therefore, the arrest of the petitioner also was without any authority.

No doubt, section of 15 the Ast empowers the Government of India and the Local Government to stay any proceedings taken under Chapter III of the Ast and to direct any warrant to be cancelled and the person arrested to be discharged. But that does not necessarily out the jurisdiction of this Court to interfere in a case where the action under the Act has not been taken under a valid warrant.

In Rudolph Stallmann, In re (1) it was pointed out that the section does not take away the power of the Court to issue habeas corpus or directions in the nature of that writ, inasmcob 8.0 neither that sestion nor any other provision of the Ast has expressly taken away the power of the Court with respect to habers corpus. Similar was the view expressed in the case of Emperor v. Huseinally Nizeally (2). Russell, J., observed as follows: "As was pointed out by Mr. Branson in his argument, there was some difficulty in assertaining what the assessed really were praying for ; but Mr. Davar in his reply put it thus: - Tais Court can order the District Magistrate to hold his hand until the warrant is shown to be legal.' The objection to this, however, is that by section 15 of the Extradition Act it is 'the Government of India or the Local Government' (not the High Court) who may, by order, stay any proceedings taken under this Chapter, and may direct any warrant issued under this Chapter to be cancelled ... This escion ousts the jurisdiction of this Court to inquire into the propriety of the warrant, but leaves open the question of this Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal".

The above remark exactly applies to the present case. The procedure for requisitioning the surrender of any person accused

(2) 7 Bom. L. B. 468 at p. 467; 2 Or. L. J. 489.

early an extradition erime, is laid down in testion 9 of the Act but the requisition in such a case has to be made "to the Government of India or to any Local Government." In the present case no such requisition was made; therefore, the warrant in question, which was addressed to the District Magistrate of Champaran, cannot possibly be supported under section 9 either vide also Gulli Sahu v. Emperor (3).

The contention of the learned Counsel on behalf of the patitioner as to the illegality of the warrant and the want of jurisdiction of the Magistrate of Champaran to arrest the patitioner and detain him in jail under the authority of that warrant appears to us to be substantial. We, however, do not think that there is any substance in the other contentions of the learned Counsel. If proper action was taken under section 9 of the Ast, perhaps, the objection of the learned Counsel as to the legality of the arrest and detention of the prisoner would not have been valid, nor his contention that a fagitive offender of the Nepal territory could not be arrested in British India for offences other than those enumerated in the Treaty between the Nepal Government and the British Government. Treaty with the State of Nepal, dated the 10th Fabruary 1835, A. D. together with memorandum dated 24th June 1881 supplemented thereto.

Reliance is placed upon section 18 of the Extradition Ast to abow that sestion 9 should be deemed to have been controlled by the Treaty, inasmush as nothing in the Act has been designed to derogate from the provisions of the Treaty for the extradition of offenders. That contention does not appear to be sound. If the Treaty probibits extradition for offenses not spesified therein such prohibition overrides the provisions of the Schedule by virtue of scotion 15, but there is no such prohibition in the Treaty and, therefore, sostion 9 does not in any way derogate from the provisions of the Treaty. The Ast practically enhances the power of the Nepal dovernment to requisition the authorities in the British territories to arrest and deliver fugitive offenders of their territory.

There appears to be some misapprehen.

(3) 21 Ind. Cas. 993; 41 C. 400; 19 C. W. N. 859;

14 Cr. L. J. 673,

^{(1) 12} Ind. Cas. 273, 89 C. 164; 15 C. W. N. 1058; 14 C. L. J. 875; 12 Cr. L. J. 505.

In te ROMABAN.

sion of the offence said to have been committed by the prisoner in Nepal. The report of the District Magistrate says that the petitioner escaped from the Nepal territory where he was kept awaiting trial for murder. The evidence forwarded by the Nepal Government to prove the eriminality of the prisoner disclose "would only at the best" a charge of abetment of murder. Abetment of murder is not one of the offences mentioned in the Treaty. tion 13 of the Act, however, makes the provisions of Chapter III apply to abetment of offences also. The evidence, however, forwarded by the Nepal authority does not disclose anything against the petitioner beyond a vague hearsay evidence of his having offered to certain people some money to cause murder of certain persons.

The matter raised in this application is of great importance and we do not think that we would be justified in passing final orders in this case until we hear the learned Government Advocate. We, therefore, request the learned Government Advocate to go through the papers of the case and to

appear in the case at an early date.

Ross, J.—I agree.

JWALA PRASAD AND Ross, JJ.—We have heard the learned Government Advocate who eave that he has considered the law and authorities in the case and that he cannot take any exception to the view expressed in our decision of the 23rd November 1921.

We, therefore, hold that the petitioner was arrested under an illegal warrant and we, therefore, direct that he be released at once.

N. H. Petitioner released.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 138 of 1921.

CRIMINAL REVISION PETITION No. 113 of 1921.

November 15, 1921.

Officiating Chief Justice.

In re KOMARAN AND ANOTHER—

Railways Act (IX of 1890), ss. 42 (2), 47 (1) (b), 109—Reservation of compartment for a class, legality of—Reservation of compartment, method of—Person entering compartment not reserved for him—Offence.

A Railway Company has the right to regulate its own traffic in its own way, and is competent to reserve accommodation for a passenger or class of passengers, and such reservation is not forbidden by section 42 '2) of the Railways Act as being an undue or unreasonable preference in favour of a particular description of traffic; section 109 of the Act contemplates such reservation for possible and

actual passengers, [p. 523, col. 1.]

The Traffic Working Orders of a Railway Company required that the reservation of a compart. ment of a Bailway carriage for a class should be effected by affixing to both sides of the compart. ment, a printed card, signed or initialled by the Station Master, in a space provided for the purpose : notwithstanding these orders, the reservation of a compartment of a Third Class Railway Carriage was effected by affixing to the compartment, under the orders of the Station Master, two slips of paper bearing the words "Reserved for Europeans and Anglo-Indians", and initialled by the Ticket Examiner, and the question was whether the reservation was in contravention of the rules of the Railway, so as to render immune from prosecution any person not of the class for whom the compartment was reserved who entered the compartment:

Held, that the reservation was not in contravention of the rules of the Railway, and any person entering such compartment who was not of the class for which it had been reserved, and refusing to leave it when requested to do so, rendered himself liable to prosecution under section 109 of the

Railways Act. [p. 526, col 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub Divisional First Class Magistrate, Coimbators, in Criminal Appeals Nos. 44 and 45 of 1920, preferred against the judgment of the Court of the Talua Second Class Magistrate, Avanashi, in Calendar Case No. 155 of 1920.

FACTS appear from the judgment.

Messrs. S. Sreenivasa Aiyangar and A. C. Sampath Iyengar, for the Petitioners.—Recervation of compartments for a class is not anthorised by any of the provisions of the Railways Act. Reservation for exclusive use of Anglo Indians is illegal. The reservation cannot be deemed to be "for another passenger" within the meaning of the expression in section 42 (2).

The compartment was not properly notified as having been reserved. Under section 172 (a) of the Traffic Working Orders which was in force on the day of the alleged offence, the reservation must be effected by affixing a printed eard containing the initials or signature of the ROMARAN, In re.

Station Master. That provision has been disregarded and the putting up of a writing signed by the Ticket Examiner is no proper substitute for the rule. No doubt the Station Master verbally intimated that the reservation was under his orders. But the rule does not recognise verbal orders.

The reservation of accommodation for a class is an unreasonable preference in favour of a particular description of traffic which is forbidden by section 42 (2). If the compartments reserved are, as generally found, empty and there is overcrowding in the unrestricted compartments, it is an unreasonable preference of the favoured class.

Mr. V. L. Ethiroj, for the Public Proseentor, for the Crown.—The Railway Company has the right to regulate its traffis and to so arrange assummodation as to sesure the general comfort and convenience of the travelling public.

Reservation for a class is reservation for the use of "another passenger" in section 109 (1) of the Railways Act. The expression "another passenger" should not be unduly narrowed in its significance.

The Traffic Working Orders are only a guide for Railway servants and are not exhaustive. They neither forbid the exercise of discretion by Railway Officers in sertain contingencies. The accused are not entitled to rely on technical infringements of those orders to justify their entry into a reserved compartment. As a fact, the Station Master verbally intimated to them the fact of reservation and asked them to go out. But the accused persisted in staying in the compartment and wanted only a test case and an authoritative desireion thereip.

The Station Master is not forbidden from delegating his functions in such matters to his subordinates.

Section 41 prohibits the accused from taking proceedings for anything done in contravention of the provisions.

The expression 'traffie' in sestion 42 (2)

is restricted to goods and animals.

This case coming on for hearing on the 20th and 21st of September 1921, upon perusing the petition and the judgments of the lower Courts and the material papers in

the case and upon hearing the arguments of the Counsel and the case having stood over for consideration till the 7th October 1921, the Court (Oldfield, J., and Krishnan, J.,) made the following

ORDER.

OLDFIELD, J.—We are asked to interfere in revision with the conviction of accreed of an offence punishable under section 109 (1) of Act IX of 1890 and their sentences, each to pay a fine of Rs. 5-C-O or in default to suffer one week's simple imporisonment.

There was some dispute as to the facts in the lower Courts; but I take them as found to be that, on 2nd May 1920, accused pagsengers at Mettuypalayam Station by the Madras Mail train, entered and persisted in remaining in a Third Class Compartment, to which a card had been attached, purporting over the initials only of the Senior Ticket Examiner to reserve it for Europeans and Angle-Indians. The questions argued before us are whether (1) the attaching of such a eard sould effect a reservation at all (2) whether a reservation for Europeans and Anglo-Indians ie, in the words of section 109 (1), a reservation for the use of another passenger, (3) whether a reservation for those classes is, with reference to section 42 (2), within the powers of the Railway and can be resognised by a Oriminal Court.

The second of these questions raises the general point of construction, whether the reference in the section to reservation for another passenger ocvers reservation for a slass. It cannot, in my opinion, be answered by direct reference to any portion of the Act. since there is no definition of the term passenger' and it is not possible to define it, as we are asked to do, with reference to section 68, as "a person who actually enters a Railway carriage for the purpose of travelling," in view of its wider use in other sections, of which section 51 (e) with its mention of "means of transport which may be required for the convenience of passengers ... carried or to be earried" is the elearest. Nor, with all respect, is it sufficient to rely on section 23, General Clauses Act (X of 1897), and the principle that the singular includes the plural or on the analogy of reservation for a Regiment or Theatrical Company referred to by

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Waleh, J., in Bri bisi Lal v. Emperor (1). For in such cases the reservation would, it is to be supposed, have been made in sonsequence of an application, on which the number and identity of the passengers would have been, at least approximately, ascertained. But that will not be the case as regards the class of European or Anglo-Indian passengers, until they take their tickets or at least intimate their intention to travel; and it is significant that, as the Traffic Working Orders of the Railway produced by the Pablic Prosecutor show, reservation for the class now in question has to be made at the starting station of all long distance main line trains, whether or no passengers of that class are there, to provide for the contingency of their travelling from later stations. In the present care there is in fact the evidence of prosecution witness No. 1, the Station Master, that seven or eight Anglo-Indians were in the compartment, when accoused tried to enter; and, as there were in the present case actual passengers to benefit by the reservation, it may on that ground be held to be of the kind contemplated by section 109. We have, however, been asked to deal with the case on general considerations; and we have then to decide whether the reservation referred to in that section is one for an actual passenger or passengers or includes reservation for possible passengers also.

No relevent authority relating either to Railways or to general sanons of interpretation has been cited; and here, as in connection with the next branch of the defence argument, the decision must be based on the policy of the Statute as a whole as well as the terms of the particular provision under construction. The Railways Act, as its preamble states, is intended to consolidate, amend and add to the law relating to Railways. But there are, and, in view of the complexity of modern Railway working, must be many things usually and properly done by a Railway, for which no explicit legal provision is made. There is, for instance, no such provision for the maintenance of waiting rooms or refreshment rooms or, what is material for the present purpose, for any reservation of accommodation on trains, except in cases in which it is compulsory, for

females under section 64 or infected persons under sestion 71 (3). It is true that, under section 47 (1) (b), the Railway Company is to make general rules consistent with the Act for providing for the accommodation and convenience of passengers, which under elance (3) of the section shall take effect, if the sanction for them of the Governor-General in Council is obtained. But the object and result of making with such sanction is only to make their breach an offence punishable by the Courts. It is not obligatory to obtain that eanetion, if the Railway sees its way to enforce the rule without it or a penalty is provided incidental. ly in some other portion of the Act; and the existence of such unsanctioned rules is recognised explicity in section 101 (b), see also Emperor v. Weir (2). The considerations arising in connection with section 42 (2) will be dealt with later; but, apart from them, the Company has, in the words of Lord Halsbury in Ferth General Station Committee v. Ross (3), "an absolute right to regulate its own traffic in its own way, its own interest being the best sesurity that its strict legal right to do so will not be abused." Generally, then, it is legitimate for it to exercise the power, its possession of which is recognised in section 109, to reserve accomodation in assordance with its own view, whether of the prospect of direct and immediate profit or of the wider considerations originating in its desire to secure the general comfort of the public; and in making a reservation for a elass it must be supposed to bave acted, as it is entitled to de, on one or other of these motives.

Reservation for a class, such as is in question in the present case, being legitimate, the only question is whether it can be enforced by the special procedure provided in section 109, or whether resort must be had to the more cumbrous methods afforded by the general law, a prosecution for criminal trespass or a suit for an injunction. And here the conclusion in favour of the legitimacy of reservations for a class is material. For, as they are legitimate, there is no reason why the special remedy afforded by restion 103 should not

^{(1) 55} Ind. Cas. 342; 42 A. 327; 2 U. P. I., R (A.) 65; 18 A. L. J. 254; 21 Cr. L. J. 294

⁽²⁾ S Ind Cas. 13; 12 Pom L. R. 930; 11 Cr. L. J.

^{568.} (3) (1897) A. C. 479; 65 L. J. P. C. 81; 77 L T. 226.

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be regarded as available to enforce them equally with others, the mischief, the infringement of the Company's right to control its passenger traffic in its own way, being in all eases of reservation the same. In these circumstances, the conclusion must be that reservations for possible and actual passengers are equally contemplated by section 109 and that the compartment entered by accused in this case was reserved for another passenger within the meaning of that section.

The right of a Railway Company to regulate its own traffic in its own way is again material in connection with the question whether that compartment had in fact been reserved at all. For the argument on accused's behalf is, that it had not, inasmuch as under the Company's Traffic Working Orders Nos. 52 (a) and 172 (a) reservation can be made only by affixore of a card signed by the Station Master, as though a Station Master had no powers control traffic in his station independently of the existence of a rule and only a reservation made in strict compliance with those orders need be recognised by the public. But, as the Station Master deposed, the orders are not available to the public, and they are not general rules, published under section 47, to which clause (6) of that section applies. They, therefore, in no way resemble a power-of attorney, from which the Station Master's authority to deal with the public in this or any other matter is derived, but are merely the domestie code, which every organization, as large as the South Indian Railway, must formulate for the guidance of its employees. The Company may and doubtless does insist on adherence to them and in the matter now in question such adherence would secure a reasonable and convenient notice to the public of the fact of reservation. But they do not provide the only or an obligatory way of giving such rotice; and, when, as in the present ease, it ean be shown to have in fact been given and the reservation to have been effected by another nethod, there is no reason why the result of the adoption of that method should be disregarded. For the facts found are that, when assured had entered the compartment in defiance of the card initialled by the Senior Treket Inspector purporting to reserve it, the Station Master told them that

it was reserved and asked them to go eleewhere. So far as the right to reasonable notice of the reservation is concerned, the assused cannot find fault with this procedure, since they had clear notice from an authority, whose competence in the matter is beyond dispute; and, so far as the validity of the reservation thus effected is conserned, it is useless to consider whether the facts are within the principle of ratification as laid down in Keighley, Maxted & Co. v. Durant (4) where the clear ground of decision is available, that the Station Master by what he said simultaneously reserved the compartment and informed the accused of the reservation. The objection that the reservation thus made and the notice of it to accused and other members of the public were oral instead of by a written card is unsustianable on the view which I take of the scope of the Traffie Working Orders, the only foundation on which accused's claim to notice of the latter description has been supported.

Two general objections have been taken by the learned Public Prosecutor to our dealing with the merits of accused's remaining contention, that based on section 42, He has arged first that they are debarred from it, because the taking of proceedings, except as provided by the Act, for anything done or any emission made by the Railway in contravention of that or any other provision in Chapter V is probibited by section 41. It is a sufficient answer that accused, in alleging such contravention in defense in the lower Courts or prosecuting these revision proceedings on the basis of its occurence, cannot be said to have taken proceedings. Next, it is urged that the expression "traffic" in section 41 (2) can be and is used only in connection with the conveyance of animals and goods and the fixing of charges therefor. But this is opposed to the definition of "traffie" in section 3 (11), as including "rolling-stock as well as passengers, animals and goods," I, therefore, turn at once to the contention on which assueed rely, that the reservation of assommodation for Angle Indians or any other class of passengers is an undue or unreasonable preference in favour of a

(4) (1901) A. C. 240; 70 L. J. K. B 662; 34 L. T.

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particular description of traffis, which section 42 (2) forbids.

This contention was supported by no authority; and in fact the reason for treating these reservations as infringements of the section was put in two ways only, that compartments reserved for Anglo-Indians are frequently empty or almost empty, when other passengers suffer inconvenience owing to over. erowding in other compartments, and that it is an unreasonable preference to allow Anglo. Indians access, not only to the compartments reserved for them, but also to the rest of the train, to which ordinary passengers are restricted. These sonsiderations must, in the absense of any other suggested test, be dealt with in the light of common experience: and they do not seem to me to correspond with any intention on the part of the Railway to give a preference. They cannot, it is observed, be connected with the distinct question whether the accommodation provided for ordinary passengers was in the acoused's train or is usually sufficient or as generous as such passengers would desire. Then, firstly, the alleged inconvenience to other passengers is not necessarily the consequence of one compartment being reserved; nor. if it were not reserved, would it necessarily be available to provide them with increased accommodation. And, secondly, there is no reason for supposing that Anglo Indians, contrary to their own convenience, use the unreserved portion of a train in preference to that reserved for them to an extent which affords a grievance of any substauce. Spesial treatment of a elass need not involve a preference in its favour or more than, in the words of Piggott, J., in Bir, basi Lal v. Emperor (1) already referred to, " provision by the Railway for the accommodation and convenience of its passengers generally, taking a broad view of its practical effect; "and it has not been shown how any other consideration is in question here. It is, in fact, as Walsh, J., said in his fuller judgment, "merely a case of providing for the general convenience of the travelling public, which has been left by the Legislature in India, as it has always been left by the Legislature in England ... to of experienced the disretion Administrators;" and we must accept the exercise of that discretion as legitimate in

the present case, in which the contrary has not been shown. In my opinion, therefore, the argument based on section 42 (2) must be rejected.

No ground having been shown for interference in revision, I would dismiss the petition.

KEISHNAN, J.-With all respect for my learned brother, I regret I am unable to concur with him in this case; for I have come to the conclusion that the accused are entitled to be acquitted on the short ground that the Third Class Compartment in question proved to have been properly reserved for Europeans and Anglo. prosecution alleged. It Indians as the is conceded by the Station Master of Mettupalayam, prosecution witness No. 1, that the label that was on the carriage door was not the usual printed label issued by the Railway Company similar to Exhibit I. but was only a piece of paper on which was written "reserved for Europeans and Anglo-Indians;" it did not bear his signature or initials. The initials on it "A. V. D. " were, he says, those of his Ticket Examiner. He also admitted in eross-examination, and other witness corroborated it, that there was no rule authorising him to delegate the power of signing the label to the Ticket Examiner,

At the time this incident happened, the rule was that the Station Master should sign or initial the reserve label as shown by the form of the eard in rule 172 (a) of the Traffic Working Orders then in force and by Exhibit I that is produced. The rule was changed in January this year so as to enable the Senior Ticket Examiner to sign the label at stations where there are Ticket Examiners (See rule 260 of the new rules) : and Mettupalayam Station is one of those stations. But this change of rule does not affect the present case as the incident in question took place in May 1920. It is thus clear that the compartment in question did not bear a proper label reserving it for Enropeans and Anglo Indians.

The question then is, are the accused liable to be punished under section 109, Indian Railways Act, for entering such a com-

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partment and refusing to leave it when asked. I will assume in deciding it that the section applies to a case of reservation for a class of persons like Anglo-Indians and is not confined to cases of reservation for specific individuals. It seems to me that before a person can be punished under the section it must be shown that the compartment was properly reserved according to the Railway rules. The Traffic Working Orders may not be issued to the public but the travelling public knows what is done every day when compartments are reserved, and I think a passenger who knew the rule in force was entitled to disregard a reserved label put upon a compartment unless it was properly authenticated by the initials or signature of the Station Master. The Station Master himself has to observe the formalities required by the rules before he ean properly reserve a compartment as his own authority to do so is given to him by the Railway Administration subject to the rules. It is said that because the Station Master himself in the present case told the accused that the compartment had been reserved they should have assepted his word for it. I am not satisfied that the assused were bound to accept his oral statement and act on it. In fact, as mentioned in the judgment of Appellate Magistrate last paragraph, the accused objected that the elip attached to the compartment was not an "authorised document" and requested the railway officials to put up an "authorised" one, but that was not done. I am not prepared to say, in these circumstances, that the accused were committing an offence under section 109 in continuing to remain in the compartment. Whether they have transgressed any other rule or sestion we need not onsider.

It is true the lower Courts have found that the compartment was reserved but I am unable to treat their finding as one of fact and accept it, as they have not considered the question from the point of view I have adopted. I would reverse the conviction and direct the fines if paid to be refunded.

In the view I take, it is not necessary to discuss the other questions dealt with by my learned brother and I express no opinion about them.

BY THE COURT,—As we differ, the case must be laid before the Chief Justice for orders as to its further disposal.

This case came on for hearing under section 439 (1), Criminal Procedure Code on the 9th November 1921, and stood over for consideration till this day, the Court made the following

ORDER

AYLING, OFFJ. C. J.—The facts of this case and questions arising for decision have been fully set out in the judgment of my brother Oldfield, and it is unnecessary for me to recapitulate them. The case comes before me in consequence of a difference of opinion between the learned Judges as to whether in this particular case, assuming the Railway Company to be legally entitled to reserve a third class compartment for the use of Europeans and Anglo-Indians, the reservation had been properly effected so as to render the action of the petitioners punishable under section 109 of the Railways Act.

The questions involved in the Railway Company's general power of reservation have been exhaustively discussed by Oldfield, J., whose conclusion is identical with that arrived at by a Bench of the Allahabad High Court [Birjbasi Lal v. Emperor (1)] though in one respect, the scope of section 42 of the Railways Act, he has taken a different view. Krishnan, J., bas expressed no opinion on this part of the case : and I am not altogether elear, whether, with reference to the terms of section 429, Criminal Procedure Code, I am called upon to deal with it. I have, how. ever, heard the matter fully argued by Mr. S. Srinivasa Aiyangar and by Mr. Ethiraj who appeared for the Public Prosecutor; and, as a result. I entirely agree with the conclusions arrived at by Oldfield, J., and feel it unnecessary to add anything to his reasoning.

Coming to the point of difference, it is really a very small one. There is no doubt that the usual method of reserving a compartment is by the affirment on both sides thereof of a printed eard signed or initialled by the Station Master in a space provided for the purpose. In the present case two

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words "reserved for Europeans and Auglo-Indian" and initialled by the Ticket Examiner. It is explained that this was due to the stock of eards having run out. The argument put forward for the petitioners is that this irregularity invalidates the reservation of the compariment, so that their action in ignoring it amounts to no offence.

I have not been referred to any rule from which I could say that a compartment can only be legally reserved by a label or notice signed or initialled by the Station Master. The only Code of rules referred to is the Company's Traffic Working Orders, which are clearly intended for the guidance of the Company's servants, rather than the information of the public. But even in this I find nothing to the effect indicated. Rule 174 which authorises the reservation of a third class accommodation for Europeans and Anglo-Indians says nothing as to the official by whose orders the accommodation is to be effected. It runs:-One third elass compartment only may be reserved by the long distance main line trains and by the principal connection trains on the branches and labelled as follows:- "For Europeans and Anglo-Indians'. Guards and Station-Masters should see that even when there are no Europeans or Anglo Indians travelling. others are not allowed to occupy the compartment." So far as this is concerned, the affixment of the paper labels spoken to in evidence would meet the requirements of the rule. The only other rule quoted is rule 172 (a) which runs thus:- "When accommodation in any train is reserved, the Station Master who has to arrange for the assommodation will label the carriage or compartment on both sides and enter the number of the carriage or compartment and the class of accommodation provided in the Vehicle Way-bill with the stations from and to which they are so reserved, and the Guard will be responsible for seeing that the accommodation is reserved ascordingly."

Now, it may perhaps be deduced from this that the reservation has been effected by orders of the Station-Master only—but I can find nothing more. The direction that he should label the carriage or compartment, of course, does not imply that he

must do so with his own hands or sign the label. The form given in the example to the rule refers not to the label, but to the entry in the Vehicle Way bill, and in this connection, my learned brother, Krishnar, J., if I may say so with respect, appears to have been under a slight misapprehension. It is in evidence and apparently not disputed, that the labels were affixed to this carriage under the orders of the Station Master; and that on being referred to he informed the petitioners that this was so. The most that can be said is that the reservation was not effected by the affixment of the usual printed cardnot that it was in contravention of the Company's rules.

I may add, though it is hardly material, that it is clear from first patitioner's own statement that this was not the essence of their objection: he says he objected to the unauthorised form of the label and requested the Railway Oficials "to put an authorised document (i.e., label) so that we could then test the right of reservation, if necessary." In other words, the petitioners were prepared to remain in the compartment even if a printed label signed by the Station Master had been affixed so as to test the Company's general right of reservation. This was, in fact, their object, as they frankly admit. They knew the reservation was under the Station Master's orders and they were anxious to have the irregularity. such as it was, remedied so that there could be no chance of the Court, before which the resultant ease would some, failing to determine the larger question.

In my opinion, it cannot be said that the procedure adopted in this case was such as to invalidate the reservation.

There are no grounds for interference and the revision petition must be dismissed.

W. C. A. & N. B. Petition dismissed.

BABUA BINGH U. ANGNU KEWAT.

ALLAHABAD HIGH COURT. CRIMINAL REVISION No. 21 or 1922. February 9, 1922.

Present :- Mr. Justice Ryves. BABUA SINGH AND OTHERS - APPLICANTS

ANGNU KEWAT-OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 435 (3), 145, proceeding under-Finding as to breach of the peace, whether essential - Revision.

Where the notice issued by a Magistrate purporting to act under section 145, Criminal Procedure Code, shows that he was satisfied that there was a serious dispute between the parties, the pro. ceeding is one contemplated by section 145, Criminal Procedure Code, even though there is no finding in it about any likelihood of a breach of the peace.

Under section 435, clause (x, of the Criminal Procedure Code a High Court is precluded from interfering in revision in a matter under section 145 of the Code.

Oriminal revision from an order of Sub Divisional Magistrate, Jaunpur, dated 17th Desember 1921.

Mr. S. O. Mukerii, for the Applicants.

Mr. S. N. Mukerii, for the Opposite Party.

JUDGMENT .- Under section 435, clause (3), I am precluded from interfering in revision in a matter under section 145, Oriminal Procedure Code. It is, however, contended that this is not a proceeding contemplated by that section, because it is said that there is no Suding that there was any likelihood of a breach of the peace. It is true that there is no finding directed to this fact, but the notice shows that the Magistrate was satisfied there was a serious dispute between the parties and, in consequence, he issued the notice, and in the judgment it appears that there is a quarrel between the parties with reference to the possession of several plots of land. I cannot say that this is not a proceeding contemplated by section 145, Criminal Procedure Code. I, therefore, eannot interfere. The application is rejected.

Order accordingly.

MILKANTH BAO TADAFUL U. EMPEROR. NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No 289 OF 1921. April 11, 1922.

Present:- Mr. Prideaux, A. J. O. NILKANTH RAO SADAFUL-

APPL: CANT

DETEUS.

EMFEROR-Non APPLICANT.

Registration Act (XVI of 1908), s. 82, offence under -Fraudulent or dishonest intention, whether essential -Sanction to prosecute, whether necessary-Identifying witness, statement by, nature of-Penalty, when incurred.

A fraudulent or dishonest intention is not essential for an offence under section 82 of the Registration Act, nor is sanction necessary to prosecute for such an offence. [p. 528, col. 1.]

A witness who purports to identify the executant of a document before a Registering Officer must be in a position to depose without the possibility of error to the identity of the person he is identifying. Merely identifying a person as soand-so, on the strength of having been told that he was so-and-so by some other person and with no actual knowledge of the facts would make the witness liable to the penalties of section 82 of the Registration Act. [p. 528, col. 2.]

Criminal revision of an order of the Criminal Appeal No. 124 of 1921, decided on

the 24th September 1921.

Messrs. M. Gupta, M. R. Bobde, and D. T.

Mangalmurti, for the Applicant.

Mr. S. R. Randit, for the Non-Applicant, JUUGMENT:-The applicant, Nilkanth Krishna Sadaphal, is a practicing Pleader at Chanda. He has been convicted under section 82 (a) of the Registration Act and sentenced to pay a fine of Rs. 100 and the conviction has been upheld in appeal. The facts found are these. Aba. Dada, Vithoha and Ramehendra are four They live at Kolari in the Warora Tabeil. They executed a general power of attorney, Exhibit P-1, wished to have it registered at Chanda instead of at Warora where the document registerable. Dada, Vithoba and Ramehandra came to Chanda, Aba could not some as he was suffering from small-One Daji accompanied the three brothers to personate Aba. Dada went to Sadaphal and told him to arrange to get the power-of attorney registered at Chanda. Sadaphal took a power of attorney, Exhibit D.1, from the three brothers and Daji, who signed it as Aba, and presented it with an application to the District ReMILKANTH RAO SADAFUL C. EMPEROR.

gistrar. Permission was obtained to register Exhibit P-1 at Chanda and it was so registered, the applicant identifying Daji as Aba in those registration proceedings.

The defence was, that Dada and Vithoba were personally known to the Pleader and that Dada told him that the power had been executed by all four brothers and that all had some there to get it registered. The Pleader had no reason to distrust the statement and, relying on the previous knowledge of Dada and Vithoba, honestly believed that Daji was Aba and identified him as such.

Section 82 (a) of the Registration Act runs:— Whoever intentionally makes any false statement, whether on cath or not, and whether it has been recorded or not, before any officer acting in execution of this Act, in any proceeding or erquiry under this Act; or

(d) abets any thing made punishable by this Act;

shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both."

It may be stated that fraudulent or dishonest intentions are not essential for offences under section 82 of the Registra. tion Act. No sanction is necessary for an offence under section 82 of the Registration Act. See Firamu Nadathi, In re (1) and see Gopinoth v. Kuldip Singh (2). of part I of Registration Rule 22 Manual states as follows-" Registering Officers shall personally, and not through their moharirs, enquire into the identity of persons not previously known to them, who appear before them in connection with doenments presented for registration or the authentication of powers-of-attorney under section 33. They shall require identification in such cases by the evidence of witnesses. The best witnesses to select for this purpose, when any such are present at the office, are persons in a publie or quasi-public position, such as Patels Patwaris, Officers of the Court, Pleaders and the like,"

It is essential for the Registering Officer to ascertain not only that each witness knows the name and address of the per-

(1) 38 Ind. Cas. 976; 40 M. 880; 21 M. L. T. 118; 5 L. W. 414; 18 Cr. L. J. 416.

(2) 11 C. 566; 5 Ind. Dec. (N. s.) 1136 (F. H.).

son be identifies but also how his knowledge was acquired. An acquaintance formed in the Registering Office, while registration proceedings are going on, is not a sufficient qualification for an identifying witness. Each witness should be examined separately.

It is here argued that the Pleader took reasonable care and his identification was not intentionally false and, therefore, no. offience under the Act has been committed. I am not pressed with this argument. In my opinion, the applicant acted with great want of sare before he was qualified by actual knowledge to testify to the identification of Abs. The identifying witness must be in a position to depose without the possibility of error to the identity of the person he is identifying. Merely stating that he knows that a person is so andso, because he has been told he is so and. so by some other person and with no actual knowledge of the facts would, in my opinion, make the identifying witness liable to the penalties of section 82 of the Registration Act. Once it is allowed that any person sculd identify A because B had told him that A was A without any real knowledge the door would be open to great irregularities and to fraudulent personations before the Sub-Registrar. In these cases the identifying witness must not think that the person he is identifying is that person because he has been told so, but must only identify him because he knows he is the person he represents himself to be. The offence has been committed. It is due doubtless to negligence and to the idea of helping his elients rather than to any dishonest or It is due to gross fraudulent motive. earelessness and does not, in my opinion, evince any moral turpitude. With these remarks, I dismiss this application for revision.

W. C. A. & N. H.

Application dismissed,

RAMESHWAR DUBE C. SHEO HARAKH DUBE.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL No. 1095 OF 1920. April 4, 1922.

Present :- Mr. Justice Gokul Prasad. BAMESHWAR DUBE-DEFENDANT-

APPELLANT

bersus

SHEO HARAKH DUBE AND OTHERS-PLAINTIFF AND DEFENDANTS-RESPONDENTS. Agra Tenancy Act (II of 1901), s. 20, 79-Occupancy tenant, transferee from, position of-Possessory right -Ouster-Damages.

A transferee from an occupancy tenant, although in law a trespassor, has a possessory right good against all the world except the true owner, i. e., the body of zemindars, and a person who is not a member of such body cannot forcibly oust him from possession without being liable for damages, (p. 580, col. 1.]

Second appeal against a decree of the Additional District Judge, Gorakhpur, dated the 30th April 1920.

Mr. Haribans Sahai, for the Appellant. Dr. S. M. Sulaiman, for the Respondents.

JUDGMENT .- This is an appeal arising out of a suit for resovery of damages for misappropriation of crops, Bam Ghulam was an ossupancy tenant. He died a long time ago leaving a son, Mangru. He died. leaving a widow, Musammat Tapesara, who remained in possession of the ossupancy holding. The defendant Rameshwar was a sub-tenant of Musammat Tapesara, In 1915 the defendant Rameshwar acquired a frastion of the Zemindari share also. Tape. sara sued to ejest Rameshwar as her subtenant and he pleaded proprietary title. The Revenue Court referred the defendant, Rameshwar, to the Civil Court for a declaration of his title. On the 15th of January 1917 the Civil Court held that Rameshwar was only a sub-tenant. On the 21st of March 1917 the Revenue Court accordingly ordered his ejectment. On the 22nd of May 1917, when Rameshwar's crops were standing on the fields, formal possession was delivered to the lady. She on the 5th of September 1917 executed a permanent lease of the plot to the plaintiff. So far the facts are not disputed. The village. The defendant cannot now claim plaintiff alleges that after the cane crop had been sut, (according to the finding of the plaintiff who slaims through Musammat

February or March 1918) the defendant left the fields and then the plaintiff sowed kodo, paddy and other food grain in 1325 Fasli, but the defendant interfered with the plaintiff's possession. There were proseedings under section 145 of the Code of Criminal Procedure and, on the 27th of October 1918, the Criminal Court gave its decision against the plaintiff and the defendant then misappropriated the crops sown by the plaintiff. The present suit was brought on the 17th of January 1919 recovery of damages. The defence raised was that Tapesara being an occupancy tenant the lease of the 5th of September 1917 executed by her in favour of the plaintiff was invalid and the plaintiff had no right of suit. Another plea was that section 79 of the Tenancy Act applied and that the suit was barred by limitation because the defendant as a Zemindar had taken wrongful possession two years ago. The First Court came to the conclusion that the defendant was not only formally dispossessed but that after reaping the sugar-cane crop he did not actually retain possession and that the plaintiff got possession in Baisakh 1325, Fasli, 'It' decreed the claim for Rs. 70. The learned Judge of the lower Appellate Court same to the conclusion that the crops in dispute were sown by the plaintiff. He did not deside the question of the invalidity or otherwise of the lease, but confirmed the decree on the ground that Rameshwar was bound to pay the price of the crops which had been misappropriated either to Taps. sars or to the plaintiff who had sown the crops. The defendent, Rameshwar, comes in second appeal and his learned Vakil contends that the lease in favour of the plaintiff being void ab initio the plaintiff-respondent had no right to main. tain the suit. He further contends that section 79 applies and the suit is barred by time. As to the last two contentions I need only say that it has been found as between the defendant and Musammat Tapesara that the appellant has not asquired the status of the Zemindar simply because of his purchase of a fractional share in the the privileges of a Zemindar as against the Court below the cane was ready in Tapesara. As to the first plea raised, I

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find it to be a different one. Under the Tenaney Act, Tapesara could not have transferred her occupancy holding. The result was that under the law the plaintiff was a trespasser, but then comes the next question, and it is, who could evict him from such possession as a trespasser. He had a possessory right good against all the world except the true owner, that is, the body of Zamindars, and the appellant who is not a member of such body could not forcibly oust him from possession without being liable for damages.

I had commenced to distate this judgment yesterday when Mr. Haribans Sabai asked me to allow him an opportunity for further argument. He is not here to-day. On the findings at which I have arrived, the plaintiff respondent was entitled to a decree and the Courts below have rightly decreed the claim for damages. The defence appears to be an absolutely dishonest one. The defendantappellant has got his mortgage money with interest at Rs. 0-14 0 per cent. per mensem from the date fixed for redemption in the decree. He now wants to take the profits also which he was in no way entitled to get. The lower Court seems to have rightly decreed the plaintiff's elaim. I confirm the decree of the Court below and dismiss this appeal with costs.

J. P.

Appeal dismissed.

LOWER BURMA CHIEF COURT FIRST CIVIL APPEAL No. 195 of 1919. May 4, 1921.

Present:—Mr. Justice Maung Kin and
Mr. Justice Higinbotham.

AYESHA BEE alias HANSA BIBI,
BY HER ATTORNEY ESOOF EBRAHIM
MOOLA—DEFENDENT No. 2—APPELLANT

GULAM HUSEIN SULEMAN ABOO ADMINISTRATOR - DEPEN ANT - RESPONDENTS.

Administration-suit - Property partly outside jurisdiction - Court, jurisdiction of.

Where in an administration suit it is found that some of the properties are situated outside the jurisdiction of the Courts of British India, and are in the possession of a person claiming a share in the estate, the Court has no jurisdiction to order that person to deliver possession of the property to the administrator to enable him to sell it and realize its proper price for the benefit of the estate; but the Court can direct that person to account for the value of such property before obtaining his share of the estate in the hands of the administrator. [p. 533, col. 2: p. 526, col. 1.]

Case-law considered.

First appeal against an order passed by Butledge, J., on the Original Side.

Mr. Daties, for the Appellant.
Mr. Giles, for Respondent No. 3.
Mr. N. M. Cowasjee, for the other Respondents.

JUDGMENT.

Maung Kin, J.—This appeal arises out of an administration suit in which the appellant is 2nd defendant. The bulk of the subject-matter is mainly in Rangoon. The appellant was not living in Rangoon at the time of the institution of the suit, nor has she ever lived there or at any other place in Burma since. She has lived in the Baroda State. She has, however, filed her written statement through her Attorney, contesting the suit.

A preliminary administration decree was passed in due course and a Commissioner was appointed to take accounts. There was no list of property constituting the subject matter attached to the plaint. Among other things, the Commissioner found in his report that the deceased left at Variav in the Baroda State two houses, a piece of agricultural land and a garden and that it was admitted that these items of property were in the possession of the appellant. The administrator, who is a defendant in the suit, had before the Com-

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missioner filed his assounts wherein he had valued the property at Variav item by item. The Commissioner same to the following enclusions: - "They are properties outside the jurisdiction of the Courts in British India, but the 2nd defendant, who has taken possession of them, must assount for the value before she can claim a share in the properties of the deseased in the hands of the administrator of the estate." And he proceeded to say that he had no alternative but to value the Variav properties according to the valuation made by the administrator, besause no other basis is supplied by the 2nd defendant. He then directed the 2nd defendant to assount for the Variav property at the said valuation, or hand over possession of them forthwith to the administrator, so that he could sell them and realiza their proper market prices for the banefit of the estate. The 2nd defend. ant objected to the Commissioner's report as follows:-" That the learned Commissioner erred in law in including in the assounts income of the estate in the territory of the Gaskwar of Baroda of which no administration has been taken." The learned Judge on the Original Side of this Court overruled the objection, and in the course of his order he observed as follows: -"The Commissioner in dealing with this objection says the properties are outside the jurisdiction of the Courts of British India. The 2nd defendant who has taken possession of them must assept assount for the value before she can claim her share of the property of the deceased in the administration suit. In order to ascertain what is the share of each heir, I think an enquiry must be made into the whole estate of the deceased so far as is known. It is admitted that the bulk of the prop. erty of the deceased's estate was in British India and within the jurisdiction of the Court. I think the Commissioner was not exeluded from taking into assount the property belonging to the estate outside British India, when it was admitted that this property was in the hands of one of the elaimants asking for a share in the assets of the estate in British India. It might be a very great hardship to the other heirs if the widow is allowed to take up the position that she could ratain and rafuse to assount for the property balonging to the

estate in her hands outside the jurisdiction of the Court and at the same time take her share in the assets within the Court's jurisdiction. In that case, she would have an unfair advantage over the other heirs."

The question involved is important. It seems to me clear that this Court cannot pass a full administration decree against the property in the Baroda State, for such a desree would involve a direct dealing with the property such as the partition or the sale of it under the orders of the Court. Section 16 of the Civil Procedure Code provides that suits for the recovery of immoveable property with or without rent or profits; for the partition of immove. able property * * shall be instituted in the Court within the local limits of whose jurisdiction the property is situate." Section 17 provides for a case where the immoveable property is situated within the jurisdiction of different Courts, and in such a case, it says that the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate. Section 16 is subjest to a proviso which allows a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant to be instituted either in the Court within the losal limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides. or earries on business, or personally works for gain, provided that the relief sought ean be entirely obtained through his personal obedience. The Explanation, however, says that the word "property" in the section means property situate in British India. The proviso is based upon the maxim of English Equity Courts, vis., equity acts in personam. But it appears that the whole principle of English Law has not been resognised by the Indian Legislature in enacting the proviso to section 16. In England equity acts in personam with reference to land in Scotland and Ireland, in the Colonies and in foreign countries where the defendant himself is within the jurisdiction of the Court upon a ground of a contract or some equity subsisting between the parties respecting immoveable property outside the jurisdiction,

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In Penn v. Lord Baltimore (1) specific performance was ordered of an agreement relating to land in America, the defendant being in England. The Courts of Equity in England generally act in this way in order to compel the performance of contracts and trusts, but the Courts in India are not given jurisdiction over property outside British India.

The proviso would appear to enable one Court in British India to act in personam against immoveable property in another jurisdiction in British India where the relief sought can be entirely obtained through the personal obedience of the defendant who actually and voluntarily resides, or earries on business, or personally works for gain, within the jarisdiction of Court in which the action is tried, interpretation of section 16, including the provise, by Mulla appears to me to ba absolutely correct. (See Mulla's Civil Procedure Code, 6th Edition, page The subject matter of the suit must not be situate beyond British India. The proviso applies only to suits to obtain relief respecting, or compensation for wrong to, immoveable property. The relief sought must be such as can be entirely obtained through the personal obedience of the defendant. So that suits for the recovery of immoveable property and for partition of immoveable property do not come within the proviso.

As I said before, one of the incidents of an administration decree is the partition of the estate and, where necessary, the sale thereof, under the orders of the Court. Such suits cannot be filed in places other than the place where the property is situate except where the property is situate within the jurisdiction of different Courts in British India, in which case the plaintiff is at liberty to choose his forum. I will endeavour to make my meaning elearer by giving some examples. Suppose there is a piece of land within the jurisdiction of a Court in British India and the suit is for the resovery of that property or for the partition of it, the suit must be filed in the Court within whose jurisdiction the property is situate. It cannot be filed in the Court within whose jurisdiction the defendant

(1) (1750) 1 Ves. Sen. 441; 1 Wh. & T. L. C. (7th Ed.) 755; 27 E. R. 1132.

actually and voluntarily resides, or sarries on business or personally works for gain. The proviso to section 16 does not apply to such a case, because the relief sought cannot be entirely obtained through the personal obedience of the defendant. Suppose the property is situate within the jurisdiction of different Courts, the plaintiff may choose any of those Courts. But if the defendant resides or sarries on business, or works for gain outside the jurisdiction of all those Courts, the suit cannot be filed in the Court within whose jurisdiction the defendant resides, or earries on business, or works for gain, the reason being the relief sought cannot be entirely obtained through his personal obedience. Where the property is situate outside British India, such suits cannot be filed in any Court in British India at the place where the defendant resides, carries on business, or works for gain. The following are suits which can be filed in any Court in British India within whose jurisdiction the defendant resides, etc., although the immoveable property involved is situate elsewhere in British India:-

(1) A suit to declare that a person resident in Calcutta holds certain lands in the mofuscil subject to certain trusts is not a suit for land and may be tried in Calcutta [Fagram v. Moses (2)].

(2) A suit to enforce the right of parties to act as co shebaits to an idol endowed with lands in the mofussil where the possession of any land is not claimed [Juggodumba Dosses v. Puddomoney Dossee (3)].

(3) A suit for specific performance of a contract to sell lands outside Calcutta Ramdhone Shaw v. Nobumoney Dossee (4). See also Yashvantran Holkar v. Dadabhai Oursetji (5), Contra see Land Mortgage Bank v. Sudurudeen Ahmed (6), Sreenath Roy v. Oally Doss (7)].

(4) A suit for an injunction to restrain a nuisance in Howrah [Raymohun Bose v. East Indian Railway Co. (8)].

(5) A suit to recover title deeds to land [Juggernauth Does v. Brijnath Does (9)].

^{(2) 1} Hyde 284.

^{(3) 15} B. L. R. 318.

⁽⁴⁾ Bourke O. C. 218.

^{(5) 14} B, 253; 7 Ind. Dec. (N. 8) 695,

^{(6) 19} C. 358; 9 Ind. Dec. (N. s.) 683.

^{(7) 5} C. 82; 2 Ind. Dec. (N. s.) 663.

^{(8) 10} B. L. R. 241,

^{(9) 4} C. 822; 8 C. L. R. 875; 2 Ind. Dec. (x. s.) 201.

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(6) A suit for trespass to land in the plaintiff's possession outside the limits of the Court's jurisdiction, and for injunction [Grisp v. Watson (10)].

The above suits are all suits for reliefs respecting land where the relief sought in each case can be entirely obtained through the personal obedience of the defendant who is within and subject to the jurisdiction of the Court.

In view of the Explanation to section 16 such suits will not lie in British India if the property respecting which relief is sought is situate outside British India.

But it is contended in this case that the Court is not asked to set directly on the property in the Baroda State, all that it is asked to say being that so long as the second defendant does not account for the value of that property, or allow the administration of the estate to go on upon the basis that it is part of the estate, whatever share she may be entitled to in the property within British India will be withheld from her.

In Momein Bee Bee v. Ariff Ebrahim Malim (11) it was held, on the authority of the English cases cited therein, that if one of the heirs owes a debt to an estate even though it be time barred under the Limitation Act the Court is entitled to retain funds in respect of the debt when calculating the account due to the heir. On the analogy of that same I do not see any objection to the Court directing the second defendant to assount for the value of the property in the Baroda State before she ean obtain her share from this Court.

I must here point out that the learned Judge on the Original Side has not by his order endorsed the second portion of the following passage in the Commissioner's report:- "The second defendant must account for these properties at the above values, or hand over possession of them forthwith to the sixth defendant administrator, so that he could sell them and realize their proper market-prises for the benefit of the estate," all that the learned Judge endorsed being the following passage only:-"They are properties outside the jurisdie. tion of the Court, but the second defendant who has taken possession of them must

(10, 20 C, 689; 18 Ind. Dec. (N. s.) 465.

(11) 16 Ind, Cas, 509, 5 Bar, L. T. 5; 6 L. B. R. 81,

account for the value before she can elaim a share in the property of the deceased in the hands of the administrator of the estate." That only means that, unless the second defendant allows the value of the property in the Baroda State to be taken into account in the administration of the estate, her share in the estate will be The Court would be acting withheld. without jurisdiction, if it ordered the second defendant to hand over possession of the property to the administrator to enable him to sell it and realize its proper price for the benefit of the estate.

I would, therefore, dismiss the appeal with costs.

HIGINBOTHAM, J.—This is an appeal from the order of the Judge of the Original Side of this Court passed in Civil Ravision No. 74 of 1916 confirming the order of the Commissioner appointed to take assounts. suit in which the order was passed was an administration-suit filed by the respondent agaist the administrator of the estate of Mahomed Ebrahim Aboo, deseased, late of Rangoon, and against the heirs and legal representatives of the said deseased praying for an account of the moveable and immoveable properties of said estate and for their administration by and under the direction of the Court. second respondent who resides within the jurisdiction of this Court had previously obtained Letters of Administration of the estate in Civil Missellaneous No. 39 of this Court and he was sued in his personal and representative character.

The appellant, who was the second defendant, resides at Variav but was represented by her Attorney and filed a separate written statement objecting to the suit on various grounds and stating that she was always ready to have the properties amicably divided.

On 31st July 1916 a preliminary desree was passed ordering assounts to be taken and amongst such assounts, an assount of what property, if any, has come into the hands of the plaintiff or the defendants or any of them, or to the hands of any other person by the order or for the use of the plaintiff or the defendants or any of them. The Commissioner took the assounts as ordered and in those proceed. ings the second defendant appellant on

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the 22nd November 1916 filed her accounts. In his report of the 19th April 1919 the Commissioner has found that the deceased left two houses and a plot of agricultural land and a garden at Variav, and held as follows:-"They are properties outside the jurisdiction of the Courts in British India but the second defendant, who has taken possession of them, must account for their value before she can claim a share in the properties of the deceased in the hands of the administrator of the estate. On the evidence before me I am compelled to value the properties at the prices stated against them in the list of properties in the second defendant Asha Bee's hands, filed by the administrator with his account, Exhibit 1, namely, Rs. 10,000, 5,000, 1,500 and 1,000, respectively. The second defendant must account for these properties at the above values or hand over possession of them forthwith to the sixth defendant administrator so that he can sell them and realize their proper market prices for the benefit of the estate."

On the 9th July 1919 the second defendant filed the following objection to the Commissioner's report:—"That the learned Commissioner erred in law in including in the ascounts income of the estate in the territory of Gaekwar of Baroda of which no administration has been taken." The Judge of the Original Side overruled this objection in his order dated 21st July 1919 and confirmed the Commissioner's report.

The second defendant-appellant has filed this appeal against this order and has raised a similar objection in her grounds of appeal Nos. 1 and 2. But she has also raised other objections which were not raised before the Original Court. In ground of appeal No. 3 the objection is taken that the lower Court erred in holding that "it is admitted that the Variav property was in the hands of the widow." But the Commissioner in his report stated that the second defendant had taken possession of these properties and no objection was taken to this finding before the lower Court and cannot now be further considered. Of the other two grounds of appeal, No. 4 has been abandoned and No. 5 has reference to It is attempted in this Court to that this last ground of appeal has reference to the costs awarded by the Commissioner but in addition to the form of the objection not being apt for this purpose, there is the fact that no objection to the Commissioner's report on the ground of costs was taken in the lower Court, which has had no opportunity of considering the question and has not dealt with the matter.

The only substantial matter before this Court is that which is contained in the first two grounds of appeal. The second defendant contends that that portion of the order of the Commissioner which is set out above was made without jurisdie. tion as the property referred to is outside the jurisdiction of any Court in British India. It is urged that under section 5 of the Indian Succession Act the law of succession is governed by the rule lex loci res situ and that the Letters of Adminis tration do not include such properties. That an administration-suit cannot include properties outside the jurisdiction. That no order of any kind with reference to such properties can be passed in an administration-suit and that the Court cannot order them to be sold or touch them in any way or order the second defendant to account for them. It is also stated that if any such orders are passed the second defendant may be seriously embarrassed by other orders passed by the Courts in Baroda in connection with the land, and it is urged that, in any event, it is wrong to place the burden on the shoulders of the second defendant-appellant of collecting these properties and bringing them into account. These objections seem to show that the order passed by the Commissioner has been misunderstood. It is not an order against the property itself but an order affesting the right of the second defend. ant to share in the distribution of the estate in the hands of the administrator who is now subject to the orders of the Court under the decree in the administration suit. That is to say, it is a personal order against the second defendant-appellant. This being the case, it is unnecessary to consider what might be the position if the Court had passed an order against the property itself. The fact that the property is not included in the Letters of Administration does not appear to affest the question of the legality

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of the Commissioner's order for the reason just mentioned.

With reference to the right of the Court to pass an order having reference to property outside its jurisdiction in an administration suit it has been suggested that a spit for the administration of an estate which includes immoveable property is a suit for the recovery of immoveable property and, therefore, the Court has no jurisdiction to pass any such order. But there is ample authority that an administration suit is not a suit for land but is a suit for the administration of the real and personal estate of the deseased as completely as the circumstances will permit. In the case of Nistarini Dassi v. Nundo Lall Bose (12) it was objected that the Court could not set aside certain leases of property belonging to the estate which was situate outside the jurisdiction of the Court. But it was held that the suit was merely one to have the property administered by the Court and to make the trustees or executors personally liable for any maladministration of the estate. That this did not turn the suit into one for the resovery of immoveable property and that the Court assumes jurisdiction in regard to immoveable property situate outside the jurisdiction in cases where it ean act in personam. This case went on appeal to the Privy Council and the right elaimed by the High Court to set aside leases of lands situate outside the jurisdiction of the Court for the due administration of the estate was expressly approved their Lordships. Benode Behari Bose v. Nistarini Dassi (13).

This principle seems to be applicable to the present case as the existence of immoveable property belonging to the estate outside the jurisdiction of the Court is only an incident to the winding up of the estate. So long, therefore, as the Court can act in personam with reference to this property and has the means of enforcing its order the Court can assume jurisdiction for the purpose of winding up the estate. In this case the deceased was domiciled within the

jurisdiction of the Jours and the administrator resides within the jurisdiction and the cause of action arose wholly or in part within such jurisdiction. This would seem to be amply sufficient to give the Court jurisdiction under section 20 Civil Prosedure Code, to entertain the suit for the administration of this estate. The second defendant-appellant, moreover, is merely one of the beneficiaries entitled to notice of such suit with the right to come in and support or object. The second defendant-appellant in fact did come and object for various reasons to a decree being passed for administration of the estate and stated that she was ready to have the estate divided up. But she took no objection as she should have done under section 21. Civil Procedure Code. to the jurisdiction of the Court to entertain the suit.

The Court has assertained that 2nd defendant appellant has some of the estate in her hands and, although she is residing outside the jurisdiction the Court, has the means of compelling her to account for such property as a condition her share obtaining ia the in the possession of the administrator, because the Court has power over such share and can enforce its order by withhold. ing and by even depriving her of it unless its order is obeyed. But this is taking action against the property itself, but is the exercise of pressure on the 2nd defendant to compel her to act in accordance with the Court's decree that the estate should be wound-up. I would hold, therefore, that the Court has jurisdiction to pass the order in question.

was right in passing such an order, as otherwise the estate could not be fully administered. The principle upon which the Court has proceeded is well established and it was clearly expressed in the case of Akerman, In re, Akerman v. Akerman (14) as follows:— A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that

^{(12) 26} O. 891; 8 C. W. N. 670; 18 Ind. Dec. (N. s.)

^{(18) 88} C, 180; 2 C. L. J. 189; 9 C. W. N. 961; 15 M. L. J. 88'; 7 Bom. L. B. 887; 32 I. A. 193 (P. C.).

^{(14&#}x27; (1891) 8 Oh. 212 at p. 219; 61 L. J. Oh. 34, 65 L. T. 194, 40 W. B. 12.

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mass without first making the contribution which completes it." The principle underlying this order was enforced in the case of Momein Bee Bee v. Ariff Ebrahim Malim (11) and I think should be followed in this .988e

The 2nd defendant appellant is asking the Court for her share of the estate in the bands of the Administrator and the Court has rightly placed the condition on her obtaining such share that she account for that portion of the estate in her bands. She can do this either by agreeing to a joint valuation being taken of such property or by agreeing with the other heirs and legal representatives to the property being sold and the saleproceeds being handed over to the administrator or in any other way approved by the Court. This need not sause any hardship for her or throw any onerous burden on her as has been suggested in this Court.

I would, therefore, dismiss the appeal with

costs.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT. APPEAL PROM APPELLATE DECREE No. 816 OF 1912.

August 23, 1921.

Present :- Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

BHUDEB MOOKERJEE AND OTHERS-PLAINTIPES - APPELLANTS

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KALACHAND MALLIK AND ANOTHER-DEPENDANTS-RESPONDENTS.

Specific Relief Act (I of 1877), ss. 3, 54, 55-"Obligation," meaning of-Injunction to restrain cutting of sacred tree-Prevention of breach of merely moral or religious obligation.

The first defendant having obtained a decree against the second defendant for the removal of a nim tree which had penetrated its roots into the adjoining wall of the house of the former, the plaintiffs instituted the present suit for permanent injunction to restrain the execution of the decree on the allegation that the tree was a sacred one, and that its removal would be an invasion of their religion and would offend their religious sentiments:

Held, that the injunction could not be granted as the refusal to grant the perpetual injunction would not lead to the breach of an obligation, that is, of a duty enforceable by law which the plaintiffs could compel the defendants to perform, within the meaning of section 54 of

the Specific Relief Act. [p. 638, col. 1.]

The word 'obligation,' in section 54 of the Specific Relief Act may be taken to be a tie or bond which constrains a person to do or suffer something, it implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances, but in order that it may be enforced by a Court it must be a legal obligation, and not merely moral, social or religious. [p. 537, col. 2; p. 538, col. 1.]

Appeal against the desision of the Subordinate Judge, Hughli, dated the 2nd February 1921, reversing that of the Munsif, Hughli,

dated the 31st March 1920.

Babus Amarendra Nath Bose and Nanda Lal Banerjee, for the Appellants.

Baba Mohini Mohan Chakrabarti, for the

Respondents.

JUDGMENT .- This is an appeal by the plaintiffs in a suit for permanent injunction to restrain the execution of a decree obtained by the first defendant against the second defendant for the removal of a nim tree. The tree stands on the boundary wall of the land of the second defendant, and its roots have penetrated into the adjoining wall of the house of the first defendant. The conrequence has been that the wall has been eracked and the house has been injured. In eirenmetances, the first defendant instituted a suit against the second defendant for a mandatory injunction for the removal of the tree and for damages. On the 30th May 1917 that suit was decreed, and the first defendant became entitled to remove the tree unless the second defendant removed it within fifteen days. That decree was affirmed on appeal on the 22nd January 1919. Thereupon, the plaintiffs instituted the present suit on the allegation that the tree was a sacred tree, that it had been duly conscerated, that it was worshipped by the orthodox Hinda people of the locality, and that its removal would be an invasion of their religion and would offend their religious sentiments. The Court of first instance decreed the suit, granted a permanent injunction and authorised the first defendant to take out within a month. BHODER MUREPIER U. KALACHAND WALLIE.

bricks from the wall on which the tree stands, thereby causing an open space between the tree and his wall, and place there an iron-plate between the tree and the walls to prevent penetration of roots into his wall in the future. Upon appeal, the Subordinate Judge has reversed this decision and dismissed the suit. In support of the present appeal, the plaintiffs have contended that a permanent injunction should be granted to prevent removal of the sacred tree in execution of the decree.

There is no room for controversy that the deeree was made by a Court of competent jurisdiction and was based on well established legal principles. The decision in Lakshmi Narain v. Tara Prosanna (1) affirms the proposition that as every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in ease of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance, under section 55 of the Specific Relief Act. In support of this view, reference was made to the desision of the House of Lords in Lemmon v. Webb (2) which affirmed that of the Court of Appeal in Lemmon v. Webb (3). The view taken there had propounded been three centuries earlier in Norris v. Baker (4). (See also Viner's Abridgment, Volume XX, page 417). The same view has been affirmed directly or by implication in subsequent eases; amongst these may be mentioned Smith v. Giddy (5), Cheater v. Oater (6), Mills v. Brooker (7). This is by no means a singular rule of law and in this connection reference may be made to the Code Napoleon tr. Barrett : Article 672 provided as follows : "He whose property the branches of a neighbour's trees overbang, may force the latter to ent such branches. If the roots extend into his heritage, he has the right of

entting them himself." Article 673 was in these terms: "Trees growing in a party hedge are party like the hedge; and each of the two owners has the right of requiring that they be out down." Article 673 of the French Civil Code (tr. Wright) contains the following provision: "A person over whose property the branches of a neighbour's trees grow can compel such neighbour to out them, Fruit that falls naturally from such branches belong to the owner of the soil over which they grow. A person has the right to out the roots of trees belonging to an adjoining owner which grow into his land. The right to out the roots or have the branches out cannot be lost by prescription (non-user)." See also Pothier, Traite de contract de societe, second Appendice, Article 243. (Ocuvres Ed. Bugnet, 1861, Volume 4, page 332); Huq. Commentaire du Code Civil, Volume 4, page 457; Wang, German Civil Code, Article 910; Schuster, German Civil law, page 388.

On what principle, then, can the plaintiffs demand that a perpetual injunction should be granted to prevent the execution of the decree? Under section 54 of the Specific Relief Act a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The plaintiffs must, consequently, specify the obligation which exists in their favour and would be infringed by the execution of the deeree held by the first defendant against the second defendant. The plaintiffs can succeed only if they can establish, first, that the first defendant is under an obligation to keep on her land a tree considered sacred by the plaintiffs, even though the tree does damage to the property of the adjoining owner; and, secondly, that the second defendant is under an obligation to asquieses in the continued existence of such a tree on the land of the adjoining proprietor even though such tree does damage to his own property. There must be obligations recognised by law. Section 3 of the Specific Relief Act states that the term obligation includes every duty enforceable by law. We need not attempt an exposition of the full significance of the term obligation. But obligation may be taken. to be a tie or bond which constrains a person to do or suffer something; it implies a right in another person to which it is correlated, and it restricts the freedom of the obliges

^{(1) 31} O. 944; 8 O. W. N. 710.

^{(2) (1895)} App. Cas. 1; 64 L. J. Oh. 205; 11 R. 116; 71 L. T. 647; 59 J. P. 564.

^{(8) (1894) 8} Ch. 1, 68 L. J. Oh. 570.

^{(4) (1618)} I Roll. Rep. 393, 81 E. R. 559,

^{(5) (1904) 2} K. B. 448; 78 L. J. K. B. 894; 91 L. T. 296; 53 W. R. 207; 20 T. L. B. 593.

^{(6) (1918) 1} K. B. 247; 82 L. J. K. B. 449.

^{(7) (1919) 1} K. B. 555; 83 L. J. K. B. 950; 121 L. T. 254; 17 L. G. R. 233; 63 S. J. 481; 85 T. L. B. 261.

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with reference to definite acts and forbearances; but in order that it may be enforced by a Court, it must be a legal obligation, and not merely moral, social or religious. Neither authority nor principle has been invoked in support of the alleged legal obligation which the plaintiffs seek to impose upon the defendants on the ground that the tree has been consecrated and is held sacred by the plaintiffs as pious Hindus. We are not unmindful that certain trees are regarded with great venera. tion; Dino Nath Chuckerbutty v. Pratap Ohandra (8), Baiju Lal Parbatia v. Eulak Lal (9). Thus the Asyatha tree, the Talsi plant and the Bilva tree are objects of worship. The first is sacred to Aditya, the second to Vishou and the third to Shiva. The Kadamba tree in the Minakshi temple at Madura and the Jamba tree in the temple of Jambakeswara near Trichinopoly are regarded with great sanctity. It may also be sonceded that ascording to the Hindu Sastras, special religious merit accrues from the planting of trees on the road side, on the banks of tanks and in gardens or groves; and the Sastras also insultate the fear of various punishments (by visitation of various sins) on those who fell trees; indeed, special ritual is prescribed for the planting of trees for the benefit of the public (see Prannath Saraswati, Hindu Law of Endowments, Tagore Law Lectures, 1892, Chapter IX, pages 250 246; see page 254, where the rules ordained by Manu and Vishna for the infliction of panishment upon persons who destroy trees are quoted from Manu 1.48, VIII.285, Xt.143, 145, Vishnu V 55.59). But the view cannot be maintained that the rules so prescribed in the ancient texts are authorities in favour of the recognition of a legal obligation of the requisite character. We hold, accordingly, that the refusal to grant a perpetual injune. tion will not lead to the breach of an obligation, that is, of a duty enforceable by law which the plaintiffs can compel the defendants to perform. No foundation has thus been laid by the plaintiffs for the grant of a perpetual injunction.

The result is that the decree of the Subordinate Judge must be affirmed and this

appeal dismissed with costs.

B. N.

Appeal dismissed.

(8) 27 C. 30; 4 C. W. N. 79; 14 Ind. Dec. (N. s.) 21.

(9) 24 C. 385 at p. 397; 12 Ind. Dec. (N. s.) 924

LOWER BURMA CHIEF COURT. CIVIL SECOND APPEAL No. 163 OF 1920. September 27, 1921. Present :- Mr. Justice Heald.

MAUNG SHWE YWET AND OTHERS-

APPELLANTS

versus

MAUNG TUN SHEIN-RESPONDENT.

Buddhist Burmese-Partition-Jointly Law. acquired property of father and mother-Auratha son, right of, to claim share on father's re-marriage.

Under the Burmese Buddhist Law an auratha son has no right to claim a share of the property jointly acquired by his parents merely by reason of his mother's death; his right to claim a onefourth share of that property, however, arises on the re-marriage of his father [p 545, col. 2.]

Case-law and texts considered.

Second appeal against the judgment passed by the Divisional Judge, Tharrawaddy, confirming the decree passed by the Sub Divisional Judge, Zigon.

Mr. Sore, for the Appellants. Mr. W. Dhar, for the Respondent.

JUDGMENT .- Plaintiff, Tun Shein, is the eldest surviving shild of the let defendant Shwe Ywet and his deceased wife, Ma Nge, and since the eldest born child, a daughter, admittedly died at the age of nine and the next born shild, a son, died at the age of six, Tun Shein is undoubtedly the "auratha" son of Shwe Ywet and Ma Nge. Ma Nge, assording to Tan Shein, died about seven years ago when Tun Shein was 19 years of age, but according to Shwe Ywet she died in February 1911 when Tun Shein was only 1d years of age. The suit was instituted in July 1919 and it is not suggested that any question of limitation arises in respect of the date of Ma Nge's death. It is admitted that, within a few months after Ma Nge's death, Shwe Ywet married a second wife, and Tun Shein elaims that, by reason of Shwe Ywet's second marriage, he, as auratha son, became entitled to elaim a one fourth share of the property jointly acquired by Shwe Ywet and Ma Nge while they were husband and wife.

The lower Courts found that he was so entitled, and this appeal has been brought on the question of Burmese Buddhist Law, whether an auratha son can, on his father's re-marriage after his mother's death, elaim a one fourth share of the property jointly

acquired by his parents.

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It is now settled law that an auratha son sannot make that claim against his father merely by reason of his mother's death, and the question to be decided is, whether the re-marriage of the father gives him a right to claim the one-fourth share which he would not have if his father did not re marry.

It will be convenient to consider, first, the dhammathats and then the case law on the

Bubjest.

I will take the Dhammathats in the order in which I dealt with them in my judgment in the Full Bench case of Maung Sin v. Ma Thein.

No extract from Vilosa is eited in sections 44 and 45 of the Digest which deal with the subject of the rights of children on the re marriage of the surviving parent, but in section 46 a passage is cited which says that on the death of the father the mother should divide the substance of the inheritance with her sons and daughters, even though she should not marry again.

The Wagaru deals only with the partition between the children and the step-parent

after the death of both parents.

No extract from the Dhammathathyaw, Raingea or Manusin on this subject are eited in the Digest but there is an important extract from the Mahayezathat which was compiled by the same writer as Kaingea, and which rune as follows: "Although accordirg to the Dhammathats the law is, that if there be an auratha son or daughter, although the surviving parent takes a lesser wife, the property other than personal belongings (of the surviving parent) shall be divided into four shares and the auratha shall have one share, and that the younger sons and daughters shall inherit only when both parents are dead, nevertheless, because the surviving parent has not remained only looking after the children in ascordance with what is right but has again taken a lesser sponse, let one balf of the property be given to the shildren as the share of the deseased parent and let the surviving parent take over the rest to the step-parent for their subsistence and though it be all spent by them let it be spent, but after both the parents are dead if any property remains unspent, it shall be divided into four shares of which the shildren of the earlier family shall get three and the step parent one, the stepparent getting a share because although it was property left by the shildren's own parents when they were young, it is due to the kindness and care of the step parent that it has been preserved."

The Manugue gives the following rules-

(1). If after the death of the mother the father lives with a lesser wife the father is to take his own personal belongings but is to make provisions for the eldest son according to his means. eldest son is to have the mother's personal belongings. The father is to have three. fourths of the property which remains over and the house. If the said son be not old enough to separate and stays on with his father and step-mother the property is to be separated in the presence of witnesses and left in the enstody of the father and step mother, and if the step mother has no children, then on the father's death the son is to get the property origin. ally assigned to him and the house to. gether with three-fourths of the property of the parents, and the step mother is to get one fourth of the property of the parents and the one-fourth of the value of the house.

The passage about the father's making provision for the son "eccording to his Doctor Biehardson means" is obseure. translated the passage: "Let him give to the eldest son what has been laid down above according to his means," The translator of the Digest translated it: "If there is no eldest son, partition of the rest of the property shall be made according to the rule already laid down," and interpolated the words "if there is one" (that is an eldest son) at the beginning of the following passage which relates to the partition of the mother's personal belongings. The actual words of the Burmese are as follows-"After mother dead, if father live (with) little wife, as for the father, leaving riding elephant, riding horse (then follows a list of a man's personal belongings) with father, according to the words that have been said above, big son if there be none, according to there being none a share shall be given. The mother's clothes (etc., personal belongings) let big son have. As for the property left over, share into four shares, three shares let father take, house let father have."

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The reference to what has been said above is to the rule for partition between the auratha son and the father on the death of the mother and that rule says that if there is sufficient property the auratha son is to get a slave, some cattle and a plot of land, or such of those things as there may be. In view of that provision, the meaning of the disputed passage would seem to be as I have rendered it above, the sense of the words "according to the words that have been said above, big son if there be none according to there being none a chare shall be given" being that a share shall be given to the auratha as directed in the rule given above according as here is or is not the property mentioned in that rule as that which should fall to his share. This rendering is strongly supported by the Amwebon, the compiler of which ordinarily reproduced the exact wording of Manugue. The text as reproduced in Amuebon adds the word "to" to the words "big son" and alters the word "if" in the phrase "if there is none," so that the passage reads "according as there is or is not (property) a share shall be given to the big son."

There is, however, a further difficulty about this passage in Manage which is that it seems to imply that the auratha son gets one-fourth of the estate as well as the specified property, since it assigns three-fourths of whatever is left to the father. It does not say in so many words that the auratha son is to get one-fourth, and he certainly would not be entitled to one-fourth if the father did not re marry, but it clearly suggests that the auratha is entitled to get one-fourth of the estate from his father on the father's remarriage.

father lives with a lesser wife, let all the property mentioned above (that is, the property of the parents) be divided into four shares and let the daughter have one and the father three. Let the daughter get the mother's personal belongings and the slave woman, and let the father have the house. Let the daughter's share be made in the presence of witnesses and if the father die while the daughter, being not old enough to separate from her father and step mother, is living in the same house with them, then if

the step mother has no children let the partition so made remain effective, and let the father's share be divided into four shares of which the daugter is to get three and the step mother one. The daughter is to get the house but must pay the step mother one quarter of its value, and the step mother is to get half the father's clothes. The debts are to be apportioned similarly.

(3) If the father dies and the wife lives with a lesser husband, the father's personal belongings are to be divided into four shares of which the eldest daughter is to get one and the mother and the younger daughters three. The mother is to get the house. The property, animate and inanimate, allotted to the eldest daughter shall be noted in the presence of witnesses and kept separate. When the mother dies, the eldest daughter is to have the property so allotted to her and the mother's share is to be divided into four shares of which the step father is to get one and the eldest daughter and her relations (that is, presumably, her brothers and sisters) three. The eldest daughter is to get the house but must pay the step-father onefourth of its value.

(4) If the father dies and the mother lives with a lesser husband, let the eldest son's share of the property, animate and inanimate, be made in the presence of witnesses and kept separate. If he is not old enough to separate and lives together with the mother and the step father, then when the mother dies, the eldest con shall get the whole of the share originally allotted to him, and thereafter the mother's three quarter chare shall be divided into four shares and the step father shall enjoy one and the eldest son of the former family three. The bonse is to be valued and the step father to have one fourth of its value. The step-father shall pay onefourth of the mother's debte.

It will be noticed that in the cases mentioned in the second and fourth of these rules the auratha child would be entitled to one fourth of the property under the ordinary rule, whether the surviving parent married again or not, so that one would expect these two rules to be practically a repetition of the rules for partition on the death of the parent. That in substance is what they are, but with the addition of a

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direction that if the eldest child is not old enough to separate from the surviving parent and step parent his or her share is to be segregated. It seems possible that these rules have been compiled from different sources, some of which used the words thagyi (big son) and thamigyi (big daughter) in the sense of the auratha son or daughter while the others used the same words as meaning the children of the elder family. This suggestion receives support from the use of the words "atet thagyi," that is, the big son of the earlier family, in the fourth of the rules given above, and from the reference to the "relations," or brothers and sisters in the third rule, but it is not necessary to consider it for the purposes of the present case, since it concerns only partition after the death of the surviving parent.

I have been unable to find in the Manusara Shwemyin any reference to a right of partition which arises on the re-marriage of the surviving parent. The ordinary rules regarding the right of the auratha son or daughter to get one fourth of the estate on the death of the father or mother respectively are mentioned, but section 25 says definitely that children do not ordinarily inherit until both parents are dead.

The Vannana, like the Manugue, gives special rules for the partition of property taken by the survivor of the parents to a · second marriage, between the shildren and the step-parent on the death of the parent, and lends some support to the view that the rules eited above from Manugue are mainly rules for partition on the death of the surviving parent rather than rules for partition on re-marriage. There is, however, a passage from Vannana eited in the Digest (section 46) which says that on the father's death the mother should not refuse partition if it is claimed by the shildren, though she has not married again and I find another passage also which says that if the mother, having equally divided the inheritance with her children, marries again, the children shall have no interest in the property of the second marriage. These passages certainly suggest that such partition was not unueual, though they do not prove that the children could enforce it against the wish of the surviving parent.

No passage from the Vinicohaya or

Vicchelani is cited in the Digest in support of a rule prescribing partition on the remarriage of the surviving parent.

The Dhammathat known as Amwebon is eited in the Digest but, as usual, it is a reproduction of Manugye. But in this instance it is useful, as I have already noted, because it throws light on the correspond. ing passage of Manugye which the official translator of the Digest has mistranslated. It gives a slightly different wording of the text and shows either that the text of Manugue was so obscure that the compiler of Amwebon was compelled to alter it to make sense, or, much more probably, that our present text of Manugue is corrupt, some seribe having read the word accord. ("according") as " ["if") and baying possibly also shanged the word "of" (" to ") which the writer of Amwebon writes instead of ||an ("not") after the words || 20 | 3 (big

son). However that may be, the Amuebon makes sense as it stands while the parallel

passage in Manugue does not.

From this examination of the major Dhammathats it seems clear that there is no authority which says, in so many words, that an auratha shild asquires by reason of the re-marriage of the surviving parent a right to a one-fourth share in the estate which he or she would not have had if the surviving parent had not re-married. The Dhammathats do clearly lay down that the auratha son or daughter shall receive on the re marriage of the surviving mother or father, as the case may be, the share to which he or she had already become entitled by reason of the death of the father or mother respectively, and that if the auratha continues to live with the surviving parent and the step-parent he or she (probably in either sase along with the other children of the first marriage) will on the death of the surviving parent be entitled to three-fourths of so much as chapses to remain out of the property which the surviving parent took to the second marrigge. Some of the Dhammathats say definitely that the children have no rights whatever in the property taken by the surviving parent to the second marriage so long as that parent is alive and that MAUNG SHWE TWET U. MAUNG TON SHEIN.

they have no right to complain if it is all consumed. But, nevertheless, there are clear indications that the author of these Dhamma. thats did contemplate the accrual of new rights on the re-marriage of the surviving parent. It is difficult on any other assumption to explain the insertion of the provision for the segregation of the auratha child's share in the presense of witnesses if the child is not old enough to separate from the surviving parent and the stepparent. The recognised right of the auratha shild to take the quarter share on the death of the parent is limited to cases in which that shild is sufficiently grown up to take the place of the deceased parent, and, therefore, it would appear that if the shild was not grown up the right to take the fourth share on the death of the parent could not arise. The right of the child. who is not sufficiently grown up to separate from the surviving parent, to have the one fourth share segregated would seem. therefore, to be a different right from tha ordinary right of the grown up auratha to take the fourth share on the death of the parent. It is true that there is no actual reference to age in the Dhammathats which prescribe segregation. The phrase used in each case is "If the child is not sufficient' to separate," but I do not think that that phrase can bear any other meaning than "is not sufficiently old to separate," and the Burmese word "to be suffi. eient" is constantly used in the meaning of "to be old enough." One is, therefore, driven to the conclusion that although the writers of these Dhammathats, and partienlarly of Manugue, did not astually say in so many words that the right of the auratha to take the one forth share of the estate on the re-marriage of the surviving parent was a different right from that of the aurutha to take a one-fourth share on the death of the parent, probably besause there was in the older law books which they were reproducing no recognition of the right to take a share on re marriage, nevertheless, the right which they had in their minds, vaguely it may be, was not identical with the recognised right of the auratha to take one fourth on the death of the parent, and was probably a right, by that time well established by oustom, allowing the eldest shild, whether grown

up or not, to elaim one fourth of the estate on the re-marriage of the surviving parent, although he or she was not in a position to claim that right by reason of the parent's It is clear that, as early as the date of the Vilasa, that is as early as the 12th century, there was a tendency towards a general partition of the state between the surviving parent and the children on the death of one parent and that that tendency was much more pronounced by the middle of the seventeenth when the author of Yazathat, sentury although he gave the ancient rule, nevertheless said that equal partition between the surviving parent and the children ought to be made when the surviving parent remarried. The same tendency re-appears in Vancana, a late eighteenth century Dham. mathat, and, in my opinion, it is particularly important in view of the conservation of the written law and isstrong evidence of the existence of a well-established custom in favour of a general partition on the remarriage of the surviving parent.

So far I have dealt only with the major Dhammathats, but some of the minor law-books also seem to me to give evidence of a similar custom.

The Dhamma which is said to be of about the same date as Manugye gives practically the same rule as the first of those extracted from Manugge above, except that it makes no reference to the special property which the auratha son would get from the father on the death of the mother. It also, like Manugye, says that the father is to take three fourths of the estate, and merely leaves it to be inferred that the auratha son gets the other fourth. It gives the auratha daughter on the death of the mother and the re-marriage of the father the same one fourth share of the estate which she would be entitled to receive if the father did not marry again,

The Rajabala, as cited in section 44 of the Digest, seems to say that on the remarriage of the mother the daughter is entitled to claim one fourth of the property remaining over after she has received the auratha share and the learned compiler of the Digest possibly read it in that sense, but if the passage be read in conjunction with the corresponding passage in section 45 it appears that the property of which she is entitled to claim one fourth is not the whole

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belongings, and I am inclined to think that that was probably the sense of the original authority which the writer of Manugue mutilated in the corrupt passage with which

I have dealt at length above.

The Kungyalinga which, as its name implies, is in verse so that words sometimes have to yield to the exigencies of metre is represented in the Digest as laying down that when either parent dies the property is always to be divided into four shares of which the surviving parent gets three and the shildren one, but it seems possible that the translator has overlooked the word auratha" before the word children (" brothers and sisters") in this passage and that it may refer merely to the ordinary auratha share which other Dhammathats also undoubtedly allow the auratha shild to take on the re-marriage of the surviving parent,

The Dhammusara also, according to the English version of the Digest, gives a similar rule, but a reference to the original shows that the translator has given merely a short paraphrase of the text, which is in verse, and has not attempted a verbal translation and it seems possible that this authority also refers only to the ordinary

rights of the auratha child.

The Cittara, which again is in verse, says that when the chief husband dies and the wife lives with a lesser husband the property, excepting her personal property and property set apart for religious uses, is to be divided into four shares of which the mother takes three and the children (brothers and sisters) one.

The Kyetyo, which seems to reproduce the rules of the Kaingsa, as to the aurutha son's share, almost word for word (vide Kaingsa eited in section 30 of the Digest), merely gives the auratha son on the re-marriage of his mother the right to the one-fourth share which he would already have by reason of the father's death apart from the remarriage of the mother, but adds that, according to some authorities, even that share should be left in the castody of the mother.

It is true that most of these authorities may be interpreted as referring only to the share to which the the auratha child would elearly be entitled by reason of the parent's death, but the constant reference to the

elaim as arising on the re-marriage of the surviving parent seems to me to suggest that the authors themselves were under the impression that the re marriage of the surviving parent conferred a new right to partition, and it can bardly be denied that the passages cited are evidence of a well-established custom in favour of some kind of partition on re-marriage.

We now come to the Attasankhepa which was compiled by the Kinwan Mingyi, shortly before the British annexation of Upper Burma. The learned author, who it will be remembered was also the compiler of the

Digest, states the law as follows :-

"if after the death of the father the mother or after the death of the mother the father wishes to marry again, the auratha son or daughter must receive his or her share if it has not already been taken. If there is no auratha shild, then the whole of the property is to be divided equally between the surviving parent and the younger shildren. Ther, unless the shildren continue to live with the surviving parent and the step-parent, they have no interest in the property of the second marriage. If, however, they continue to live with the surviving parent and the step-parent in the new household and it is possible to keep their share of the property separate. then on the death of the surviving parent they are entitled to receive their share in full and shall also receive three-fourths of the property which the surviving parent took to the second marriage. If, however, their share has not been kept separate it is to be regarded as property taken by the surviving parent to the second marriage."

It will be noticed that this authority, like the rest, does not say in so many words that the auratha acquires any new right to a one-fourth share on the remarriage of the surviving parent. It says merely that if the auratha has not already reserved the one fourth share he or she is to get it. This might mean that if the auratha son or daughter, who has already become entitled to the auratha's one-fourth share by reason of the death of the father or mother, respectively, has not already elaimed and taken that share, he or she shall be entitled, and will of course be well-advised, to take it on the re-marriage of

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the surviving parent. But it might also mean that, although the auratha son or daughter has not already become entitled to the one-fourth share because it not the father or mother, as the case may be, who died, nevertheless, he or she shall be entitled to claim that share from the surviving father or mother by reason of the re-marriage. Such a rule would, I think, be eminently reasonable, and might be regarded as being supported by the ancient rule given in Yazathat. It would do away with the difficulty arising from the omission of any provision in Attasankhepa for the ease of an auartha shild was not already entitled to the quarter share. That difficulty elearly arises if the rule in Attasankhepa be regarded as referring only to an auratha shild whose share has already vested. might of course be explained away by supposing that the learned author regarded the auratha whose right to the one fourth share had not already vested as only potentially auratha and, therefore, classed him or her with the younger children, or it might merely be due to inadvertence, but neither of these explanations seems to me very probable. I have already pointed out that there is a tendency even in the older Dhammathats towards partition on re-marriage. The Yazathat recommends it: the Vannana recognises and approves of it; the Panim says in so many words that the inheritance may be claimed on the re-marriage of the surviving parent; a passage from Kungyalinga 45 of the eastion Digest, sited in seems to recognise the shildren's right to elaim half the property from the surviving parent at any rate in certain case; and when the Vttasankhepa itself says that if there is no auratha, the rest of the shildren are entitled to half the estate, I do not think that we shall be doing any violence to its meaning if we suppose that when it says that the auratha has not already received the one fourth share, he or she shall receive it on the remarriage of the surviving parent, it means that the auratha as such, whether already entitled or not to receive the one fourth share, shall reseive that share on the re-marriage of the surviving parent. One exception to the rule that children inherit only on the death of both parents is clearly established by the reaugnition of the rights of the auratha son or

daughter on the death of the father or mother. There are clear indications of the resognition of two other exceptions, namely, the right of the auratha, whether is not entitled to the benefit of the ordinary auratha share, to take a one fourth share on the re-marriage of the surviving parent, and the right of the children generally to partition on the re-marriage of the surviving parent. So far as this case goes, we are not concerned with the latter of these exceptions except in so far as indications of its recognition add to the probability of the recognition or the second, and the case-law up to present is against its recognition.

The question to be decided in the present case is, whether or not the auratha's right to partition on the re-marriage of the surviving parent can be regarded as having been established. So far as the Dhammathats are concerned, I am of opinion that it can, and it remains to be seen whether that opinion is borne out by the case-law on the subject.

In Ma On v. Ko Shwe O (1) the passage cited above from Vannana was considered and it was said that, although without the consent of the surviving parent the younger children cannot obtain their shares, yet the surviving parent may, if so minded, partition the inheritance retaining his or her share, and as to the part so retained it is at his or her absolute disposal. In that case the father had died and the mother had not remarried.

In Maung Hlaing v. Tha Ka Do (2) the passage from Vannana and Attasanthepa referred to above were considered and it was taken as settled law that if the widow re-marries she is to take her half share of the joint property and the children by the former marriage are to divide the other half, the share of the auratha child being one fourth of the whole.

In Maung Seik Kaung v. Po Nyein (3) the eldestborn shild, a son, claimed one fourth of the
estate from his father, the mother having died
and the father married again, and the learned
Judges said: 'We do not think it open to
reasonable doubt that when the father doss
marry again, the eldest son, especially if he
be the eldest shild, can claim a one-fourth
share of the general joint estate of the parents.'
They went on to say that this is in accordance.

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⁽¹⁾ S. J. L. B. 378.

⁽²⁾ P. J. L. B. 65,

^{(3) 1} L. B. R. 23.

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with paragraph 2 of sestion 2, Book X of Manugue, which, as I have said above, I consider open to doubt, but, however that may be, the case is on all fours with the present case, and, if it is good law, is sufficient for the decision of this case.

The Fall Bench case of Ma Thin v. Ma Wa You (4) was the converse case where an only daughter sued her mother on her re-marriage after the father's death for a one fourth share of the parents' joint estate, and it was held that she was entitled to get it, one of the learned Judges, after considering the authorities, saying: "As a matter of fact partition of property is generally effected on a second marriage and the principle appears to be that a single shild gets one-fourth of the joint estate, the mother getting three-fourths; while if there are a number of shildren the mother takes half and the other children half between them." I may note that it is not elear what the learned Judge meant by "other" shildren, and that I know of no authority in the Dhammathats for the proposition that if there is only one shild its share is only one fourth.

In Mi Haing v. Mi Thi (5) it was said that the texts giving the auratha daughter the right to elaim one-fourth do not authorise her to elaim one fourth from her mother, at least when her mother has not married again. That is, of course, correct.

In M: The O v. M: Sue (6) it was held in Upper Burma that after the death of the father the eldest daughter sannot elaim one quarter of the estate from her mother even though the latter marries again. The question which arose in that ease was the converse of that which arises in the present case and, therefore, it is not necesseary for me to consider it. I may say, however, that I doubt whether the decision is good law, and that it is contrary to the decision of the Fill Bench of this Court in Ma Thin v. Ma Wa You (4).

In Maung Shoe Po v. Maung Bein (7) the mother died, and the father married again. The only son elaimed that he was entitled on his father's re marriage to half the estate. It was taken as settled law both in Upper and Lower-Borma that the father was entitled (4) 2 L. B. R. 255.

(6) 28 Ind Cas. 803; U. B. R. (1914) II, 47. (8) 28 Ind Cas. 831; U. B. R. (1914) II, 48.

(7) 27 Ind. Cas. 612; 8 L. B. R. 115; 5 Bur. L. T.

to at least one-half of the property, and that the son was entitled to one-fourth on the father's second marriage.

The effect of the case-law would, therefore, seem to be that it is settled that on the death of the mother and the re-marriage of the father, the auratha son is entitled to get from the father one fourth of the estate. This view may originally have been based on what is a doubtful text in Manugue, but it is reasonable and is in accordance with the tendency in the Dhammathats towards exceptions to the rule that children do not inherit until the death of both parents.

I hold, therefore, that the lower Courts were right in finding that Tan Shein is entitled as against his father to one-fourth of the property jointly acquired by his father Shwe Ywet and his mother M. Ngs during their marriage.

No other point was argued in the appeal and on the facts the two lower Courts have some to concurrent findings.

The appeal is dismissed with costs.

W. C. A.

Appeal dismissed.

ALLAHABAD HIGH COURT. EXECUTION FIRST APPEAL No. 84 or 1921. April 3, 1922.

Present:—Mr. Justice Walsh and
Mr. Justice Byves.

Lala BIRJ LAL AND OTHERS—

DECKES HOLDERS—APPELLANTS

Lala DAMODAR DAS-OBJECTOR-

Civil Procedure Code (Act V of 1903), s. 144-Restitution, application for - Execution proceedings -"Party," meaning of - Limitation Act (IX of 1903), Sch I, Art. 183 - "To enforce," interpretation of.

An application under section 144 of the Civil Procedure Code is not a proceeding in execution under the Code although it is in the nature of proceedings in execution to enforce either directly or indirectly the final decree. A party to an application under section 144 of the Code need not necessarily by a party to the decree The word "party" in section 44 means "party to the application." [p. 548, cols. 4 .]

An application for restitution under section, 144 of the Givil Procedure Gode consequent upon a decree of His Majesty in Council is governed by Article 181 of Schedule I to the Limitation Act. [p. 643, col. 2.]

Per Ryves, J. - The words "to enforce" in Article 163 of Schedule I to the Limitation Act are wider in meaning than the words "to execute" in Article 183 BIRJ LAL U. DAMODAR DAS.

of hte Act and should be interpreted as equivalent to 'to give full effect to." [p. 548, col. 2.]

Execution first appeal against a decree of the Subordinate Judge, Bareilly, dated the 16th November 1920.

Dr. K. N. Katju, for the Appellants. Mr. B. E. O'Conor, for the Respondent. JUDGMENT.

WALSH, J.—This appeal raises two points. It was an application in the Court below against a person who had become a transferee of a deeree which was subsequently set aside in the Privy Council in favour of the present appellants. The transferee was not a party to the proceeding in the Privy Council, but under the decree which the Privy Council set aside and of which he had become the transferee, he obtained possession of certain property and was, therefore, in the enjoyment of mesne profits in respect of it. The application to the Court below which was in substance a proceeding under section 144, but which adopted all the forms applicable to execution proceedings, asked that the respondent should account for mesne profits during the time which he had been unlawfully in possession under a desree which had been set aside. The application was dismissed by the Court below on the ground that it was time barred by Article 181 of the Limitation Act, and, secondly, on the ground that the respondent was not a party to the decree which gave rise to the application, A further point was raised under Order II, rule 2 of the Code of Civil Procedure which obviously has no substance. The case has been extremely well argued on both sides before us and a great number of authorities have been eited on this vexed question. It is not desirable to add more than one is obliged to the tangle which appears to exist with regard to the method of reconciling proceedings under section 141 with other provisions of the law. It so happens that in the case before us the point whittles itself down to a comparatively compass. We agree with the narrow decision of this Court in the ease of Jiwa Ram v. Nand Ram (1) that proceedings under section 144 of the Code are not execution proceedings, although they are, of course, in the nature of proceedings in execution to enforce either directly or indirectly the final deeree. We do not agree with the lower

(1) 66 Ind, Cas. 144; 20 A. L. J. 226.

Appellate Court that it is necessary that a party to an application under section 144 should have been a party to the decree. Section 144 is very wide in its terms. It includes matters which an Execution Court or an Appellate Court could not ordinarily deal with, and the word "party" is not used in that section in the sense "party to the suit", which the expression ordinarily found in other parts of the Code dealing with execution matters but must mean, "party to the application." It so happens that in this particular case the matters arising out of the final decree of the Privy Council have been already on more than two occasions before this Court, although not always as between the identical parties now before us, We have decided to follow the view taken by this Court in the same or cognate matters arising out of this Privy Council decree. That is to say, firstly, this Court has already held that Damodar Das, although not a party to the Privy Council decree, was bound to give up possession and that an application under section 144 was properly made against him. We agree. That disposes of the second point decided in his favour by the lower Court. Mr. Justice Steart in a previous matter which came before him by way of first appeal in May of last year [the ease is Madhusudan Das v. Biri Lal (2)] held that the application was one justified by the provisions of section 144, and inasmuch as its only authority was derived from the final deeree of the Privy Council, it same within the expression used in Article 183 of the Limita. tion Act, as being an application to enforce an order of His Majesty in Council. The words which we have just quoted are clearly capable of being read so as to cover an application of this kind which is in substance to enforce a decree of the Privy Council which restored the parties to the position they were in before the High Court interfered. We think the only logical course to take, whatever academic view one might take as a matter of construction in the interpretation of these somewhat difficult provisions, is to follow the view taken by Mr. Justice Stuart in the case of Madhusudan Das v. Birj Lal (2). The appeal must be allowed and the ease restored to the lower Court to deal with on the merits. The appellants will

(2) 61 Ind. Cas. 806.

BIPJ LAL U. DAYODAR DAS.

have the costs of this appeal. Costs in the Court below will abide the result.

Raves, J.-I agree generally. The facts out of which this case arises are as follows. Some persons sued the appellants for possession of land. They succeeded partially in the Trial Court but on appeal in this Court, sasseded entirely. Thereupon they executed their decree and got possession of the land and then they transferred a part of the desree to the respondent and put him in possession of a corresponding portion of the land. Thereafter, the appellants appealed to His Majesty in Council. The respondent was not made a party to that appeal. On the 9th of February 1914 the Privy Council passed a decree reversing the decree of this Court and dismissed the suits. It went on to direct that the parties should bear their own costs. On the 8th of March 1914 the appellants applied to the Subordinate Judge to obtain restitution of possession of the land of which they had been deprived. They based their application on a printed copy of the judgment of their Lordships of the Privy Council which had been supplied to them by their Solicitor in England. It was objected by the other side that the application to the Subordinate Judge was premature and that in any ease it could not be based on the report of the Privy Council. it was pointed out that, under Order XLV, rule 15, it was necessary to apply, first of all, to the High Court to transmit the decree of the Privy Council before its execution could be taken out. The Subordinate Judge overruled this objection. On appeal this Court upheld is. The judgment is reported, Damodar Das v. Biri Lal (3), and I will refer to it later. There were two further applications made to the Subordinate Judge, one for resovery of possession and the other for costs. Both of these were made within three years of the decree of the Privy Council, that is, the 9th of February 1914. The present application was filed on the 4th of September 1918 for mesne profits for the period during which the appellants had been kept out of possession of the property. The lower Court rejected application on three grounds. Firstly that it was barred by Article 181 of the First Schedule to the Limitation Act, on the ground that an application for restitution was not an applica-

(3) 30 Ind. Cas. 77; 37 A. 567; 13 A. L. J. 769.

tion in execution of a decree, and, therefore, Article 182 did not apply. It also held that Article 183 was not applicable, because it was not an application to enforce in terms the decree of the Privy Council. It, therefore, held that the only other Article posssible was Article 181 and that under that Article the application was barred by time. It also held that, inasmuch as the respondents were no party to the appeal in the Privy Conneil, they were not bound by that decree Thirdly, it applied Order II, rule 2 as barring the application. On this ground also it dismissed the application. On appeal before us all three points have been attacked. The third point has not been pressed. On the second point, I think, it is sufficient to say that in previous proceedings for restitution and costs in this very litigation arising out of this decree and in connection with the same property, it has been finally held by this Court that the respond. ents though no party to the appeal are bound by the desree. They, therefore, in my opinion cannot raise that objection again. On the first point 1 feel consider. able difficulty. It has now been held by this Court in the case of Jiwa Ram v. Nand Ram (1) that an application under section 144 of the Code is not a proceeding in execution under the Code of Civil Procedure. It is unnecessary, I think, to refer to any other rulings of other Courts. The question, however, remains as to whether, assuming that it is not an application for execution, what is the Article of Limitation which would apply. It has been held in the eases of Ram Singh v. Sham Parshad (4), Krupasindhu Roy v. Mahanta Balbhadra Das (5) and Asha Bibi v. Nuruddin (6) from Burma that applications under section 144 some within the purview of Article 181 of the Limitation Act. On the other hand, the Bombay High Court, in the case of Hamidalli v. Ahmedalli (7), and the Madras High Court, in the case of Unnamalai Ammal v. Mathan (8), have held that applications

^{(4) 44} Ind. Cas. 301; 67 P. R. 1918; - 36 P. W. R. 1918; 15 P. L. B. 1918,

^{(5) 47} Ind. Cas. 47; 3 P. L. J. 867.

^{(6) 30} Ind. Cas. 680, 8 Bur. L. T. 165; 8 L. B. R.

^{(7) 62} Ind. Cas. 283, 45 B. 1187; 23 Bom. L. B. 480.

^{(8) 42} Ind. Cas. 530; 83 M. L. J. 418; 6 L. W. 859; (1917) M. W. N. 643; 22 M, L. T. 883.

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under section 144 fall within Article 182 of the Limitation Ast. I may point out that all these cases refer to applications under section 144 from decrees of the High Court and that, therefore, Article 1:3 was not and could not have been considered. It has been argued that in the case already mentioned Damodar Das v. Biri Lal (3)] this Court has really decided the matter and held that an application of this kind is really a proceeding in execution. In my opinion, however, in order to appreciate that decision it is necessary to examine what were the actual facts before the Court. There an attempt had been made to execute the decree of the Privy Council in the Court of the Subordinate Judge on the basis of a copy of their printed judgment only, and without having adopted the procedure laid down in Order XLV, rule 15. This Court held that Order XLV, rule 15 provides that whoseever desires to obtain execution of any order of his Majesty in Council must first apply under that particular order before they can proceed further and it goes on to say that the word "execution" in that Order is intended to cover execution of any kind because, as they point out, that, but for the presence of Order XLV, rule 15, there would be nothing to show what steps should be taken to execute a decree or to give effect to a decree of His Majesty in Council.

In my opinion that case takes us no farther. The only case to which we have been referred in which a Privy Council deeree has been the subject of decision, is Execution First Appeal No. 93 of 1920, decided by a Single Judge of this Court on the 7th of May 1921, which has been reported as Madhusudan Das v. Bir, Lal (2). There, although it appears from the report that Damodar Das was a party, he is not the same individual as is the respondent here. That sase is not in any way res judicata, but it is a decision among other parties to the same litigation and gives effect to the same decree of the Privy Council. It was an application to recover sertain costs, and although the order of the Privy Council as to costs was that there should be no order as to costs, this had the effect of reversing the order of the High Court which had given the respondent in that ease costs which he had resovered. Mr. Justice Stuart held that the only authority for the recovery of costs which Birj Lal paid to Musammat Indar Kuar was the order of His Majesty in Council. He held, therefore, that although that application was under section 141 of the Code, pevertheless the period of limitation applicable was that provided by Article 183 The language of Article 183 is different to that of Article 182. Article 182 provides for "the execution" of a decree or order of any Civil Court. Article 183 is "to enforce" a judgment, desree or order of His Majesty in Counsil. It seems to me that the words 'to enforce" there are wider in meaning than the words "to execute" in Artisle 182 and should be interpreted as equivalent to "to give full effect to" which is synonymous with "to enforce." In my opinion, therefore, the order of Mr. Justice Stuart was right and we should follow it. I would, therefore, allow the appeal.

By THE COURT.—The order of the Court is that the appeal must be allowed and the ease restored to the lower Court to deal with on the merits. The appellants will have the costs of this appeal. Costs in the Court below will abide the result.

J. P. Arpeal allowed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATIONS Nos, 29

AND 30 CF 1921.

November 28, 1921.

Present:—Mr. Justice Robinson, Chief Judge,
and Mr. Justice Maung Kin.

MRS. KIRKWOOD alias MA THEIN

AND ANOTHER—APPELLANTS

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MAUNG SIN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLV, r.

7 (1), as amended by Act XXVI of 1920 - Appeal to Pricy Council—Security—Time for applying to change nature of security.

Although, under the proviso to sub-rule (1) of rule 7 of Order XLV of the Civil Procedure Code, added by Act XXVI of 1920 an applicant for leave

MRS, KIRKWOOD C. MAUNG BIN,

to appeal to His Mejesty in Council may move the High Court to permit security to be furnished in some other form than in cash or in Government Promissory-Notes, it is essential that the court should be so moved before or at the time of the hearing of the application for leave to appeal, and if no such order is obtained at the date of the grant of the certificate, security must be furnished in cash or in Government securities within the period allowed by rule 7 of Order XoV. [p. 550, col. 1.]

Mr. Riginbotham, for the Appellants.

Mr. Hay (with him Mr. Thein Maung), for the Respondents.

JUDGMENT.—The decree of the Appillate Court in this case was granted on the 18th of April 1921. On the 13th of July, 1941, an application for leave to appeal to His Majesty in Council was filed and came on for hearing on the 3th of August 1921, when an order was passed that the certificate must be granted.

Owing to a recent raling of their Lordships of the Privy Council in respect of the contents of such certificates in certain case, it was ordered that the draft certificate should be submitted for approval before being submitted for signature. This was done, and the draft certificate was approved on the 18th of August, 1921.

The usual notice to the appellants to furnish security within the time allowed by Order XLV, rale 7, of the Civil Procedure Code, was issued on the 18th of August 1921 and at the same time a copy of the cartificate bearing date the 18th of August 1921, was furnished to Counsel for the appellants.

On the 21st of Septembar 1921, an application was filed by the appellants setting out that by an order, dated the 8th of August 1921, this Court was pleased to order the issue of the certificate for leave to appeal. Petitioners prayed that one Ma Aye was willing to stand surety on the security of her paddy lands, the value of which is set out. A draft mortgage bond was filed, and it was prayed that her security might be accepted. It further prayed that, in ease the time for farnishing security fell short of the period allowed, an extension of time may be granted, and that Ma Aye's Attorney may be allowed to execute the mortgage bond.

On the 28th of October 1921 a further application was filed, in which it was set out that petitioners' attention had been drawn to the amendment of Order XLV,

rule 7, introdused by Act XXVI of 1920, and they prayed to be allowed to file an affidavit in support of their previous application. The affidavit was intended to show that an order should be made as prayed on the ground of special bardship.

A preliminary objection has been taken that the applications are barred by time, that the time for furnishing scourity has already elapsed, the leave to appeal can, therefore, not be granted, and that the certificate must be cancelled.

We have heard Counsel as to this preliminary objection and have reserved consideration of the merits of the applications until the objection has been decided.

It may be conceded that the procedure adopted by the petitioners was in accordance with the rules of this Court prior to the passing of Act XXVI of 1920. By that Act several important changes were made in rule 7 of Order XLV. The priod within which the applicant was to furnish security was altered from six months to three months from the date of the decree, the Court being granted a discretion to extend the period of three months up to a further period of sixty days. No change was made in the provision that security might be furnished within six weeks from the date of the grant of the certificate.

A further amendment was made in subclause (a) by inserting the words "in each or in Government securities" word 'security." The result of this amend. ment is, that applicants are bound to furnish security in each or in Government securities, but a proviso is further inserted allowing the Court to permit, on the ground of special hardship, some other form of security to be furnished. The result of these changes is, that one of the two alternative periods within which seenrity must be furnished is altered, and further that the security must be furnished in each or in Government sesurities, unlesse a special order is obtained from the Court to the contrary, in accord. anse with the provisions of the proviso that has been inserted.

Security has not been furnished within three months from the date of the decree. No application for any extension of that period was made and the applicant has, therefore, to show that he has furnished security within six weeks from the date of

MUSTAJAB RHAN C. THARUR SRI LARSHMI MARAIN.

the grant of the certificate. It is equally elear that he has not done so, but it is urged that he proceeded strictly in accordance with the rules of this Court and that, therefore, his application should be granted.

We have been referred to recent rules which have been published by this Court only a short time ago. They were drawn up before the amending Ast was passed and may have to be amended, but they do not govern the applications before us which were made before they came into force. The previously existing rules were abrogated by the amendment of the Act with reference to which they were passed.

The proviso to sub-rule (1) of rule 7. lays down that, "The Court at the time of granting the certificate may, after hearing any opposite party who appears, order, on the ground of special hardship, that some other form of security may be furnished: Provided further, that no adjourn. ment shall be granted to an opposite party to

contest the nature of such security."

The whole of the amendments made by this Act were clearly intended to combat delays in the matter of appeals to His Majesty in Council, and special provision is made that, as an ordinary rule, the security to be furnished shall be furnished in each or in Government securities, and while the proviso allows some other form of security, it provides against any delay by reason of such permission being given by requiring that the order for such other form of security must be passed at the time the certificate is granted. By this means the period of six weeks from the date of the grant of the certificate within which security must be furnished is not extended. therefore, it was open to the applicant to move the Court to permit security in any other form to be granted, it is essential the Court should be so moved before or at the time of the hearing of the application for leave to appeal when a certificate would be granted. If no such order is obtained at the date of the grant of the certificate, security must be furnished in each or in Government securities within the allowed by rule 7 as amended.

Security has not been furnished and we must, therefore, allow the objection, with the result that leave to appeal will not be granted and the certificate must be treated as eancelled.

The applications are, therefore, dismissed with sosts. Advocates' fees five gold mohurs.

W. C. A.

Applications dismissed.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL No. 31 or 1921. January 50, 1922. Fresent:-Mr. Justice Stuart. MUSTAJAB KHAN AND OTHERS-DEFENDANTS - APPELLANTS

persus

Thakur Sri LAKSHMI NARAIN alias BADRI NARAIN MAHARAJ BIRAJMAN, THROUGH Musammat KUNJI KOER, AND OTHERS-PLAINTIFFS-RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s 107-Question of proprietary title-Appeal to District Judge - Partition-Temple , property-Managers, whether can claim partition.

Where in a suit for partition in a Revenue Court objectors admit the proprietary title of the applicant but deny his right to demand a partition, a question of proprietary title is raised and against the decision in such a case an appeal lies to the District Judge.

In the case of property dedicated to an idol the managers of the temple having to manage the landed property in the interests of the temple, have an inherent right to claim a partition under the law, being the managers of the recorded ccsharer.

Second appeal against a decision of the District Judge, Meerut, dated the 28th July 1920.

Dr. S. N. Sen, for the Appellants. Mr. S. N. Gupta, for the Respondents.

JUDGMENT .- The facts are as follows:-A certain lady dedicated a share in a village to the god described as Sri Thakur Lachmi Narain whose temple was in the village, and by the deed of dedication appointed certain managers of the temple. These managers, sning in the name of the god, applied for partition in the Revenue Court under section 107 of the Land Revenue Act. The god is a recorded so sharer. Other so sharers took the objection that the managers in question were not authorised under the deed of endewDULHIN LACHHAMBATI KUMBI t. BODHNATH TIWARI.

ment to apply for partition. They did not contest the fact that the god was a recorded so sharer, nor did they contest the fact that the plaintiffs were the managers of the temple. The Assistant Collector allowed this objection and dismissed the application. An appeal was taken to the District Judge on the ground that the question was one of proprietary title. He decided that the question was one of proprietary title, and further decided that as the god was a recorded eo. sharer, the managers of the temple had an inherent right to put the law in motion on behalf of the recorded so sharer whom they represented, apart from any resital in the deed of trust. He accordingly allowed the appeal. In second appeal it is contended that no appeal lay to the District Judge and that his order cannot be supported on the merits. It is true that in this case the objectors did not assert that the god had no right to apply for a partition. They asserted only that his managers could not represent him in the matter. It was desided in the eass of Abu Muhammad Rhan v. Kaniz Fizza (1), that where the objectors admit the proprietary title of the applicant but deny the right to demand a partition, a question of proprietary title was raised. I do not con. sider that it is straining the meaning of the words to hold that the objectors here raised a question of proprietary right. An appeal, therefore, lay to the District Judgs. On the merits, his view was elearly correct. The managers of the temple having to manage the landed property in the interests of the temple, have an inherent right to claim a partition under the law, being the managers of the recorded co-sharer. I dismiss this appeal with costs.

. J. P.

Appeal dismissed.

(1) 28 A 185; 2 A. L. J. 652; A. W. N. (1905) 240.

PRIVY COUNCIL.

APPEAL FAOM THE PATER HIGH COURT. July 1, 1921.

Present :- Viscount Cave, Lord Shaw and Mr. Ameer Ali.

DULHIN LACHHANBATI KUMRI AND OTHERS-APPELLANTS

versus

BODHNATH TIWARI (SINCE DECEASED) AND OTHERS - RESPONDENTS.

Merger-Mukarrari lease-Patni lease-Both to different members of same family-Intention.

Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others -in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine of merger is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain? [p 553, col 1.]

Where a mukarrari lease is granted in favour of certain members of a joint Hindu family, and later on a patni lease is granted of the same lands in favour of certain other members of the same family and upon the documents and accounts it is plain that the two are kept alive there is no merger.

[p. 553, col. 2]

Appeal from a judgment and decree of the High Court dated 27th Jane 1916, affirming a desree of the Subordinate Jadge, Bhagalour.

Mr. De Gruyther, K. C., and Mr. Dube, for the Appellants.

Mr. henworthy Brown, for the Respond. ents.

JUDGMENT.

LORD SHAW .- This is an appeal against a decree of the High Court of Judicature at Patna, dated June 27, 1916, affirming a decree of the Subordinate Judge of Bhagalpur dated August 20, 1912.

The purpose of the suit was for a deelaration of the plaintiffs' title to a paini taluk called Israin Kalan, in the District of Bhagalpur, and for khas possession of certain lands which are in the bands of the defendants. The defendants this claim on the ground that they are the holders of a mukarrari, lease of a son. DULBIN LACHBARBATI EDMRI C. BODBRATH TIWARI.

sderable portion of the petni called Jadua potti.

There were many issues in the case, each party attacking the title of the other. Interalia, a strongly contested issue was whether the mukarrari lease set up by the defendants was genuine. After a very full trial there is a consurrent finding by both Courts that it was.

The case was ably argued before the Board, and the point of contention may be said to have been that which was contained in the eighth issue tried before the Subordinate Judge. That issue was in these terms: "Was the said mukarrari interest merged in the point interest of the defendants' first party and thereby extinguished?" If this merger took place, the defence fails. If it did not take place, the defence succeeds.

Reduced to the simplest elements, and confined to those which bear upon the issues so determined, the facts may be stated thus: One Mathura Nath Ghosh was proprietor of the Manza holding under Lakhiraj title prior to 1846. On June 14 of that year, he granted a mukarrari lease respecting Jadua patti in favour of Dhir Nath Tiwari and Loke Nath Tiwari, the predecessors of the Tiwari defendante, at a rental of Re. 66-11-3. There can be no dcubt that this was an agricultural lease binding the lessees "to cultivate the said land to your satisfaction." Under this agricultural lease the leasees would, according to practice, either farm the lands them. selver, or let them to other cultivatore, drawing rents therefor. During their possession the value of the lands thus let in mukarrari appears to have greatly risen.

Ten years later—namely, on August 31, 1856, the owner of the Marza, Mathura Nath Ghoth, already mentioned, granted a paini lease of the whole Marza in favour of two persons, Tej Narayan Tiwari and Kalit Nath Tiwari, More than two years afterwards, Tej Narayan Tiwari sold his half share of the paini to Kalit. The exact date of this transaction was December 19,

1858.

The question whether these transactions were fundamentally joint family transactions and should be so treated for the parpose of the application of the doctrine of merger, is a question which will be afterwards referred to; but, in the meantime, it

may be noted that is facie of there two trareactions, the potni lease and the muharreri lease, they are pranted by the same granter to grantees who are different persons. But for the introduction of this question of the joint family, the point of merger could not, in fact, srice, as there is no identity of person between the mukar. raridars and the patnidars. This applies elearly to August 1856 when the point lease was granted, but it also further applies to December 1858 when Tej Tiwari sold his half-share to Kalit Tiwari, besause Kelit, although thereafter bolding the patni en bloc, was not himself a mukar. raridar of Jadua patni.

Accepting for the moment, bowever, as relevant, the fact that Kalit Tiwari, the potnidar, was of the same joint family as Dhir Tiwari and Loke Tiwari, the mukarridars under the 1846 deed, and accepting also as relevant, for the moment, that when a joint family interest can be postulated, the dostrine of merger should be applied to it, their Lordships note that much authority was eited to the Board as it had been to the Courts below, on the proposition broadly maintained that, prior to the Transfer of Property Ast, there was no law of merger in the mofusil. The various points of this argument, including the question whether the case law applicable to the situation of mortgagor and mortgagee, ecold be applied by securate analogy to the case of mukarraridar and patnidarthere various points need not be entered upon at leigth in the present case, in view of the elear opinion which the Board has formed and which will be presently stated as to the true range of the doetrine of merger itself. It may, however, be mentioned incidentally that towards the close of the series of decisions referred to, there occurs the case of Hirendra Nath Dutt v. Hare Mohan Ghose (1) and in the judgment of the Court, consisting of Fletcher and Chatterjee, JJ., of whom the latter delivered the judg. ment, there is a valuable review of the reries of decisions upon this branch of Irdian law.

Before leaving the list of Indian eases referred to, it may, however, also be ob-

(1) 22 Ind, Cas. 986; 18 C. W. N. 860.

DUCHIN LACGHANBITI ZUKBI U. BODGHATH TIWARI,

ease by the later balf of them, which were ruled by the provisions of the Transfer of Property Act. This case is not so ruled, but

depends upon general law.

But, if the desrine of merger is appealed to, that doetrine may be taken as it stands. Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons-conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others-in the source of which the expediency of avoiding the coalescence of interest and precerving the separation of title may be apparent. In short, the question to be settled in the application of the dostrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain? This is in accord with settled law, of which two recent instances may be given -namely, Capital and Counties Bank v. Rhodes (2), and especially the judgment of Farwell, J, in Ingle v. Jenkins (3).

The dostrine of merger being thus applied to the present case, it is found, on an examination of the circumstances, that they show with great elearness that, instead of the mukarrari lease baving been extinguished by merger, it was, on the contrary, kept up, as upon the one hand the source of right to the cultivators proceeding from the mukarridars, and upon the other, the separate grant of subsisting right to the mukarridars by their lease in respect of which the payment into the paint exchequer of the specific Rs. 66, specified in the mularrari lease, continued to be made. The argument of Mr. Kenworthy Brown upon the documents made this clear. It is not, however, necessary to enter upon the details thereof, for both the Courts in India, after full investigation, are satisfied in that particular point. Had there been a true merger in fact, and in intention, the whole of such transactions would, in all probabi-

lity, have taken a different shape, and in particular no more would have been heard of the mukarrari rent.

This raises the last question in the case, and it is one of importance. It was strongly argued by the appellants' Connsel that it was sufficient for his purpose to show that mukarraridars and potnidars were of the same joint family, and that the difference of name of the one set of persons from

the other person was of no assount.

Their Lordships are not of this opinion. The difference of name, it is not going too far to say, may be at least an element, and an important element, in the question whether merger was ever truly intended. There may, under the law of England, be complete fundamental identity of right between the holder under one title, and the holder under another, but a convenient method of indicating intention on the subject is to create, for the purpose of keeping up the separation of title, a trust by which merger in the legal sente is clearly avoided. In short, although the same person is traly and comprehensively the owner of all the rights which might have coalesced, the substance of separation is preserved by the form of title not having been allowed to merge into the one name.

To apply this doctrine to the Indian joint family, when a joint family interest might be said to cover rights acquired to property by several individuals belonging to the family, but when the rights which might otherwise be merged are conferred by titles taken in the names of different members of the family, and thereby the means of articulate differentiation is continued as effectually as by the artifice employed in England of the setting up of a trust ad hoc, then it appears to their Lordships that these circumstances are elements for consideration.

All the length that this judgment goes is, that the fast that the two sets of title do not meet in identity of name, but are separately attached to separate members of the family, is a matter to be considered on the question whether merger was ever intended. As already stated, however, in the present case, in addition to the title standing in the names of different members of the family, the transaction under which the mukarrori lease and the rights consequent thereupon were kept.

^{(2) (&#}x27;903) 1 Ch. 631; 72 L. J. Ch. 386; 88 L. T. 255; 51 W. R. 470; 19 T. L. R. 280.

^{(8) (1900) 2} Ch. 3:8; 69 L, J. Ch. 6:8, 83 L, T. 155; 48 W. B. 684,

GUJRATI C. SITAI MISIS.

alive, is quite plain upon the documents and accounts.

Their Lordships are of opinion that a sound view is taken of this case by both the Courts below, and that the appeal fails. They will humbly advise His Majesty accordingly, and that the appellants should pay the costs.

J. P. Appeal dismissed.

Solicitors for the Appellants, Messrs. Barrow, Rogers and Nevill.

Solicitors for the Respondents, Messrs. Watkins and Hunter.

ALLAHABAD HIGH COURT.

APPLICATION IN SECOND APPEAL

No. 391 of 1920.

February 27, 1922.

Present:—Mr. Justice Ryves and

Mr. Justice Gokul Prasad.

Musammot GUJRATI—PLAINTIPF

—APPELLANT

versus

SITAI MISIR AND OTHERS—DEFENDANTS — BESPONDENTS.

Civil Procedure Code (Act V of 1903), O. XXII, r. 9 (2)—Abatement of appeal—Formal order, necessity of, before application for restoration.

A formal order declaring that a suit or an appeal has abated is necessary before an application under Order XXII, rule 9 (2) can be entertained.

Secretary of State for India v. Juahir Lal, 25 Ind. Cas. 48; 12 A. L. J. 299; 36 A. 245, followed.

Mr. K. O. Mitil, for the Appellant.

Dr. S. M. Sulaiman and Mr. N. Uradhya,

for the Respondents.

JUDGMENT.—This purports to be an application to set aside an order of abatement. It appears that one of the respondents died in March 1921 and an application was put in by the learned Vakil for the appellant after ninety days had expired. The learned Vakil in the application stated that the appeal as against the deceased respondent had abated and he applied for an order under Order XXII, rule 9 (2). The matter came before a learned Judge of this Court who was of opinion that the application was premature, inasmuch as there was no order of the Court declaring the appeal to have abated As, bowever, a learned Judge of this Court in

RAMASAMI IYENGAR U. KUPPUSAMI IYER.

Lichmi Narain v. Muhammad Yusuf (1) was of opinion that on the expiry of ninety days after the death of a respondent, if no applieation was made within ninety days to bring his representatives on to the record, the appeal automatically abated and it was not necessary that a formal order should have been passed to that effect before an application under Order XXII, rule 9 (2), sould be made. As the learned Judge before whom this application first came doubted the correct. ness of the raling, the matter was referred to two Judges and comes before us. It seems to us that the point is concluded by Secretary of State for India v. Jushir Lal (2) and we think that that decision was correct In Order XXII, rule 9 (2) it is stated that the plaintiff may apply for an order to set aside the abatement or dismissal. It is quite obvious that a suit cannot be dismissed automatically. It seems to us, therefore, that a formal order declaring that a suit or an appeal has abated, is necessary before an application under this rule can be entertained. We, therefore, dismiss this application and order the appeal to be put up in the ordinary course. In order to save time, we direct that the appeal be put up tomorrow before us for orders.

J. P.

Application dismissal.

(1) 59 Ind, Cas. 903; 18 A. L. J. 683; 42 A. 540.

(2) 25 Ind. Cas. 48; 12 A. L. J. 299; 36 A 235.

MADRAS HIGH COURT.
SECOND CIVIL APPRAL No. 1372 or 1919,
February 14, 1921.

Present: -Sir John Wallis, Kr., Ohief Justice, and Mr. Justice Oldfield,

RAMASAMI IYENGAR - DEPENDANT No. 16-APPELLANT

tersus

M. V. KUPPUSAM(IYER AND OFFIRS PLAINTIFFS AND DEFENDANTS NOS, 1 TO 3

-- RESPONDENTS.

Transfer of Property Act (IV of 1882), 88, 53, 59, 100

RAMASAMI ITENGAR C. KUPPUSAMI ITEB.

-Document making property liable for debt without transfer of interest-Charge or mortgage-Evidence Act (I of 1872), ss. 69, 71, whether of plicable to charges-Document creating charge on immoveable property, suit on-Contract to indemnify-Contract in writing registered-Limitation-Limitation Act (IX of 1908), Sch. I, Arts. 83, 116, 132.

A document which gives immoveable property as security for the satisfaction of a debt, without transferring any interest in the property, merely constitutes a charge on the property, and is not a mortgage [p. 555, col. 2.]

The special provisions of the Transfer of Property Act, relating to the attestation of mortgages, and of the Evidence Act, relating to the method of proof of mortgages, are not applicable to charges.

[p. 555, col. 2:]

A suit to enforce a payment of money under a document which creates a charge on immovable property is governed by Article 132 of Schedule I to the Limitation Act even though the document is a contract to indemnify, or a contract in writing registered such as would ordinarily be governed by Articles 86 and 116 respectively, [p. 556, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Sait No. 185 of 1917, presented against the desree of the Court of the District Munsif, Tanjore, in Original Suit No. 575 of 1915.

Mr. S. Subramanya Aiyar, for the Appel-

Mr. T. R. Srinivasa Rajagopala Iyengar, for

the Respondents.

This second appeal and Second Appeal No. 1393 of 1919 coming on for hearing on the 17th, 22od and 23rd, respectively, of September 1920, the Court (Oldfield and Hughes, JJ.,) delivered the following

JUDGMENT .- These appeals have to some extent been argued on identical grounds, The appellants-11th and 16th defendants -are purchasers of certain items of property covered by what may be described scenrity-bond, Exhibit C. The District Munsif dismissed the suit brought by the holder of Exhibit C to enforce its terms against the executants and against the property bound by it. The lower Appellate Court gave the deeree asked for, which is now under appeal.

The first contention with which we have to deal is, that Exhibit O has not been properly proved. The lower Courts dealt with the question on the assumption that Exhibit C is a mortgage with reference to section 59 of the Transfer of Property Act and sections 68 and 71 of the Evidence Act.

Here we might not be able to follow the lower Appellate Court in its application of section 71. But it is unnecessary for us to go further into this portion of the ease. because we accept the respondents' contention that the document is not a mortgage, but a charge, to which section 100 of the Transfer of Property Act is applicable. It is urged that the provisions of section 58 (599) of the Transfer of Property Act and of the Evidence Act apply also to charges; but we cannot fied any warrant for that even in the wording of section 100 of the Transfer of Property Act, still less in Order XXXIV. Civil Procedure Code, by which the procedure portion of the Transfer of Property Act has been superseded, and from which material portion of section 100 has been omitted. Rule 15 of Order XXXIV, which relates directly to charges, is in different terms from section 100 and those terms go no way towards supporting the appellants' argument. A reference to Exhibit C shows that it does not transfer any interest in the property, but simply makes it liable for the satisfaction of the plaintiffs' claim. We have no hesitation in holding that it constitutes a sharge and not a nortgage, and that the special provisions of the Transfer of Property Act, relating to the attestation of mortgages, and of the Evidence Act, relating to the method of proof of mortgager, are not applicable. It has been suggested that we should remand the ease in order that the lower Appellate Court might find whether Exhibit C been proved bae evidence in accordance on the the general law. It is sufficient that the lower Appellate Court has already recorded a finding that the document has been proved with reference to section 71 of the Evidence Act. We, therefore, hold that Exhibit C has been properly proved.

The next question is, whether the plaintiffs have shown that any thing has happened which entitles them to recover under Exhibit C. The appellants argue that, in respect of two items at least, on a part of which the plaintiffs' elaim had been allowed, nothing has been established.

First, it is arged, in respect of Exhibit J, that, although Exhibit J is a decree given in a suit brought subsequently to Exhibit O, the liabliity represented by that decree had arisen before Exhibit C, and that it is BAMABAMI IYEYGAR U. ECFPUSAMI IYER.

incoresivable that the parties to the dcen. ment could have contemplated the application of the security towards their liability. when they sould have made explicit reference to it and did not do so. This argument has been further complicated by the fact that the plaintiffs, who were parties to the proceedings in which Exhibit J was obtained, did not join in the appeal which other persons liable under Exhibit J preferred to the High Court and which ended in their exoneration. We may say at once that it has not been suggested that it was owing to any fraud or collusion or gross negligence that the plaintiffs did not earry the care to the High Court and participate in the berefit of its decision. In the absence of some such considerations, we cannot see how they were not justified in making a pay. ment in satisfaction of the decree, which might have been exceuted against the property in their bande.

Returning to the general considerations arising in respect of Exhibit J, we observe that the liability on which it was based, was no doubt inexistence before Exhibit C was executed. The terms, however, of Exhibit C are very The material general. portion follows :- "Whether we defaulted in discharging the said prior encumbrances or whether through the said prior ensumbrances or other means, disputes arose in respect of the sale lands, and in consequer ce, any part of the sale property fails to belong to you, or whether you suffered loss in any other manner, we have in consideration therefor furnished to you as security the properties mentioned below." We cannot accept the appellants' suggestion that as some ensumbrances have been specified, the mere debt, which might or might not be ultimately recovered from the property, must, at the date of the execution of Exhibit (), be held to have been cutside the contemplation of the parties. There is reference to the disputes arising tot only in respect of the said prior ensumbrances or other means "but also to the loss suffered "in any other manner." We think that this language is quite ecoprehensive enough to cover the contingerey in which the plaintiffs were constrained to make a payment towards Exhibit J. A somewhat similar argument has been bored on Exhibit D and can be similarly answered,

The appeals are next argued with reference to limitation. The appllants contended that the suit was out of time. because either Article No. 83 or Article No. 116 is applicable to it. Article No. 83 provides for suits upon contracts to indemnify, and no doubt Exhibit O is a contract to indemnify, and no doubt also, with reference to Article No. 116, is a contract in writing registered. But those facts will not deprive it of the further character which it possesses by viture of the provision which it contains for a charge on immoveable property. The wording of Exhibit C that these lands specified in it are given as seeprity and that the excentants under it and their heirs should be bound to pay the money on the liability of the said scourity is, in our opinion, sufficient to constitute a charge. We, therefore, bold that the suit is a suit to enforce payment of the money charged on the immoveable property and that it is within time with reference to Article 132, Schedule I, of the Limitation Act. We might add that there is no question of personal liability raised in these appeals.

The remaining matter common to the two appeals is the claim of the appellants -11th and 16th defendants-to subrogation in respect of mortgages which the 11th defendant's vendor and the 16th defendant bad discharged. No doubt, a elaim was made in respect of these mortgages at the beginning of the trial. The issue framed, however, was very general, and the District Munsif made no reference to the mortgages relied on by these two appellante, although he dealt with the other elaims under that issue. dismissed the suit, it was unnesessary for him to refer to any such claims or to any decision on them in his decree. In the lower Appellate Court, the plaintiffs obtained a decree, a different view being taken regarding Exhibit O and other matters. But it does not appear that any contention was put forward regarding subrogation or that the 11th and 16th defendants insisted on their claims to it. We do not think that they can revive their elaims in search appeal.

The appellant in Second Appeal No. 1393 has also claimed compensation for improvements, apparently under section 51 of the Transfer of Property Act, in case

JANKI U. BAH KISHORE.

he is evicted from the property. That claim was mentioned in the written statement but was not put in issue, and, so far as appears, was never referred to again in either of the lower Courts. In respect of this, again, we decline to interfere at

this stage in second appeal,

claim which is dealt with in paragraph 41 of the District Munsif's judgment. The District Munsif apparently would have allowed it, if he had given plaintiffs a decree at all. The lower Appellate Court in giving plaintiffs a decree lost eight of this contention of the 16th defendant and did not consider it or make any reference to it. We think that the lower Appellate Court must consider it now.

The result is that the Second Appeal No. 1393 by the 11th defendant is dismissed

with costs of the plaintiffs,

In Second Appeal No. 1372 the lower Appellate Court will submit a finding on the evidence on record on the issue whether any portion, and if so, how much, of the 16th detendant's items is liable for sale?

[Note.- The rest of the judgment is not material

for the purposes of this report, -Ed.]

M. C. P. Order accordingly.

" N. H.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1122 of 1920.

April 7, 1922.

Fresent: - Mr. Justice Gokul Prasad.

JANKI AND ANOTHER—DEFENDANTS

-APPELLANTS

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RAM KISHORE - PLAINTIFF--RESPONDENT.

Evidence Act (I of 1872), s. 68 (51-Mortgage, proving of-Illiterate person, whether proper witness.

Where the only witness in support of a mortgage is an illiterate person Le cannot be deemed to be one who has seen the mortgage within clause (5) of section 63 of the Evidence Act.

Second appeal against a decree of the District Judge, Allahabad, dated the 19th May 1920.

Mesere, Baribane Sahai and Lakehmi Norain Tewari, for the Appellants. Messrs. Bhagwati Shankar and Kanhaiya

Lal, for the Respondent.

JUDGMENT. - This is a defendants' appeal arising out of a suit for redemption of a mertgage, executed about 45 years ago by Dec Saran and Mantol in favour of Ram Rup and Madho, now represented by the defend ants, of a grove No. 97 for about Rs. 5. The plaintiff sued as representative of the mort. gagors. The defence was a denial of the mortgage and the plaintiff's right to redeem. The defendants further plead that they were in possession as Zeminders for a large number of years and that no grove existed on the land. The Munsif held that there was no grove nor was there a mortgage and dismissed the suit. On appeal the learned Judge of the lower Appellate Court has differed from the Munsif on these two points and has allowed redemption. The defendants some here in second appeal and the point urged by them before me is, that the lower Appellate Court has erred in holding that the mortgage has been proved because the only witness in support of the mortgage is one Bindeshri, an illiterate person, and no other witness has been produced, and such an illiterate person could not be deemed to be one who has seen the mortgage within clause (5) of section 63 of the Evidence Act. argument of the learned Vakil for the appellants finds full support from the case of Ghure v. Chatrapal Singh (1). The only difference is that in the present case the scribe and the other two marginal witnesses are dead. Under these circumstances, I allow the appeal, set aside the deerse of the Court below and restore that of the Court of first instance with costs in all Courts.

J. P.

Appeal allowed.

(1) 28 Ind. Cas. 11; 12 A. L. J. 289.

TIRBENI KUNWAR U. MOHAN LAL.

ALLAHABAD HIGH COURT. First Appeal From Order No. 132 of 1921.

March 2, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Musummat TIRBENI KUNWAR AND OTHERS
-APPELLANTS

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MOHAN LAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r.

1-Review, application for, grant of—"Other sufficient reasons"—Appeal, maintainability of.

No appeal lies from an order granting a review for "other sufficient reasons" within the meaning of Order XLVII, rule 1 of the Civil Procedure Code.

First appeal from the order of the District Judge, Badaun, dated 14th May 1921.

Mr. Peary Lal Banerji, for the Appellants. Mr. Panna Lal, for the Respondents.

JUCGMENT.—This is an appeal against an order passed by the District Judge of Budaun, allowing an application for review of an appellate judgment in a case heard by him on the 18th of February 1920. The circumstances are somewhat peculiar. The suit was one for declaration and the plaintiff had lost in the Trial Court. On the day on which the appeal was down for hearing the plaintiff was in hospital, and on the day following he was operated upon, so that all his family were naturally in attendance upon him at the hospital. A week later he died, apparently without having left the hospital.

The applicant for review is the son of the original plaintiff-appellant. He came before the District Judge with a number of certified copies, apparently of public documents, which he said it had been intended to lay before the Appellate Court with a view to their admission in evidence under the provisions of Order XLI, rule 27 of the Code of Oivil Procedure. He ascribed the failure to do this to his father's serious and fatal illness and the circumstances attendant thereon which have already been stated. The learned District Judge has passed an order granting review of judgment.

One thing seems clear and should be understood by the parties concerned. The order so far passed is merely an order for the re-hearing of the appeal, as it was heard on the 18th of February 1920, with liberty to the plaintiff appellant to make any appliestion, as, for instance, an application under Order XLI, rule 27. Civil Procedure Code, which could have been made on that date and might have been so made but for the serious illness of the then appellant. It is still left to the Court below to consider carefully whether a case is made out for the admission of fresh evidence under Order XLI, rule 27 of the Civil Procedure Code, as well as the effect of the evidence thus tendered may have upon the decision, if it be accepted.

The appeal before us is subject to the provisions of Order XLVII, rule 7 of the Civil Procedure Code. There is no question of limitation involved and there has been no contravention of Order XLVII, rule 2. The contention before us is that there has been a contravention of Order XLVII, rule 4, because the Court below has granted an application for review on the ground of discovery of new matter or evidence, without the strict proof of the necessary allegations which is required under the provisions of the said rule. It seems doubtful whether this review has really been granted on the ground of the discovery of new and important matter or evidence. Ordinarily, that expression would refer only to a discovery made since the order sought to be reviewed was passed. Under the somewhat peculiar eircumstances of the present case, the applicant, while alleging the discovery of new and important evidence, does not say that he has discovered it since the passing of the order sought to be reviewed; on the contrary, it is his grievance that he was prevented by circumstances beyond his control from tendering this evidence to the Court at the time when the judgment sought to be reviewed was delivered against him. If the application be treated as falling within the purview of the words "discovery of new and important evidence which after the exercise of due diligence could not be produced at the time when the deeree was passed," it seems difficult to hold, in view of the discretion allowed to Courts in this matter, that the District Judge arrived at the conclusion that this new evidence could not be tendered at the previous hearing of the appeal without such proof as the law considers sufficient. If, on the other hand, the ease does not really fall within the purview of these

JAMMU C. MAHADEO PRACAD,

words at all, then the learned District Judge has granted this review "for other sufficient ressons", within the meaning of Order XLVII, rule 1, and the appeal against it is not maintainable.

For these reasons we are content to dismiss this appeal, and we do so with costs.

J. P.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 164

OF 1921.

April 5, 1922.

Present:—Mr. Justice Walsh and

Mr. Justice Ryves.

JAMMU—DEFENDANT—APPELLANT

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MAHADEO PRASAD AND OTHERS—
PLAINTIPP AND DEFENDANTS—
— RESPONDENTS.

Jurisdiction-Civil and Revenue Courts-Proceeding of Revenue Court-Fraud-Civil Court, whether can be moved.

Per Walsh, J.—A Civil Court cannot set aside the proceedings of a Revenue Court, but it might declare that the conduct of the parties to the suit, in obtaining orders in their favour, no matter what they are, has been in fact fraudulent and that the plaintiff's interest, if he had any, in the property in suit is not affected by any order so fraudulently obtained. It can declare, for instance, that the plaintiff is entitled to possession of the property as owner and can award damages for deceit or fraud.

Appeal from an order of the Second Additional District Judge, Aligarh, dated the 2nd August 1921,

Mr. P. L. Banerii, for the Appellant.

Mesers. N. P. Asthana and Baleshwar

Frasad, for the Respondents.

JUDGMENT.

WALSE, J .- In my opinion this appeal fails. The members of the Court are not entirely agreed about their way of looking at it, although this disagreement is not one of enbstance so much as of form. About one point we entirely agree, namely, that we both of us object, indeed resent very strongly, being salled upon to deside this point of law without any finding at all. It would have been much better if the Munsif, and indeed all Munsifs and all Trial Courts, were to do what the Munsif ought to have done in this case, devote himself to the trial of the facts and deeide all the issues, instead of proceeding to write essays on points of law. Assumed statements of fact have not been agreed to by the parties. Of course, if the parties agree to a statement of fast so that such fact is binding upon them in the suit as if it were established by evidence, then the question of law becomes ripe for decision. Most questions in legal proceedings, and in the difficult business of settling disputes of parties who are at variance with one another about the facts, are mixed questions of fast and law, and it is only when the facts are irrevocably established, that one can apply the law. On the other hand, and it is here where I differ from my brother, it seems to me that certain decisions are forced upon us, that is to say, we cannot deal with this appeal without taking a definite view of certain principles of law, and as I feel elear about them, I have no besita. tion in expressing my opinion, and if the result is to prevent the appellant before us to-day from raising them hereafter in this suit or elsewhere, all I can say is that that is the penalty he has to pay for what seems to me an idle attempt by this appeal to burke an irquiry into facts. I entirely agree with the main part of the learned Judge's judgment, and I am content to adopt as part of my judgment, the final passage beginning with the words:-"It is true, that a tenant, who has held the same land continuously for a period of twelve years, shall have the right of ossupancy created in his favour in such land, but presumably it means a tenant to whom the landlord rightfully leases the land possessed by him.

"In this case, the plaintiff alleges, that the

JAMMU U. MAHADEO PRASAD.

land holder obtained possession of the land fraudulently by colluding with the pairolars of the guardian of the plaintiff. The possession was, therefore, not legal. The tenant baving obtained from the land holder possession, which in its nature was a fraudulent one, did not acquire any rights of companey or otherwise by holding the land continuously for twelve years

"This is, however, denied by the other side, who allege, that once the Tenancy Ast creates occupancy rights in a tenant, no Court can pass an order depriving the tenant

of those rights.

"It is a settled law, that a minor plaintiff is as much bound by a decree in a case and by all the proceedings following it, as a person of full age; and cannot, nor can his representatives, open the proceedings unless on the ground of gross laches, or of the fraud and collusion, which, when established, will undoubtedly annul the proceedings of the Courts of Justice as much as any other transaction. Therefore, a decree, whether it is of a Civil or Rant Court, can, in my opinion, be impeached, where there is a gross negligence by the guardian in the conduct of the minor's suit.

"The question that I have to decide is, whether the plaintiff, who was then a minor and against whom a deeree was passed under section 59 of the Tenancy Act, is to suffer by any negligeree or want of knowledge on the part of his guardian. I am of opinion that he cannot be called upon to suffer. The proposition that a minor of tender years may bave his whole fortune wreeked by the neglest of his guardian is so monstrous, that I for one can pay no attention to it. A minor is entitled to have a guardian, who must be diligent, and who must protect his interests. It is, therefore, clear, that gross negligence on the part of his guardian would entitle a minor to obtain the avoidance of proceedings undertaken on his behalf. A minor, there fore, when he comes of age, can sue in his own name for anything, that his guardian. either through ignorance, or negligence, has omitted to prosecute, and no law would prevent him from so suing : because if it were otherwise, no minor could be safe; and I do not see how Mahadeo Prasad plaintiff, after be attained his majority, is barred from elaiming the property, of which, owing to the pegligence of his guardian, he had been

deprived. Once the minor establishes the fasts alleged in his plaint, viz., that the Zamindar colluded with the pairokars, or his grardian, and made them absent themselves from appearing before the Rent Court on the 18th of December 1906, and took steps that the certified copy of the application made to the Judge, might not be filed, and thus obtained the ejectment order, the proceedings ejecting the plaintiff, must be deemed to have been vitiated, and the plaintiff entitled to restitution of the property by avoidance of the proceedings of the 18th of December 1906, and those that followed it subsequently.

'It was, therefore, of the utmost importance, that the learned Munsif should have gone into the merits." I merely observe that I have reason to know that a portion of that ex. tract in the middle with reference to wreeking the fortune of a minor, is a verbatim extract from a judgment to be found in Hoghton, In re, Highton v. Fiddey (1). It is none the worse for that, but it is not merely the opinion of the learned Judge. Mr. Peary Lal Banerji who has ably argued his case, as usual, in all its bearings, has strongly pressed upon us that the suit, especially as against him, offends against the provisions of the Tenancy Act, and that a Civil Court has no jurisdietion to declare proceedings in a Revenue Court invalid even on the ground of fraud. I think it is too late to raise this question in this Coart. It seems to me to be well settled. Certainly a Civil Court has no jurisdiction to set aside the proceedings in a Revenue Court, but I have no doubt that it has jurisdiction to declare that a course of conduct which eventuates in some decree or order in the Revenue Court or on the revenue side. was fraudulently devised or was the result of some wisked conspiracy to injure the plaintiff and deprive him of his rights behind his back and without his knowledge. This seems to me to be clear from the judgment of the Obief Justice in the case of Rai Krishen Ohand v. Mahadeo Singh (2), commented upon and followed by Mr. Justice Banerji in the case of Uman Shankar v. Bhagwan Din (3), and given effect to in the judgment of the Court of which I was a member in the case of Raghunandan Ahir v. Sheonandan Ahir (4). (1) (1874) 18 Eq. 573; 43 L. J. Ch. 758; 22 W. R.

854. (2) A.W. N. (1901) 49.

(3) 8 Ind. Cas. 568; 7 A. L. J. 1064.

(4; 49 Ind Cas. 309; 41 A. 182; 17 A. L. J. 97.

JAMMO C. MAHADES PRASAD.

The question seems to me to be clearly one of fundamental principle which really admits of The whole of the very little diseussion. argument on behalf of the appellant before us to-day is based upon a fallacy. If fraud is established, there was no tenancy in existence at all to which the provisions of the Tenancy Act would apply, and the argument that the Civil Court, in entertaining such a suit, is asurping the functions of the Revenue Court in a matter which has been exclusively entrusted to the Revenue Court by the Legislature, seems to me to be based upon this fallacy. It may be that the two jurisdictions are mutually exclusive. I take it that a Ravenue Court could hear an application to review its own proceedings on the basis of new matter analogous to the new provisions of the Code of Civil Procedure. I express no opinion as to whether these provisions are. applicable to the proceedings in a Rovenue Court. That is their business. Presumably, if a Revenue Court finds that it has been deceived by a fraudulent knave who has brought dishonest proseelings in order to obtain orders against an ignorant and halpless minor, it might, on the new facts. being brought to its notice, re-open its own proceedings in the exercise of its inherent powers to do justice in the matters entrusted to it. As to this I am anable to express any opinion. It is a matter for the Revenue Court. But that Court certainly has no jurisdiction to grant damages in an action for deceit, and I can imagine no possible ground either in law or equity or sommon sense, upon which, in such a case as occurred in Raghunandan Ahir v. Sheo Nandan Ahir (4), or in this case, if a person has really been deseived, he sannot sue in a Civil Court to establish the fasts in his own favour and to obtain a deelaration of the assertion of his true rights to which he has succeeded or which be has inherited. He claims to be re placed. in the position which he would have ossupied if it had not been for such proceedings, and asks for damages which, in the case of land, would necessarily take the form of mesne profits as against those who have decrived. him, and who have enjoyed the land and the profits thereof, and also asks to be restored to the possession of the land of which he has been deprived. Il leannot imagine that in ensh a ease, an action would be, to use the old word, demarrable, even although it

happens to include matters in respect of which the Ravenue Court itself might also grant relief in another proceeding. As we are seized of the matter, I merely mention for the possible assistance of the parties and of the Courts who have to try this case, that it seems to me that the relief claimed in this suit by the plaint is not properly framed and is capable of very considerable improvement. A Civil Court cannot set aside the proceedings of a Revenue Court, although it is possible that the learned gentleman who settled this plaint had a sort of hops, if not a belief, that it could. If it could, the Civil Courts, judging from some of the matters which come up here for decision, would be engaged in little else but hearing suits brought for the purpose of setting aside proceedings on the revenue side. But it might declars that the conduct of the parties to the suit in obtaining orders in their favour, no matter what they are, has been in fact fraudulent and that the plaintiff's interest, if he had any, in the property in suit is not affected by any order so fraudulently obtained. It can, no doubt, declare that the plaintiff is entitled to possession of the property as owner, and can award damages for deseit or fraud. These are matters which the Trial Court will do well to consider in disposing of this suit if a proper application for amendment is made by any party. In my judgment, this order was right in substance and in form and the suit ought to go bask to be determined by the First Court.

The appeal is dismissed with costs including fees on the higher scale.

Brvs., J.—Without giving a decided opinion on any of the abstract questions of law raised in the arguments. I am not prepared to say that the order of remand is so wrong that I should feel constrained to set it aside. It seems to me that the suit must be tried out and the facts found. The Court will then be in a position to come to a proper decision. I agree in the order passed.

By THE COURT.—The order of the Court is that this appeal is dismissed with. costs in-sluding fees on the higher scale.

w and we have the various

Appeal dismissed,

N. H.

E, P, S. CHETTY FIRM C. MAUNG FYAN GYI.
LOWER BURMA CHIEF COURT.
SPECIAL SECOND CIVIL APPEAL No. 172
OF 1919.

June 20, 1921.

Fresent:-Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

S. P. S. CHETTY FIRM-APPELLANT

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MAUNG PYAN GYI AND OTHERS-

Mortgage, simple—Property subsequently transjerred—Suit on mortgage—Transferees not made party —Decree—Execution—Sale—Purchase by mortgagee— Mortgagee, whether can recover possession from transjerees.

As between two persons entitled to possession the party who acquires that right first cannot be deprived of it by the other. [p. 564, col. 1.]

Where the puisne transferees of a property mortgaged under a simple mortgage are not made parties to the suit on the mortgage and the mortgage in execution of his decree on the mortgage purchases the property himself, he purchases whatever rights the mortgagor then possesses and the mortgagor not having the right to possession, the mortgagee-decree-holder cannot recover possession of the property from the transferces, his proper remedy being only to enforce his mortgage against them. [p. 564, col. 1.]

Special second civil appeal from a decree of the Divisional Judge, Hanthawaddy, reversing a decree of the District Judge, Hanthawaddy,

Mr. Burjorji, for the Appellant. Mr. Chari, for the Respondents.

JUDGMENT .- It is necessary to set out the facts of this case in order thoroughly to appreciate the point to be decided. The plaintiff appellant obtained a mortgage, dated the 30th June 1903, from the mortgagor. The mortgage deed has not been filed in the present suit but it is said to have been a mortgage in English form. strenuously opposed and Mr. This WAS Burjorji for the appellant stated that he did not press any rights on that basis. The mortgage must, therefore, be treated as a simple mortgage. In consequence, it gave him no right to the present possession of the land mortgaged and that right remained in the mortgagor. On the 24th of April 1911, the mortgagor sold the lands now in suit by registered-deed to respondents Nos. 1 and 2. On the 20th December 1912 the plaintiff-appellant brought a suit on his mortgage against the mortgagor. He did not implead respondents Nor. 1 and 2. He obtained a decree on the 22nd April 1915 and in execution

thereof, be brought the lands to sale, including the land in suit and purchased them himself. On the 16th November 1917, respondents Nos. 1 and 2 transferred the land in suit by a registered deed of sale. to their shildren, respondents Nos. 3, 4 and 5. When the appellant sought to obtain presession by virtue of his sale certificate, he was resisted by the respond. ents and then, on the 6th January 1919, he brought the present suit which was for posreseion by ejectment and a declaration that the deeds of sale referred to above were inoperative and of no effect as against him. He further asked for mesce profits for a smell sum of revenue alleged to bave been paid by bim and for costs. It appears from the examination of the parties at the commencement of the suit that, on the purchase of this land by respondents Nos. 1 and 2, they obtained immediate possession and that fact has not been contested.

The learned Judge held that plaintiff would be entitled to postession provided that the respondents were given an opportunity of redeeming on payment of the full amount due on the mortgage after accounts had been taken in his presence and that on failure to pay the amount so found due within the time fixed by the decree, the appellant should be given possession. He declined to follow the ruling of this Court in San Bin v. Nagamutu (1) in which Sir Charles Fox considered a recent decision of the Madras High Court in Mulla Vettel Seeths v. Achuthan Nair (2) and which he held undoubtedly to state the law scrreetly, on the ground that these judgments dealt with the converse case. The learned Divisional Judge beld that this fact made no difference and that he was bound by the decision of this Court, and accepted the appeal.

The question then for decision before us is, whether, under the circumstances set forth above, the appellant is entitled to possession and to out the respondents, even though the decree be in the form suggested which would preserve respondent's right of redemption and provide for the mortgage accounts being again gone into in his presence.

^{(1) 30} Ind. Cas. 710; 8 L. B. R. 266; 8 Bur. L. T. 261.

^{(2) 9} Ind, Cas. 513; 21 M, L. J. 213; (1911) 1 M.W, N. 165; 9 M, L. T. 431,

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A very large number of cases have been referred to but a great majority of them have been discussed and analysed in the desision of the Madras High Court referred to above. We have very earefully considered these desisions with a view to ascertaining on what grounds and arguments they were based, and in order to learn what, if any, legal principles were applied. We think no useful purpose will be served by our again dealing with them in detail. In some, the Courts were inflaenced by the idea that the omission to implead a puisne mortgages or the purchaser from the mortgagor was sharp practice: in others they apparently regard the fact that a fresh suit by the mortgages to enforce his mortgage rights would be barred as justifying the grant of relief in another form : in others the claim was made in the alternative for possession or to be allowed to redeem or to compel the puisne mortgages or purchaser to redeem; in some the fact that the puisne mortgagee had only a right to redeem the prior mortgagee was held to justify a decree if he be given an opportunity to do so. In several the puisns mortgages assepted the position offered and in others the decree was based on the pleadings: in many of the cases subsequent to the Madras Full Bench decision, that decision was not referred to. Speaking very generally, the result of the decisions is that the Allahabad and Patna High Courts and also this Court have agreed with the Madras view. The Bombay High Court had not decided the exact question arising in this case, but the Calentta High Court has taken a different view while not always unanimously. In Ohhattur Dhari Ohowdhury v. Gaya Prosad Singh (3) in which the desision of the Madras High Court was strongly relied on, Mr. Justice Coxe referring to two desisions of his own High Court taking a different view said, "It is not impossible that these rulings may have to be considered further, but the present is certainly not a case for dissenting from them when the defendant's purchase was made just at the time that the plaintiff was suing on his mortgage."

We will, therefore, proceed to give our reasons for holding that this appeal should be dismissed.

(3) 23 Ind, Cas. 791.

There is no doubt that the purchaser's possession and rights were not in any way affected by the decree in the appellant's mortgage suit to which he was not a party and it is, therefore, necessary to see what exactly his position and rights were after his purchase. The mortgage being treated as a simple mortgage gave no right of possession to the mortgages, the right of possession remained with the mortgagor and it continued until he transferred that right by sale to the respondents. It would have continued, had there been no cale, until the mortgagee by suit caused it to be taken away. While the mortgagor still had that right, he sold the land to the respondents and they at once received possession as of right and were in possession as of right when the present suit was filed. Their purshase was admittedly subject to the mortgage. This is a most important point for consideration and its importance is pointed out in Balli Sing's v. Bindeswari Tewari (4). In that ease it was vigorously contended that the mortgages was entitled to the desree for khas possession. The Court was referred to a large number of eases and in the judgment it is said in all the cases referred to it will be found that the person oscupying the position of the plaintiff in that suit was entitled to the possession of the mortgaged property on the day of suit, and later on it is said: "The reason why he gets a decree for possession of property is that at the date of the suit he was entitled to possession of the property against all the world." The judgment then goes on to point out that the purshase at the execution sale of the rights of the mortgagor did not give the plaintiff a right to possession of the property against the prior purchasers.

The respondents admit that their purchase was subject to the mortgage but the right that that mortgage gave to the appellant was a right to bring the property to sale; it conferred no right to present possession. The appellant's rights were to enforce his mortgage and this he could do against the purchaser even though he did not make him a party to the prior suit. Had he proceeded to enforce those rights the respond-

^{(4) 35} Ind. Cas. 582, 1 P. L. J. 183, 2 P. L. W. 482.

SARJU PRASAD C. MUHAMMAD SHARUR.

ents would have had the opportunity to question the accounts, whereas if a suit for simple possession is to be permitted they may be deprived of that right. It is true that the learned District Judge would have re opened the accounts but this shows the result of not compelling the plaintiffappellant to adopt his proper remedy. The deerce he purported to give was practieally one of forcelosure and that in a suit that was not based on the mortgage at all. A remedy by forcelosure is not one of the rights that the mortgagee was entitled to. If the judgment be beld in fact to allow an amendment of the plaint, without that being actually carried out, it overlooks the fact that the character of the suit is entirely altered. It would direct a mortgage decree in a suit in which it was not asked for, and in which the deed of mortgage was rot proved and not even produced.

A puisne mertgagee and also a purchaser may have the right to redeem a prior mertgage, but that is a right which may or may not be exercised at his option. A decree of the nature proposed or each as is given in many of the rulings considered, turns what is merely a right to be exercised or not at his sole option, into a liability to redeem.

The mortgagee in this case can still enforce his rights as mortgagee, it is said, and, if so, there is still less resson to allow him to bring a suit which he is not entitled to bring and thereby improperly impose on the other party conditions which he should

not be compelled to fulfil.

The question is, as to which party is entitled to possession? The respondents are so entitled by reason of their having purchased this right from the mortgagor at a time that he possessed that right and had the power to transfer it. The appellant had no right whatever to possession arising out of his mortgage. When he enforced his mortgage when he enforced his mortgage decree and brought the property to sale he purchased whatever rights the mortgagor then had. Amongst these rights, the right to possession was not included.

A mortgagee in enforcing his mortgagee rights may or may not be entitled to possession and in this case he was not to entitled. The possession of the respondents

is the result of his not doing that which he should have done in his first suit, and if either party is to eaffer it should be the mortgagee rather than the purchaser As between two persons entitled to possession, the party who acquired that right first cannot be deprived of it by the other.

We are, therefore, of opinion that the appellant was not entitled to possession and that no effort should have been made to grant that which he sought in the present suit. He should have been relegated to his proper remedy, which was a suit to enforce his mortgage against the respondents.

For the above reasons, the appeal is dismissed with costs.

W. C. A.

Apreal dismissed.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL No. 1288 of 1919, March 16, 1922.

Present:-Mr. Justice Lindsay and Mr. Justice Stuart.

SARJU PRASAD alias PAPPU LAL-PLAINILEE-APPELLANT

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MUHAMMAD SHAKUR-DEFENDANT-

Hindu Law-Alienation by widow-Legal necessity, proof of-Recital in deed, evidential value of.

A mere recital in a deed as to the necessity for a loan cannot be taken as conclusive evidence of the legal necessity for it. The recitals coupled with other evidence, circumstantial or otherwise, may amount to sufficient proof in circumstances that the transactions were binding upon the family.

[p. 566, col. 1.]

Second appeal against a decree of the District Judge, Gorakhpur, dated the 2nd April 1919.

Dr. S. M. Sulaiman and Dr. K. N. Kot u,

for the Appellant.

Mr. Igbal Ahmad, for the Respondent.

of this appeal is a simple one. The plaintiff appellant same into Court asking for
a declaration that certain transfers made by
a lady named Musammat Sarfarezi Kunwari

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were not binding upon him as the nearest reversioner.

One of the transfers which was an attacked was a transfer by way of mortgage in favour of one Muhammad Shakur, who was arrayed as defendant Nc. 6.

This document of mortgage was executed on the 22nd of September 1894 in favour of Faiz Baksh, the father of Muhammad Shakur. The executant was Sarfarazi Kunwari and the amount which was expressed to be borrowed under the deed was R. 683. As security for this loan, Sarfarazi Kunwari purported to grant to Faiz Baksh a usufruetuary mortgage for 18 odd bighus of land.

The ease for the plaintiff was that this document had been executed by the lady without any legal necessity. In the written statement filed by Muhammad Shakur he pleaded that the document was a good and binding document; that the debt to which it relates had been incurred for legal necessity, and in the second paragraph of his written statement containing the additional pleas, he distinctly set out the case, that the father of the plaintiff had consented to this mortgage and that, therefore, the Court ought to hold that the mortgage was binding upon the plaintiff.

We may note here that an issue was raised in the first Jourt upon this plea raised by the defendant Muhammad Shakur, that is to say, Issue No. 4.

The Court of first instance decreed the elaim on the finding that there was no proof of legal assessity for the loan evidenced by the document in suit.

On appeal the desision of the first Court has been reversed by the learned District Judge who has dismissed the plaintiff's suit being of opinion that legal necessity was established.

The argament before us is, that the finding of the learned Judge whise purports to be a finding of fast is not breed upon any legal evidence and ought not, therefore, tobsellowed to stand.

It is quite clear from what is resorded in the judgment of the Court below that the learned District Judge fell into a serious error. He has, for the purposes of coming to his conclusions, assumed that this deed of mortgage executed in the year 1894 was written by the plaintiff's father, a man

named Sarabankh Lal, and treating that fact as undoubtable evidence of the consent of the plaintiff's father who was at that time the nearest reversioner, he has held that the document being executed with such consent must be deemed to have been executed for some valid and binding purpose.

If we had been able in any way to support this particular finding of the learned District Judge the eass for the plaintiff would have been at an end. Unfortunately, however, it appears from a perusal of the rasord, that there is not a secap of evidence to show that the document of 1891 to which this suit relates was, as a matter of fast, written by Sarabsukh Lal. Two attesting witnesses to prove the execution of this deed were called on behalf of the defendant Muhammad Shakar. Both of them stated that they were not present at the time when the deed was astually written, though they both admitted that they were present when the lady executed it, and they both deposed that they attested the lady's signa. tare. Oas of these two witnesses was asked dirietly the question as to whether the bond was in the handwriting of Strab. sukh Lal. The only answer that he could give was that he did not know. We must take it, therefore, that there is no evidence at all on the record to show that Sarabsukh Lal, the father of the plaintiff, wrote this dosument.

If this finding of the learned District Judge disappears, we are left with practically nothing which would support the plan put forward by the defendant in support of his ease of legal necessity. It is quite trae, as the learned Counsel for the respondent observer, that the dosament now in sait is one of exceiderable antiquity. The mortgagor, Musammat Serfarazi Kan vari, has died and so has the mortgages who was of Mahanmad Shakar, In the father these eireumstances, we have been asked to act upon the principle which was laid down by their Lordships of the Privy Council in the care reported as Nandt Lal v. Jogat Kistore Ach r.y: (1). There, where their

(1, 88 Ind. Cas 4:0; 14 A. L. J. 1103; 20 M. L. T. 8:5; 31 M. L. J. 66; (1916) 2 M. W. N. 833; 4 L. W. 458; 18 Bom. L. R. 869; 24 C. L. J. 4:7; 1 P. L. W. 1; 21 C. W. N. 2:5; 41 C, 1:6; 10 Bur L. T. 177; 48 I. A 249 (P. C.).

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Lordships were dealing with a somewhat ancient transaction, it was held that recitals in the dosuments relating to this transaction could not be ignored and ought to be given some weight as evidence in coming to a decision on the question whether the transactions were entered into for purposes of necessity. Their Lordships, however, did not lay down that the recitals by themselves could be taken as conclusive evidence of the legal necessity. We take the judgment to indicate that the recitals coupled with other evidence, circumstantial or otherwise, may amount to sufficient proof in sireumstances that the transactions were bind. ing upon the family. Apart, however, from the resitals in the deed which are before us, namely, the recital in the dooument of 1894 and in a previous document of the 13th of Jane 1883 to which the 1894 decament refers, there appears to us to be really nothing which could justify us in holding that this particular case falls within the scope of the jadgment of their Lordships in the case above mentioned. There it was held that, in a case like the present, a recital in the document is clear evidence of representation to the lender and it was added that if the circumstances were such as to justify a reasonable belief that an enquiry would have confirmed the truth of the representation then, when proof of actual enquiry had become impossible, the recital, coupled with the circumstances, would be sufficient evidence to support the deed.

All we have here to rely on are the recitals; the other circumstances are wanting, and, this being so, we have come to the conclusion that the defendant Muhammad Shakur has failed to discharge the burden of proof which lay upon him, that is to say, the burden of showing that the loan was advanced to Sarfarazi Kunwari for a purpose which was binding upon the property

and, therefore, upon the reversioner.

The result is, that we allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The plaintiff appellant is entitled to costs both here and in the Court below, the costs in this Court will include fees on the higher scale.

J. P.

Appeal allowed.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 86 of 1921

CIVIL MISCELLANEOUS PETITION No. 1697 OF 1921.

September 8, 1921.

Present: —Sir William Ayling, Kr,
Officiating Chief Justice, and Mr.
Justice Odgers.

In re PALANIKUMARA CHINNAYYA GOUNDER. ACCUSED - PETITIONER.

Hereditary Village Offices Act (Mad. III of '1895), s. 7-Enquiry by Divisional Officer into Village Munsif's conduct-Framing of charges-High Court, jurisdiction of, to interfere-Civil Procedure Code (Act V of 1908), s. 115-Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107-Letters Patent, (Mad) cl. 16.

The High Court has no power to interfere with an order passed by a Revenue Divisional Officer in an enquiry under section 7 of the Madras Hereditary Village Offices Act either under section 115, Civil Procedure Code, or section 107 of the Government of India Act, or clause 16 of the Letters Patent inasmuch as the Revenue Divisional Officer proceeding under the said section is not a Court.

[p. 569, col 1; p. 571, col 2.]

Nilmoni Singh v. Taranath Mukerjee, 9 C. 295; 12 C. L. R. 361: 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 39'; 6 Ind. Jur 547; 4 Ind. Dec. (N. s.) 848 (P. C.), Chaitan Patjosi Mahapatra v. Kunja Behari Patnaik, 11 Ind. Cas. 207; 38 C. 832; 15 C. W. N. 863; 14 C. L. J. 284; Collector of Thana v. Bhaskar Mahadev Sheth, 8 B. 264; 4 Ind. Dec. (N. s.) 550; Balakrishna Udayar v. Vasudeva Aiyar, 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101: 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.) and Paramasucami Ayyangar v. Alamu Nachiar Ammal 49 Ind. Cas. 11; 42 M. 76; 35 M. L. J. 632; 9 L. W. 26; (1918) M. W. N. 107, distinguished.

Per Ayling, Offg C. J — The two things required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. An officer acting under section 7 of Madras Act III of 1895 cannot be styled a Court subject to the High Court's Appellate

Jurisdiction. [p. 558, col 1.]

IN C. R. P. No. 86 of 1921,

Petition under section 115 of Act V of 1903 and section 107 of the Government of India Act, preferred to the High Court praying that the charges framed by the Revenue Divisional Officer, Erode, against the petitioner on 8th January 1921, and all proceedings before the said Officer connected with those charges may be quashed.

In O. M. P. No. 1697 of 1921.

Petition praying that in the eireumstances stated in the affidavit filed therewith, the High Court will be pleased to commit PALANIKUMABA OHINNATTA GOUNDER, In re.

the Revenue Divisional Officer, for contempt for disobedience to the order of this Court, dated the 18th February 1921, in Civil Revision Petition No. 86 of 1921, and to order stay of all further proceedings before the said Revenue Divisional Officer, Erode, consequent upon his proceedings, dated the 8th January 1921, pending disposal of this petition.

FAOTS appear from the judgment.

Mr. J. O. Adam (Public Prosecutor), took the preliminary objection that the High Court could not interfere with the order of the Revenue Divisional Officer, Erode, either under section 115, Civil Procedure Code, or under the Letters Patent. The Divisional Officer was making a departmental enquiry into the conduct of a Village Officer. The action taken under section 7 of Madras Act III of 1895 is not subject to the revisional jurisdiction of the High Court. The Act is self contained and does not provide for the High Court's interference save in certain spesified matters.

Mr. V. C. Seshachariar, for the Petitioner. -The proceedings before the Divisional Offiser were more in the nature of criminal proceedings. The charges framed against petitioner amount to a criminal offense under section 171 (c), Indian Penal Code, and no enquiry should be held into those charges before sanction was accorded under section 126. Oriminal Procedure Code.

If Madras Act III of 18.5 purported to onet the High Court's powers prior to its enastment the Act itself is ultra vires.

The High Court could interfere both under section 107 of the Government of India Act and section 16 of the Letters Patent. Nilmoni Singh v. Taranath Mukerjee (1), Chaitan Pat;ori Mahapatra v. Kunja Behari Patnaik (2), The Collector of Thana v. Bhaskar Mahadev Sheth (3), Balakrishna Udayar v. Vasudeva Aiyer (4) and Parama. swami Ayyangar v. Alamu Nachiar Ammal (5).

(1) 9 O. 295; 12 O. L. R. 381; 9 I A. 174; 5 Shome L. B. 130; 4 Sar. P. O. J. 392; 6 Ind. Jur. 517; 4 Ind. Dec. (N. s.) 846 (P. C.).

(2) 11 Ind. Cas. 207; 38 C. 832; 15 C. W. N. 86);

14 O. L. J. 284

(3) 8 B. 264 4 Ind. Dec. (N. s.) 550.

(4) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101, 88 M. L. J. 69, 26 C. L. J. 143, 19 Bom. L. B. 715; (1917) M. W. N. 623; 6 L. W. 501; 22 O. W. N. 50; II Bur. L. T. 48; 44 I. A. 261 (P. O.).

(5) 49 Ind. Cas. 11; 42 M. 76; 35 M, L. J. 612, 9 L.

W. 26; (1918) M. W. N. 107.

JUDGMENT.

AYLING, OFFG C. J .- Petitioner in this case is the Village Munsif of Sivagiri in Erode Taluk and moves us to interfere in revision and quash certain charges framed against him by the Revenue Divisional Officer of Erode, and all proceedings before that Officer connected with the charges.

sharges run as follows :--

" (1). That you being a Government servant, actively associated yourself in the movement of non-so-operation against Government by going with Mr. E. V. Ramaswami Naisker of Erode to the Sivagiri shandy on 26th November 1920 and telling people there not to vote at the elections of the 3Cth idem.

(2) That you dissuaded and prevented people from resording their votes by making false representations both in the shandy on 26th November 1940 and at the polling station on 30th November 1920 and that the result of voting would involve the increase of taxes and the relinquishment of the voters' properties to those in favour of whom the votes were recorded, etc."

Mr. Adam, the Public Prosecutor, who appears on behalf of Government, takes the preliminary objection that the proceedings in question are taken under Ast III of 1895, section 7, and that this Court has no jurisdiction to interfere.

The first point for determination is clearly the nature of the proceedings. Mr. Sesha. chari, who has argued the case most exhaus. tively for the petitioner, contendr, in the first place, that they are crimical; and his main ground for revision is, that the facts sharged amount to a criminal offence under section 171 (c) of the Indian Penal Code and ean only be enquired into on sanction accorded under section 196 of the Oriminal Procedure Code. This view seems to me to be slearly wrong.

The charges have been framed by the officer holding the enquiry as " Revenue Divisional Officer" and in that capacity he is undoubtedly entitled under section 7 of Act III of 1895 after enquiry, to fine, suspend, dismiss or remove the holders of certain village offices (including the office of Village Munsif) for missonduct, neglect of duty, ineapasity, non-residence or other sufficient cause. Under rules framed under section 20 of the same Ast, he is bound to record charges and

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examine witnesses for and against them. All his procedure in this case appears to have been such as he would have adopted if he were act. ing under section 7 of Act III of 1895 and I have no doubt whatever that this is the provision of law under which he purported to act. Even supposing that the facts alleged against petitioner constituted a criminal offence, which seems to me extremely doubtful, it is difficult to see how this would be incompatible with the Revenue Divisional Officer taking action under section 7 of the Act. It must be the discretion of a Village Officer's superiors to proceed either by way of proseention or by way of departmental action under the section.

The nature of the proceedings being thus determined, has this Court any power to interfere in revision? The petition is filed under section 115 of the Civil Procedure Code and section 107 of the Government of India Act. The former is obviously inapplicable.

Section 107 says: "Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction."

Now, can an Officer acting under section 7 of Act III of 1895 be styled a Court subject to this Court's appellate jurisdiction?

I think not. Appellate jurisdiction no doubt includes the power to interfere in revision. and is not confined to cases in which the law allows a regular appeal. As stated by Subramania Iyer, J., Chappan v. Moidin Kutti (6), the two things required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court, and the power, on the part of the former, to review decisions of the latter. I accept this definition but I cannot see here either the relation or the power. It cannot be assumed that every officer exercising statutory powers in this Presidency stands to this Court in the relation of an inferior Court to a superior, or that we have the power to review his decisions. Act III of 1895 is a self-contained Act which. as set out in its preamble, purports to provide "for the succession to certain hereditary Village Offices in the Presidency of Madras; for the hearing and disposal of claims to such offices or the emoluments annexed thereto; for the appointment of persons to

(6) 22 M 69; 8 M, L. J. 231; 8 Ind. Dec. (N. s.) 49 (F. B.)

hold such offices and the control of the holders thereof; and for certain other purposes."

It contains provisions dealing with all these matters; and places the decisions in all eases in the hands of the Revenue Officers under the control of the Board of Revenue. The jurisdiction of Courts to decide claims to office and smoluments is specifically barred, except in one particular ease, by section 21: and as regards orders under cection 7, with which we are concerned, section 23 provides for appeals to the District Collector or Board of Revenue whose decision, it says, "shall be final." I find it impossible to hold on a perusal of the Act that the Legislature intended that these decisions should be subject to review by the High Court. I fail to see how we have any power of interference.

It has been suggested that if this be

so, Act III of 1895 purported to take the High away powers which possessed prior to its enactment and to that extent is ultra tires. But I can discover no basis for thie. Prior to its enactment the position of Hereditary Village Officers was governed by Regulation VI of 1831; and this Regulation is, if possible, even more explicit than the Act now in force in placing such Village Officers as the petitioner under the exclusive control of the Revenue Authorities. Section 7 of the Regulation provides that "all other persons who hold or may hereafter hold Hereditary Village or other offices in the Revenue and Police Departments, to which emoluments have been annexed by State, shall be under the immediate authority and control of the Collectors of the Districts in which such offices are established, and shall be liable to suspension or removal from office for incapacity. neglect of duty, or other just cause, by the orders of the Collectors, subject in every instance to the approval of the Board of Revenue, and to the sanction of the Governor-in-Council in all cases in which he may see fit to interfere." It seems to me impossible to contend that the Collector's power of control over Village Officers under this Regulation was subject to the

superintendence of the High Court;

I am not aware of any single case, out

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of the innumerable eases of dismissal, etc., which must have occurred under the Regulation or under the present Act, in which the Court's interference has been invoked.

Clause 16 of the Letters Patent to which Mr. Seshachari has referred us seems to me to advance the case no further than sestion 107 of the Government of India Ast.

The same learned Vakil has sited two eases Nilmoni Singh v. Taranath Muker ee (1) and Ohaitan Pat on Mahapatra Runja Pehari Patnaik (2) arising out the Bengal Rent Recovery Act (X 1859). This Act, on much the same lines as our own Madras Act VIII of 1865, is of a very different nature to the one we are now considering. The Bent Courts constituted under it practically perform the functions of Civil Courts in sertain matters: and it is sufficient for the present purpose to quote the words of Norman, J., in Bhyrub Ohunder v. Shama Soonderee Debea (7): "It is elear that the Collector's Court is a Court over which, at the time of the passing of the Charter Act, the Sudder Court possessed appellate jurisdiction; and, therefore, it is clear that the 15th section of the Charter Act gives us a superintendence over such Courts."

Neither of the other cases relied on [Collector of Thona v. Bhackar Mahadev Sheth (2), Balakrishna Udayar v. Vasudeva Aiyar (4) and Paramaswami Ayyanzar v. Alamu Nachiar Ammal (5)] appear to me to contain anything helpful to petitioner.

I must, therefore, hold that the Revenue Divisional Officer proceeding under section 7 of Act III of 1895 is not a Court subject to the superintendence of this Court and that the revision patition should be

missad.

The subject matter of Civil Missellaneous Petition No. 1697 of 1921 is dealt with in the judgment of my learned brother and it seems unnecessary for me to add anything to what he has said.

Opers, J.-This petition 18 ravise the order of the Revenue Divisional Officer, Erode, dated 8th January "charges" 1921, wherein certain framed against the Village Munsif of Sivagiri. It is first contended that this is a criminal matter and falls within the

(7) 6 W. R. Act X Rul., 68.

sorrupt practices' sestions added to the Indian Penal Code by Act XXXIX of 1920, and that the Revenue Divisional Officer was ultra vires as no sanction for the proceedings had been obtained section 196, Oriminal Procedure Code. The sestions of the Indian Penal Code relied on are 171 (c) and 171 (f). Secondly, it is contended that, even it it is not a criminal matter, we ought to interfere under, either section 115, Oivil Procedure Code, section 107 of the Govern. ment of India Act, or clause 16 of the Letters Patent. The first consideration, therefore, is, Is this a criminal matter? As the Judge who admitted the petition when this was the only ground presented, I must confess that, at first, I thought it might prove to be so. The charges are set forth in detail and the Revenue Divisional Officer is also a First Class Magistrate. There is ground for saying that the matter was presented in such a form as to have the appearance of a eriminal matter and the learned Vakil who appeared naturally did nothing in argument to detract from this. The contention on the other side ir, that this is a purely departmental enquiry into the conduct of the Village Munsif. The so called "charges" are as follows:

"(1) That you, being a Government servant, actively associated yourself in the movement of non-co-operation against Government by going with Mr. E. V. Ramaswami Naisker of Erode to the Sivagiri shandy on 26th November 1920 telling people there not to vote at the elections of the 30th idem.

"(2) That you dissuaded and prevented people from recording their votes making false representations both in the shandy on 26th November 1920 and at the polling station on 30th November 1920 that the result of voting would involve the increase of taxes and the relinquishment of the voters' properties to those in favour of whom

the votes were resorded, etc."

Are these within section 171 171 (f), Indian Penal Code ? The sharge is simply 'telling people not to vote; the second is false representations' as to increase of taxation and confiscation of properly. I gravely doubt if either of these would constitute voluntary inter-

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ference with free exercise of electoral rights so as to constitute the offence of undue influence at an election for which punishment is prescribed in section 171 (f). Under the English Statute (on which presumably the new sections of the Indian Penal Code are modelled) 46 and Viet, Chapter 51, sestion 2, the following persons are guilty of undue influence:

(1) Every person who directly or indirect. ly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflists or threatens to inflist, by himself or by any other person, temporal or spiritual injury, damage, barm or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or account of such person having votes or refrained from voting at any election; and

(2) Every person who by abduction, duress, or any fraudulent device or contrivance succeeds in impeding or preventing the free exersise of the franchise of any elector, or thereby succeeds in compelling, inducing or prevailing apon any elector either to give or refrain from giving his vote at

any election.

I think, therefore, upon further consideration, that neither of these so called charges would fall within the misshief of section 171 (c). There is, however, an almost clearer ground for distinction. The petitioner is a Village Monsif, and is as such the Hereditary Village amenable to (Madras Aot III of Offisers' Act 1895). Seption 7 of that Act provides that the Collector may after enquiry fine. suspend, dismiss or remove the holder of any of the offices forming class (1) in section 3 (of which the Village Munsif is one) for missondust, neglect of duty, or incapacity or non-residence or for any other sufficient cause. Section 2) of the Act provides that the Board of Revenue may make rules for (inter alia) the holding of enquiries under section 7 and the hearing of appeals under sestion 23. This last section provides for an appeal from the order of a Collector under section 7 to the District Collector and if the latter passed the order appealed from, to the Board of Revenue. "The decision, on appeal, of the District Collector or the Board of Revenue,

as the ease may be, shall be final." The Board of Revenue made rules under section 7 and they are published in the Fort Saint George Gazette of 28th June 1898. The rules perhaps rather nunesessarily incorporate certain legal terms familiar to us in eriminal proceedings including

the use of the work "charges".

On the whole, I have some to the son. elusion, having regard to the above and to the fact that the officer purported to act as Revenue Divisional Officer, that this was a departmental enquiry under Madras Ast III of 1895, and was, therefore, not a criminal proceeding. being then a civil matter, have we any jurisdiction to interfere? We clearly have none ander section 115, Civil Procedure Code, and this was not seriously pressed by Mr. V. O. Seshashari for the petitioner. His contention was that we could interfere under section 107 of the Government of India Act and clause 16 of the Letters Patent. The former gives each High Court "superintendence over all Courts for the time being subject to appellate jurisdiction," and the question arises as to whether a Revenue Officer acting under sestion 7 of Ast III of 1895 in subject to our appellate jurisdiction. As laid down by Subramania lyer, J. in Chappin v. Moidin Kutti (6) "'appellate jurisdiction' means 'the power of a superior Court' to review the decision of an inferior Court ". Here the two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. Is there such a relation here? It is clear that a Collector dealing with matters under the Rent Recovery Act is not in such relation in Madras Velli Periya Mira v. Moidin Padsha (5), Appandai v. Srihari Joishi (9) and Venkatanarasimha Naidu v. Suranna (10), In Nilmoni Singh v. Turanath Mukerjee (1) the Privy Council elearly states that the process under consideration was not the trial of any question regarding rent, but that the Act in question (X of 1859) went beyond the trial of such questions and provided for the execu-

^{(8) 9} M. 332; 3 Ind. Dec. (N. s.) 627.

^{(9) 16} M. 451; 5 Ind. Dec. (N. s.) 1020.

^{(10) 17} M. 298; 6 Ind. Dec. (N. s.) 206.

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Collector's Court is a Court over which at the time of the passing of the Charter Act the Sudder Court possessed appellate jurisdiction and that section 15 of the Charter Act gave the Calcutta High Court superintendence over such Courts. See Norman, J., in Bhyrub Chunder v. Shama Soonderee Debea (7). The Act dealt with by the Privy Council in this case was of a very different nature to the one under consideration here, and, as already stated, it has been held here that the proposition does not apply to the Rent Resovery Act in Madray.

apply to the Rent Resovery Act in Madras. The 'relation' thus being found not to exist, does the 'power' exist? The answer is, as pointed out by my Lord, that the Act in question (III of 1835) is self-contained. There is no appeal beyond the District Collector or the Board of Rovenne as stated above, save in one solitary instance (section 21) and on one solitary ground, vis., on the ground of want of jurisdiction basause no empluments appertain to the Village Officer in respect of which the suit is brought. It was thus obviously the intention of the Legislature that the Civil Courts should, save in the ease under section 21, not interfere. The contention raised on this is that the Ast is ultra vires of the local Legislature and that it had no power to displace the power of superintendence of the High Court, But if the High Court never had such power on the ground that the relation of superior and inferior Court did not in this instance exist, the Act cannot have taken it away. Further, the previous Regulation (VI of 1831) relating to village offices declares in its preamble "whereas-it is necessary to provide that no claim to such offises, or to any of the emoluments annexed shall be cognizable thereto. Ordinary Courts of Judiesture, and to render all such claims adjudicable to exclusively by the officers of Government in the Revenue Department," etc. Section 6 provides that the orders of the Board of Revenue shall be final and conclusive. See also section 7. The provisions of the Regulation will thus be seen to be even more unequivosal than most of the sections in the Act. No case has been brought to our notice where the contention of ultra vires either under the Regulation or the existing Act has raised or desided, and disposal under both

must have been and must still be of very frequent occurrence. With regard to clause 16 of the Letters Patent, I do not think the case for the petitioner can be carried further under that—as I have already stated my reasons for holding that the Collector is not subject to the superintendence of the High Court in matters arising out of Act III of 1895.

In Balakrishna Udayar v. Vasu leva Aiyar (4) it was held that, under the provisions of Act XX of 1863, section 10, the Civil Court (in this case the Collector) exercised its powers as a Court of law not merely as a persona designata. Paramaswami Ayyangar v. Alamu Nachiar Ammal (5) held that where a Revenue Court had dealt with a question of succession under the Madras Estates Land Act without taking evidence, the High Court could revise the order under section 115. Civil Procedure Code. as that section had been made applicable to proceedings in Revenue Courts under that particular Act by section 192 of that Act.

Neither of these cases desided on the provisions of Acts widely differing from the one under discussion can help the petitioner's case.

I am, therefore, of opinion that this is a matter in which we have no power to revise the proceeding of the Revenue Divisional Officer and I would dismiss the petition.

There is, further, a motion to commit the Revenue Divisional Officer, Erode, for contempt for refusing to forward the records The revision petition was in this case. admitted by me on 18th February . 921 and on 21st February , 921 the office called for the record under section 115, Civil Procedure Code. The Collector to whom the Revenue Divisional Officer forwarded this Court's notice calling for the records, replied on 3rd March 1921 as follows:- "There has been no desision to enable section 115 of the Code of Oivil Procedure to be applied, nor does the notice quote the number of the decree or order to which it purports to refer. I, therefore, return it."

On 11th March 1921 the office again called for the papers and specified the order referred to. This was simply endorsed by the Collegion tor under date 20th March 1921 as follows:— Returned, There has been no decision to make section 115, Civil Pro-

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eedure Code applicable." The matter, if any, is a civil contempt and there is authority to show that it makes no difference if the order calling for the records is wrong i. e., that it has eventually been held by us that section 115 Civil Procedure Uode does not apply. That this was hardly selfevident is witnessed by the long and learne ! arguments addressed to us and by our detailed judgments in this ease. The question of contempt was not seriously argued and I do not propose, under the eirenmstances, to go into the question further than to set out the facts as I have done above and to observe that the letter and endorsement of the Collector were neither courteous nor respectful to this Court and that the attention of Government will be drawn to the matter.

M. C. P.

Pelitions dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL FROM ORDER No. 212
of 1921.
April 7, 1922.

Present:—Mr. Justice Rasque and
Mr. Justice Piggott.

BASDEO RAI AND ANOTHER—
PLAINTIFFS—APPELLANTS

V-1848

JHAGROO RAI-DEPENDANT-RESPONDENT.

Pre-emption-Suit based on custom-Custom not proved-Appeal-Plaintiff entitled to succeed on basis of contract-Remand-Procedure.

Where a suit for pre-emption filed on the basis of custom fails for want of proof of custom and an Appellate Court considers that the case might succeed on the basis of contract, it should not record a finding to the effect that the contract of pre-emption stood proved as between the parties, but should remand the case to the first Court for trial with permission to the plaintiff to amend the plaint basing his claim on ground of contract.

Appeal from an order of the Additional Subordinate Judge, Basti, dated the 2nd June 1921.

Mr. P. L. Banerii, for the Appellante,

JUDGMENT.—This appeal is from an order of remard made by the lower Appellate Court under Order XLI, rule 23. It appears that Munpa Rai executed a deed of sale in

favour of Basdeo Rai and Sat Narain Bai in respect of certain immoveable property. Jhagroo Rai sued to resover the said property by right of pre-emption, Jhagroo alleged in his plaint that a custom of pre emption obtained in the village in which the property in dispute was situate and that he, being a cosharer, had a preferential right over the vandees who were strangers. The Court of first instance found that the allegation of oustom alleged in the plaint had not been proved. The claim was accordingly dismits. On appeal by the pre-emptor it was eontended on his behalf, though no such ground was taken in the memorandum of appeal, that inasmuch as there was a mention of pre-emption in the samima khewat, the pre-emptor was still entitled to succeed, if not on the ground of eastor, at least on the ground of contract. The lower Appellate Court acceded to the contention and setting aside the decree remanded the case for trial on the merits. The vandees in appeal to this Court challenge the order of remand and ecntend that the lower Appellate Court should not have accepted the contention of the pre-emptor, and if it did, it should have remanded the case to the Court of first instance directing the amendment of the plaint and the framing of an issue with regard to the alleged contract of pre-emption and then the case should have been disposed of. In support of his contention the learned Conneel for the vendees refers us to the case of Ram Gharib Tewari v. Shankar Tewari (1). The case relied upon by the appellants before us does not bear out the contention for them to a certain extent. In that care the first Appellate Court had deerced the elaim of the pre emptor holding that though he had failed to prove the alleged sustom of pre-emption yet the waith ul are could be construed to contain a contract of custom and as the period of the wanb.ul. are bad not expired the contract would be considered to be still in force. The facts of the present ease are slightly different. In the present ease the lower Appellate Court has not deereed the elaim of the pre-emptor on the basis of contract but has only remarded the case to the first Court for trial on the merits. We, however, think that the contention of the appellants is so far correst

(1) 65 Ind. Cas. 242; 20 A. L. J. 15.

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that the lower Appellate Court should not have recorded a finding to the effect that the contract of pre-emption stood proved as between the parties. If the lower Appellate Court was inclined to think that the paper, upon which the plaintiff pre-emptor relied. evidenced a contract and that that contract was still in force at the time that the disputed sale was made and the present suit instituted. the plaintiff pre-emptor should have been allowed to amend his plaint and the ease should have been remanded for trial on the amended plaint. We, therefore, allow the appeal and medify the order of the Court below to this extent that the case will go back to the first Court for trial with permission to the plaintiff pre-emptor to amend his plaint basing his claim on the ground of contract, The defendant-vendees would, of source, be allowed to urge their defence to the new plea and to give evidence if they think it necessary. With this modification the decree of the first Court is affirmed. As to costs, we think the sosts should abide the event including fees in this Court on the higher seale.

J. P.

Appeal allowed.

LOWER BURMA CHIEF COURT. FIRST CIVIL APPEAL No. 21 or 1920. May 31, 1921,

Fresent :- Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth. MA NYUN SEIN-APPELLANT

versus

MAUNG CHAN MYA AND ANOTHER-RESPONDENTS.

Buddhist Law-Adoption-Kittima adopted son entering priesthood-Return to civil life-Adoption,

how offected.

Under the Buddhist Law, when a kittima adopted son onters the Buddhist Priesthood, he completely severs himself from all rights to inherit, and from all family ties, in the family of his adoptive parents, and on his re-entering civil life he would not ipso facto be entitled to resume the position and rights he might have been possessed of before, although it is open to the adoptive parents to again adopt: him as their kittima son, and if he is received back, in his home on the old status with the obvious intention that he should resume his old position as adopted son and heir, the years spent in the priesthood would not in any way affect his right to inherit the estate of his adoptive parents. (p. 577, col. 1.]

Appeal against the judgment of Mr. Rigg, J., on the Original Side.

Mr. Higinbotham, for the Appellant.

Mr. Leach, for the Respondents.

JUDGMENT.

DCCEWORTH, J .- This is an appeal from the decision of the learned Judge on the

Original Side of this Court.

The second respondent, Ma Ma Gyi, is the widow of one Maung Ba Than. In the suit it was claimed that this Maung Ba Than was a kittima son of U Phoo and Ma Ywet, both deceased, First respondent, Maung Chan Mya, is the assignes of the interest of Manng Ba Than in the estate of Ma Ywet. Ma Nyun Sein, the appellant, is the grand-daughter of Ma Twet by a previous marriage of hers with Ko Po Sin. In the Court of first instance Maung By Than was himself joint plaintiff with Maung Chan Mya, but he died pending the suit, and he is now respresented by Ma Ma Gyi.

The suit is one for the administration of the estate of Ma Ywet, who died on 6th January 1918, and for a declaration that Manng Ba Than is her sole heir as the kittima adopted son of her and her deceased

husband, U Phoo.

Ma Nyun Sein denied that Maurg Ba Than was ever adopted by U Phoo and Ma Ywet. and she claimed to be the sole heir entitled to inherit. It was further contended that even if Ba Than had been adopted by U Phoo and Ma Ywet, he lost all his rights as their beir by becoming a Rahan and continuing as such for several years.

Four issues were framed by the learned judge on the Original Side and he decided that Be Than was the adopted kittima son of U Phoo and Ma Ywet; that he did not entire. ly exclude Ma Nyun Sein as grand-daughter of Ma Ywet from inheriting; that the said Ma Nyun Sein was entitled to a one-fourth share of the estate; and that the fact that Ba Than had entered the Buddhist Priesthood for a time did not exclude him from his rights as heir of Ma Ywet. Against this desision Ma Nyun Sein has appealed. She has really raised only two points, firstly, that, as, admittedly, there was no public ceremony of adoption, the learned Judge erred in holding on the evidence that Ba Than was adopted with a view to inherit, and, secondly, that Ba-Than, by becoming a Raban and soutinging

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in the religious life for several years, severed all ties with the secular world and cancelled the adoption, if any such adoption had taken place, and that there is no evidence of any fresh adoption by either U Phoo or Ma Ywet after he had left the priesthood.

Cross-objections were filed by the respondents Maung Chan Mya and Ma Ma Gyi in respect of the finding that Ma Nyun Sein was entitled to a one-fourth share in the estate. They contend that the learned Judge on the Original Side should have decided that the appellant was only entitled to one-eighth share in the said estate. There are thus really only three points to be decided in this appeal, viz:—

1. As to the adoption of Ba Than,

2. As to whether, if adopted, his position as an heir was destroyed by his entering the monastic life for a time, and

3. As to whether, in the event of his being held still to be an heir, the appellant, Ma Nyun Sein, should get a one-fourth or a one eighth share in the estate.

In regard to the first point, viz, the adop. tion of Maung Ba Than, there is, in my opinion, a great deal of evidence to support it. According to this evidence, there was no public ceremony of adoption, but the evidence of what may be styled habit and repute is, in my opinion, very strong indeed. There can be no doubt that Ba Than was received into the house of U Phco and Ma Ywet when he was some five or six years of age. His mother, a Burmese woman, had died when he was still an infant, and he had been left to be looked after by Ma The U, sister of Ma Hnin U, who used to visit Ma Ywet's house in her eapacity as a bazar seller. Ba Than appears to have gone there too. He was an attractive little boy and, after some time, it is elear that he lived permanently with U Phoo and Ma Ywet at their own house. It is not certain when Ba Than's father, who was a Shan, died, but it is apparent that from the time he entered the house of U Phoo and Ma Ywet, his relations with his own family and guardians were completely severed. He continued to live in U Phoo's house and was brought up by him right up to the time when he entered the priesthood in fulfilment of a vow, and again for several years after he had given up his monastic life. I might here point out that Ma Nyun Sein's case is that Ba Than, though he permanently resided with

U Phoo and Ma Ywet, was kept there as a mere menial servant. I think it will be clear that the evidence as to his position in the house renders it impossible to held that such was the case. Maung Kyaw Zan, the twelfth witness for the defence, who, to my mind, appears to be largely responsible for the line taken by the defence in this case, was bound to admit that Ba Than was certainly more than a menial and describes him as being "something like a manager." U Phoo and Ma Ywet paid for the expenses of Ba Than's schooling, and for his shinpyu ceremony, and there is evidence that after U Phoo's death, when Ma Ywet and Ba Than were quarrelling about his right to claim a one-fourth chare of the estate as orassa, she offered to pay the expenses of his marriage.

U Shwe Zin, fifth plaintiff witness, states that U Phoo gave his own name as father of Maung Ba Than when he brought him to his school.

Ko Po Sin, the fourth witness for plaintiff, states that U Phoo and Ma Ywet told him that they had adopted Ba Than, and that it was generally reputed in the quarter that he had been adopted with a view to inherit. This witness, Ko Po Sin, had known the parties for seventeen years.

Ma Thaw, the third plaintiff witness, is Maung Ohan Mya's wife, but she was related to Ma Ywet. She definitely states that both Ma Ywet and U Phoo told her that Ba Than was their adopted son, and had been adopted with a view to inherit. She also states that there was general repute in the quarter to this effect. This witness used to live with Ma Ywet after the latter's marriage with U Phoo and she continued on intimate visit. ing terms with the family. further that Ba Than's position in the house was that of the son and not of a servantthat when he was young, he slept with Ma Ywet and U Phoo, and that when he was sick U Phoo and Ma Ywet used to look after him. There is a great deal of corroboration of her evidence in the statement of Ko Po Sin already referred to. U Pe is a trader and, according to his evidence, U Phoo told him that Ba Than was adopted with a view to inherit. He says that Ba Than was reputed in the quarter to be U Phoo's adopted son, and that Ba Than was regarded as U Phoo's gon,

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The learned Jadge on the Original Side has expressed some doubts as regards this evidence of U Pe, on the ground that it was unlikely that U Phoo would have made such a statement on the ossasion of a mere quarrel between Ba Than and U Pe's son, but after reading the evidence in question, I see no reason to doubt the statement. It was quite natural for U Pe when his own son had had a quarral with another boy to find out the social status and anteredents of his son's antagonist. I think it was a natural action on the part of a parent, and that, in order to re-assure U Pe, U Phoo may very well have told him that the boy was his adopted son and that he had adopted him as his heir.

Maung Po Gaung, Inspector of Police, speaks of the reputation of Ba Thau in the quarter as the adopted con and heir of U Phoo and Ma Ywet. He goes further and says that Ma Ywet told him that Ba Than was her son and adde that before he came to know Ba Than personally, U Phoo had told him that they had an adopted son.

. The evidence of U Tha Nyo (Honorary Magistrate), U Tun Lin, Ma The Bwin, Ma Lon Tin and Minus sorroborates in so far as to show that they looked upon Ba Than as an adopted son, while The Nyo, Ma The Bwin and Ma Lon Tin depose that they were told by U Phoo and Ma Ywet that Ba Than was an adopted son. U Ton Lin states that Ba Than addressed U Phoo as father and that both U Phoo and Ma Ywet addressed him as son. He adds that Maung Ba Than took his meals with Ma Ywet and U Phoo. Farther, from the evidence of U Tun Lin, Ma The Bwin and Minus, it is apparent that from the general way in which Ba Than was treated by U Phoo and Ma Ywet or spoken of by them, they looked upon him as adopted with a view to inherit.

On the side of the defence, the evidence of Ma Nyun Sein, her husband Maung Ba Yin, Ma Pwa and Po Hlaing is interested and, as the learned Judge below said, they are all more or less concerned with the devolution of the property in favour of Ma Nyun Sein.

The evidence of Po Thit, the fifth defence witness, is quite unreliable, for it has been proved that he committed perjury in denying convictions of criminal offences and that he was under Police supervision. Ma Ka Doe and

Ma Ma Gyi have given the most discrepant evidence on all material points. Dawood's evidence is not to be relied upon. He was put in the witness-box to prove. that Ba Than worked under him painting signboards for about a year after he had left the monastery. It is sufficient to say that Ba Than sould not have worked for him at the period stated, as he was then living with U Phoo. Further, he admits that his own work and profits had been greatly diminished by the War, and it is, to say the least, unlikely that he would engage a man to assist him at such a time. He also admitted that Ba Than was the only man whom he had ever taken as an assistant.

The defence witnesses attempt to explain Ba Than's return to U Phoo's house after he left the monastery by saying that there, was a fear that Ba Aye's ghost might haunt U Phoo's house. Not only is this a farcical story but it is contradicted by the evidence of Pleader Kyaw Zan. This witness says that the sole reason why B. Than did not return at once from the monastery to U Phoo's house was on account of some quarrel which was soon settled, Ba Than then returning to his old home.

I consider that the position of Ba Than in the house of U Phoo and Ma Ywet was entirely inconsistent with his having been a servant, and that the only reasonable explanation is, that he was their adopted son, and, inasmuch as they had no son of their own, an adopted son with a view to inherit.

I have not referred at any length to the position of Manng Ba Than after he gave up monastic life, because I shall deal with it in my remarks on the second question arising in this appeal.

In regard to the second question, vis., as to whether Ba Than forfeited his rights as an heir by becoming a Monk and continuing so for several years, the point is not an easy one, because learned Counsel on both sides have been unable to put before me any decisions in the Courts or any Dhammathats which really bear upon the question, and, in spite of a diligent search, I have been unable to find any authority directly bearing on the matter.

It is proved, I think, that when Ba Than was lying sick with plague at about the age of 20 years, he madelfa yow that if he

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recovered from his malady he would become a Monk and devote his life and energies to religion. In due course he recevered and earried out his vow, in so far that he entered the priesthood. He remained a Monk for a period which is described in the evidence as from three to seven or, at the most. eight years. His adoptive father, U Phoo, was a ward-headman in Rangoon, who would naturally be a well-known personage in the neighbourhood. There is every reason to believe that U Phoo and Ma Ywet paid the expenses of his ordination, and that all the time during which he was a Monk they regarded him as still their son so far as due religious observance permitted. It is very significant that when Maung B: Than took up monastie life, U Phoo and Ma Ywet adopted another son named Ba Aye. It is pretty clear that it was on Ba Aye's decease some years later that Ba Than left the priesthood and, after a very short interval, rejoined U Phoo and Ma Ywet in his old

home. The evidence shows beyond all reasonable doubt that he not only took up his life in the family from where he had left it, but that his position was in many ways improved. There are two documents on the record, Exhibits D and E, in the latter of which Ba Than is spoken of as the son of U Phoo. There is no doubt, in sonnestion with these documents, which are dated in the year 1914, that U Phoo who paid the consideration money permitted Maung Ba Than's name to appear publiely as his son. This was subsequent to Ba Than leaving the monasite life. Further, there is evidence that Maung Ba Than managed the theatrical business of U Phoo and Ma Ywet, and after U Phoo's desease in 1917 Ba Than completely Farther, some managed the pue business. ten days after U Phoo's desease, Ba Than was appointed, in succession to him, ward-Inspestor Po headman of the quarter. Gaung himself resommended Ba Than as U Phoc's successor, stating that he was his son and, as such, best entitled to succeed his father. At this time there was not yet any dispute about the succession to U Phoo's estate, and I agree with the learned Judge on the Original Side that this fact must have been well known to Ma Ywet who lived in the same house as Ba Than. Then there was no doubt that about two months before

Ma Ywet's death, she and Ma Nyun Sein had emes bes engisteres smos tucds bellerrepp jewellery of which M. Nyan Sain was in possession, and that after this quarral plaintiff's witnesses, The Nyo and Po Sin, same and interviewed the parties. Tha Nyo is a well-known man and was believed implicitly by the learned Judge below, and, after perusing The Nyo's evidence, I see no reason whatever to doubt him evidently acted on more than one ossasion as an intervener in the disputes of this family. The most important point in connsetion with this quarral is that during the conversation which took place between U The Nyo and Ma Y wet the latter stated that she could not permit her grand-daughter to keep all this property because she had already given her Rs. 10,000 and there was a son whose interests she had still to consider. In answer to further questions, Ma Ywet deelared that Ba Than was this son, and that he had been adopted with the intention of his becoming their beir. This conversation took place approximately three hours after alterestion between Ma Nyun Sein and Ma Ywet. This unfortunate quarrel between Ma Ywet and Ma Nyun Sein appears to have gone on during the latter half of November and up to the 27th of Desember, when Minus sent a letter to Ma Ywet on Ba Than's bahalf, claiming his quarter share of the property belonging to U Phoo's estate, on the ground that he was the orassa son. There can be no doubt that Ma Ywet received this letter. Witness U Tan Lin deposes that she brought some such letter to him and told him to tell Ba Than not to ask for his inheritance then, as she had already given a share to Ma Nyun Sein, and he would get all the property at her death. Pleader Maung Kyaw Zon wrote a reply on the 3rd January, Exhibit 8, which, in 'my opinion, was the foreranger of the defense in the present suit. Farther, Kyaw Zan states that Ba Than came to him the next day (that would be the 4th January), and informed him matters had been settled amieably. Kyaw Zin contends that he is ignorant of the terms of that settlement, but Minus states that they were that Ba Than should have Rs. 1,500 instead of Rs. 3,000 which he was asking for, and that Ma Ywat told Ba Than not to trouble her any more as he would obtain all her property on her MI NYON SELN U, MAUNG CHAN MYA.

decease. On the 6th of January Ma Ywet diel. After her death there ean be no doubt that U Tha Nyo sent for Ba Than at Ma Nyun Sein's request, and that his presence there was a meeting between Ma Pws, Ma Nyon Sein and Ba Than. There can be no question that this interview referred to a division of Ma Ywet's estate. U Tha Nyo deposes that Ma Nyan Sein asked him to divide the property equally between her and B. Than. Ma Nyan Sein contends that the object of this interview was to obtain property from Ma Thaw, but she does not explain why, if that was so, U Tha Nyo should have written the letter, Exhibit 1, to Maung Ba Than.

I agree with the learned Judge below in assepting U The Nyo's version of this story and in thinking that the reason for Ma Nyun Sein's visit to U The Nyo was, that she feared that Ba Than, as the adopted son, would claim the whole estate, and she desired The Nyo to make an equal division.

I have gone into these facts in some detail, because it is my opinion that on entering the priesthood, Maung Ba Than must be held to have severed himself from all rights to inherit and from all family ties. I some to this conclusion after reading the Full Bench case of Maung Shwe Ton v. Maung Tun Lin (1), and page 175 of Mr. May Oung's Burman Buddhist Law. It is shown that, before the outbreak of the great European War, Maung Ba Than had left , the monastery and had re joined his family as an ordinary member of society. The Burmese expression for leaving the monastic life is "Lu Twet," viz., to come out a man. I expressly wish to avoid attempting to decide the question of whether in such a case a new ceremony of adoption is necessary. What I do wish to say is that in this case the evidence, which I have detailed above, shows that Ba Than was received back in his home on the old status and that the obvious intention was that he should resume his old position as adopted son and heir. It appears to me that the real reason for his leaving the monastery was that the old folk desired to have him about the house as a son, sines they had lost Ba Aye, whom they adopted

(1) 49 Ind. Cas. 317, 9 L. B. R. 23); 11 Bur. L. T.

when Ba Than became a monk. I think there can be no doubt from the evidence that he must be held to have resumed his old position of kittima son and that the years spent in the monastery have not in his case in any way affected his right to inherit the estate of Ma Ywet.

In regard to the third question, raised by the respondents in their cross objections, it seems to me that the learned Judge on the Original Side by an oversight misapplied the case of Ma Saw Name v. Ma Thein Yin (2). If Ma Swa Ngwe's mother had survived, her share would, I think, have been one half. It has not been contended that her mother was the orassa. As the law stands at present, Ba Than would undoubtedly be the crassa of the family. Therefore, I consider that Ma Nyun Sein is only entitled to one-fourth of a half share (or one eighth share) in the estate and not to the one-quarter share assigned to her by the learned Judge below.

On these findings, I would dismiss Ma Nyun Sein's appeal with costs throughout on the division of the estate as now awarded and would allow the respondents' cross-objections with costs on Rs 1,000.

Robinson, C. J.—I entirely concur, and would only wish to add a few words as to the effect of Ba Than entering the priesthood. There can be no question that this completely severed all ties that existed before he did so and that, therefore, on his re-entering civil life, he would not ipso facto be entitled to resume the position and rights he might have been possessed of before. It was open to U Phoo and Ma Ywet to take him back and to again adopt him as their kittima son but that they did so must be proved. I do not think that the same degree of proof would be necessary in all eases, and that it would depend on the fasts and circumstances of each case whether a re-adop. tion had taken place or not.

In the present ease not only did Ba Than resume his former position in its entirety but the evidence clearly shows that U Phoo and Ma Ywet meant him to do so and that he agreed. He lived with them as before and he performed all the duties of a son, attending on his adoptive parents and assisting them in their business.

^{(2) 1} L B, R, 198,

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It is shown he was accepted and recognized in the quarter as their son and they openly acknowledged him as such. It is certain that U Phoo provided the purchase price of the houses bought, and deliberately allowed Ba Than's name to appear benami for his own, attesting the deeds describing Ba Than as his son. In every way, therefore, that was possible they expressed their intention of taking him back and re placing him in the position he had formerly occupied. His appointment as Ward Headman because he was the son of the deceased Ward Headman is strong proof of how he was regarded in the quarter and this was done to Ma Ywet's knowledge and with her with concent.

I also agree as to the share of Ma Nyun Sein. Her mother was not the orassa child and she would be entitled to only one-quarter of what her mother would have got.

The appeal is dismissed with costs throughout on the division of the estate as now awarded, and the cross objections are accepted with costs on Rs. 1,000.

W. C. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 151 of 1921.

April 19, 1922.

Fresent:—Mr. Justice Gokul Presed,

FIRM RAM SAHAI-CHHIDDA LAL—

PLAINTIFF—PETITIONER

THE EAST INDIAN RAILWAY
COMPANY—DEFENDANT—OPPOSITE
PARTY.

Railways Act (IX of 1890), s. 77-Notice to agent, necessity of-Correspondence with Divisional Traffic Manager-Implied notice to Agent.

A notice under section 77 of the Railways Act, having regard to section 140 of the same Act, should be given, in the case of State Railways managed by a Company, to the Government or to the Agent of the Company or the Manager of the Government and any correspondence with, or notice to, the Divisional Traffic Manager of such Railway cannot amount in law to a notice on the Agent of the Company. [p. 578, col. 2.]

Oivil revision against an order of the Judge of the Court of Small Causes at Aligarh, dated the 25th June 1921.

Mr. Fanna Lal, for the Petitioner. Mr. L. P. Zutshi, for the Opposite Party.

JUDGMENT .- The plaintiff-applicant despatched two consignments of brass ware from Delhi to Aligarh on the 20th of April 1920. These consignments did not arrive at their destination and the plaintiff, after ecrrespondence with the Divisional Traffic Manager, Cawnpore, served a notice on the Agent of the East Indian Railway Company on the 6th of December 1920, admittedly more than six months after the delivery of goods. The plaintiff thereupon instituted the present suit for recovery of damages for loss of goods. He was met with an objection by the defendant East Indian Railway to the effect that the suit did not lie as the notice contemplated by section 77 of the Railways Act, IX of 1890, had not been given.

The learned Judge of the Court of Small Causes has come to the conclusion that the notice which had to be given in the present case under section 77 of the Railways the Agent of the Act was a notice to Company and that any correspondence with, or notice to, the Divisional Traffic Manager at Cawnpore would be of no avail. It is true that the notice contemplated by section 77 of the Indian Railways Act and, having regard to section 140 of the same Act, in the case of State Railways, managed by a Company, is served on the Government or on the Agent of the Company maraging the Railway or the Manager of the Government. In the present case whatever interpretation might be put on the correspondence between the Divisional Traffic Manager and the plaintiff, it cannot amount in law to a notice on the Agent of the defendant Company.

This point is covered by the case of Great Indian Peninsula Railway Company v. Chandra Bai (1) where the plaintiff had given notice to the General Manager, and in that case it was held that it was not equal to a notice on the Agent as contemplated by the aforesaid sections, so that on this point the Trial Court was correct. The other

(1) 28 A. 552; 3 A. L. J. 329; A. W. N. (1908) 101,

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point argued before me, was that, having regard to the terms printed on the back of the receipt given by the Railway, no notice was necessary. A reference was made to paragraph No. 5 commencing with the words "all claims, etc.," and it was argued that, having regard to this especial condition, the notice contemplated by section 77 of the Indian Railways Act was not necessary. This point, too, has been the subject of a decision of this Court ; [see Great Indian Peninsula Railway Company v. Ganpat Rai (2), and a Bench of this Court has held that a condition like that does not absolve the person who claims to make the Railway Company liable from the necessity of giving the notice contemplated by section 77 of the Indian Railways Act. This ground of attack also fails. I, therefore, dismiss this application for revision and confirm the decree of the Trial Court with costs.

Application dismissed. J. P.

(2) 10 Ind, Cas. 122; 83 A. 544; 8 A. L. J. 543.

LOWER BURMA OHIEF COURT. FIRST CIVIL APPEAL No. 59 OF 1920. August 16, 1921.

Present :- Mr. Justica Robinson, Chief Judge, and Mr. Justice Duckworth.

S, K, R, S, L, CHETTY FIRM-APPELLANTS

versus

AMARCHAND MADHOWJEE & Co .-RESPONDENTS.

Contract, C. I. F., breach of-Damages, measure of.

. A. contracted to sell to B. a certain quantity of rice at a certain rate per bag c. i. f. to Colombo, and undertook to make shipment at Bassein before a certain date and obtain payment by handing over bills of lading to B. at Rangoon; he failed to ship any rice at any time to Colombo, whereupon B. brought the present suit to recover damages arising from the breach of the contract, and the question was as to the true measure of damages to be awarded:

Held, that a c. i. f. contract being a contract for the sale of goods by tendering the shipping documonts, and not a contract for the sale of documents relating to goods, the principal and substantial breach for which damages were awardable was the failure to ship the rice to Colombo, and B. was entitled to be put in the same position that he would have been in, had the contract been duly performed, and the rice delivered to him on due date, and that the true measure of damages was the difference between the contract rate and the rate at which

the rice could have been sold by him at Colombo had it been delivered on duc date,

Appeal against the judgment of Maung Kin, J., on the Original Side.

Mr. Leach, (with him Mr. Ohari), for the Appellants.

Mr. N. M. Cowasjee, for the Respondents.

JUDGMENT,-The sole question for decision in this case is, what is the true measure of damages for breach of a certain c. i. f. contract. The defendants respondents agreed to sell to the plaintiffs appellants 590 bags of rice at Rs. 18-8.0 per bag, c. i. f. to Oolombo. The terms of the contract were that shipment was to be made per Ss. "War Panther" or any other steamer from Bassein before the 20th Dasember 1918, payment to be made on handing over bills of lading by sellers to buyers at Rangoon. Defendants respondents did not ship any rice at Bassein under this contract before the 20th December 1918, or at any time. It was, therefore, impossible that any documents in pursuance of the contract should ever have come into existence, and none could, therefore, be banded over at Rangoon or anywhere else. The learned Judge on the Original Side of this Court held that the damages to be awarded were the difference between the contract rate and the market rate prevailing at Rangoon on the 20th December 1918. He apparently held that a c. i. f. contract is a contract for the sale of doeuments and not a contract for the sale of goods. He apparently followed the case of Karberg & Co. v. Blythe, Green, Jourdain & Oo. (1).

It is contended before us on appeal that the measure of damages is the difference between the contract rate and the market rate at Colombo at the time that the goods might be expected to have reached there. had the contract been duly carried out.

What a c, i.f. contract is, is fully laid down in Biddell Brothers v. E. Olemens Horst Co. The seller undertakes to sell the specified goods, to ship them to the place agreed upon, to obtain a contract of the affreightment and policies of insurance and

^{(1) (1916) 1} K. B. 495; 85 L. J. K. B. 665; 114 L. T. 152; 21 Com. Cas. 174; 18 Asp. M.IC. 285; 60 S. J. 156; 32 T. L. R. 188,

^{(2) (1911) 14}K, B, 214,

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to hand over the bill of lading and the policies to the buyer. Such a contract provides for delivery of the goods to be made by handing over the documents, and when this is done, the seller has performed the contract in full and is relieved of further liability. In the present case, the seller did nothing to carry out the contract, and it is contended that the breach of the contract consisted in his not handing over the documents at Rangoon.

In the case relied on in the Court below, the learned Judge appears to have acted on the opinion of Scrutton, J. He had held that a c. i. f. contract is not a sale of goods but a sale of documents relating to goods, and damages were awarded on the ground that regard must be had to the breach committed by him, which was the failure to hard over the documents. But in the Court of Appeal, two of the Lord Justices distinctly held that this was not a correct view of a c. i. f. contract. Banker, L. J., said, "The contract on the part of the sellers is a contract for the sale of goods whereby the sellers slso undertake, inter alia, to enter into a contract of affreightment to the appointed destination, which contract will be evidenced by the Bill of Lading, and, secondly, to take out a rolley or policies of insurance upon the terms current in the trade," and dealing with the statement made by Serutton, J., in his judgment that "the key to many of the difficulties arising in c. i. f. contracts is to keep firmly in mind the cardinal distinction that a c, i. f. sale is not a sale of goods but a sale of dosuments relating to goods," he said, "I am not able to agree with that view of the contract that it is a sale of documents relating to goode. I prefer to look upon it as a contract for the cale of goods to be performed by the delivery of dcouments, and what those dccuments are, must depend upon itself." the terms of the contract Warrington, L. J., in his judgment said. "Ineidentally I desire to say that I entirely agree with Bankes, L. J., in the remarks he has made about the statement made by Serutton, J., that such a contract as this is a contract for the sale of dccuments. I need not say that it is with much deference that I express my disagreement with a statement of that sort made by a Judge with such

Scrutton, J., but it seems to me that it is not in accordance with the facts relating to these contracts. The contracts are contracts for the sale and purchase of goods, but they are contracts which may be performed in the particular manner indicated by that passage from the judgment of Hamilton, J., which I have just read; in particular, that the delivery of the goods may be effected first by placing them on board ship, and secondly by transferring to the purchaser the shipping documents."

The judgment of Hamilton, J., referred to was given in the case of Biddell Brothers v. E. Clemens Horst Co. (2). That this view is the correct view is clear from the judgments in the House of Lords in Johnson v. Taylor Brothers & Co., Ltd. (3). Their Lordships were dealing with the question as to whether leave should be given for service out of the jurisdiction of a writ of summons. Where the breach of a contract which is the founds. tion of the action was committed within the jurisdiction, leave would be granted, but where the breach was committed outside the jurisdiction, leave is not, as a rule, granted. The facts of the case were practically the same as the fasts before us. The seller had shipped no goods. That breach had been committed outside the jurisdiction and the breach to deliver documents was committed within the jurisdiction and it was sought to obtain leave by reason of this latter breach. The Lord Chancellor held: "The real complaint of the respondents against the appellant is that he did not, according to his contract, put on board ship the goods which he had contracted to sell. It is ludicrous to suppose that their substantial complaint lies in the withholding of paper symbols which could have no meaning, and which, indeed, could have no existence when once the original breach had been committed." Lord Danedin said: "Turning now to the present case, what is it that the plaintiff really complains of? It is that the ore was not shipped in order to be forwarded. That is the gist of the whole matter, The non-tender of the shipping documents might have constituted a breach if the ore had been shipped, but when the ore was not shipped, no shipping documents

(3) (1920) A. C. 144; 89 L. J. K. B. 227; 122 L. T. 130; 25 Com. Cas. C9; 64 S. J. 82; 36 T. L. R, 62.

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could be called into existence, and the breach of non tender was, so to speak, swallowed up by the prior breach of nonshipment." Lord Atkinson said the same. "But here the seller has in breach of his agreement failed to ship the goods. By doing so he has made the creation, and, of course, the tender, of the shipping documents impossible. That is a nesessary but collateral ecusequence of the main substantial breach of his contract," Lord Buckmaster said: "In the present instance the refusal to ship the goods ie, in my opinion, the whole of the breach. Unless and until the goods are shipped, the shipping documents cannot come into existence, and refusal to tender such documents is consequent upon the refusal to put the goods on board. It is perfectly true that without the documents, the title to the goods is not complete, that delivery is not effected, and it may be that in an action for non-delivery cf the documents the measure of damage would be the same as that for non-delivery of the goods."

Regarding, therefore, a.c. i. f. contract as a contract for the sale of goods and not as a contract for the sale of documents relating to goods, and having regard to the fact that the seller put no goods on ship board and that, consequently, the shipping documents could not come into existence, it is clear that the failure to tender the shipping documents has no relation to the damages arising from the breach of the contract as a whole.

It was at one time contended that damages could not be recovered for loss of market on a contract of carriage by sea, but this view was rejected in Dunn v. Bucknall Brothers (4). Colline, M. R., said, "Wherever the eirenmstances admit of calculations as to the time of arrival and the probable flietus. tions of the market being made with the same degree of reasonable certainty in tha ease of a sea as of a land transit, there ean be no reason why damages for late delivery should not be calculated as. cording to the same principles in both CA908."

The ries in this suit was purchased to be delivered at Colombo with a view of re-sale (4) (1902) 2 K. B. 614; 71 L. J. K. B. 963; 51 W. R. 100; 87 L. T. 497; 18 T. L. R. 807; 9 Asp. M. C. 336; 8 Com. Cas. 183,

there. The time that would be occupied in the transit from Bassein to Colombo would be four or five days under ordinary circumstances. The plaintiffs appellants, therefore, would be able to calculate the time of arrival and the probable fluctuations of the market, and they bought with reference to the probable rate of the market and this fact the defendants respondents must be taken to have realized.

The ordinary rule as to the measure of damages is to be found in section 73 of the Indian Contrast Act. The party who suffers by the breash is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

The loss that would be caused to the plaintiffs appellants in this case would be the loss of the market at Colombo and not the loss of the market at Rangoon. That loss was due, in the present case, solely to the breach by the seller of his contract to ship the rice at Bassein and send it to Colombo. That, as has been shown, is the principal and substantial breach of the contract. The failure to deliver the shipping documents has either nothing to do with the loss arising from the breach of the contract, or has been swallowed up in the principal breach.

In Williams Brothers v. El. T. Agius Ltd. (5) it was held that the true measure of damages was the difference between the contract price and the market price at the time of the breach. That was also c. i. f. contract case. In the course of his jadgment in that ease, Lord Danedin drew attention to the distinction which must be made batween cases in which damages were elaimable in consequence of a total breach and eases in which damages arose from delay. Referring to Wertheim v. Ohicoutimi Pulp Co. (6) he said: "The buyer, therefore, got the goods, and the only damage he had suffered was in delay. Now, delay might have prejudiced him; but the amount of prejudice

(6) (1911) A. C. 301; 80 L. J. P. C. 91; 104 L. T. 226; 16 Com. Cas. 297.

^{(5) (1914)} A. C. 510; 93 L. J. K. B. 715; 110 L. T. 65; 19 Com. Cas. 20); 58 S. J. 377; 30 T. L. R. 851.

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was no longer a matter of speculation, it had been put to the test by the goods being actually sold; and he was rightly, as I think, only held entitled to recover the difference between the market price at the date of due delivery and the price he actually got. But when there is no delivery of the goods the position is quite a different The boyer never gets them and he is entitled to be put in the position in which he would have stood if he had got them at the due date. That position is the position of a man who has goods at the market price of the day-and, barring special eiroumstances, the defaulting seller is neither mulet in damages for the extra profit which the buyer would have got owing to a forward re-sale at over the market price, nor can he take berefit of the fact that the buyer has made a forward re-eale at under the market price."

The authorities, therefore, elearly show that, in this case, the only breach or, at any rate, the principal and substantial breach for which damages are to be awarded was the failure to ship the goods in order that they might be delivered to the boyer at Colombo, and, under the law, damages are to be awarded to place the buyer in the same position as he would have been in, had the contract been duly carried out and the goods delivered to him on due date. In order to put plaintiffs appellants in the position that they would have been in had this contract been duly performed, the damage to which they are entitled is the difference between the contract rate and the rate at which the goods could have been sold by them at Colombo had they been delivered on due date.

The parties are agreed that the rate prevailing at Colombo, which is to be taken to calculate the amount of damages, is Re. 26 per bag.

The appeal will, therefore, be accepted and the decree of the lower Court will be set aside, and a decree will be passed in favour of the appellants for the sum of Rs. 4,425 with costs on that amount in this Court and in the Court below.

We certify for two Counsel.

W. C. A.

Appeal accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 874 OF 1920.
February 6, 1922.
Present:—Mr. Justice Stuart.
THE SECRETARY OF STATE FOR

INDIA IN COUNCIL—PLAINTIFF

- APPELLANT

versus

MULLA-DEFENDANT-RESPONDENT.

Cantonment land—Ejectment—Agra Tenancy Act (II of 1901), applicability of—Secretary of State—Owner of Cantonment lands—Adverse possession—Person occupying Cantonment land, position of—Coste—Plaintiff suing in wrong Court and on wrong cause of action but succeeding—Defendant's costs, liability for.

The provisions of the Agra Tenancy Act do not apply to lands lying in Cantonment areas as they are under the direct administration of the Government of India. [p 582, col. 1.]

The Secretary of State is absolute owner of all Cantonment land, unless he has parted with the ownership. There can be no adverse possession against him. [p. 583, col 2.]

A person occupying land in Cantonments, which has not been specifically transferred by the Secretary of State, is in the position of a tenant or in the position of a licensee. [p. 582, col. 2.]

Where a plaintiff institutes a suit in a wrong Court on a wrong cause of action and on assertions, which he is unable to prove, but ultimately succeeds on appeal, he should pay his own costs throughout and those of the defendant. [p. 584, col. 1.]

Second appeal against the decision of the District Judge, Shabjahanpur, dated the 9th April 1920.

Mr. L. M. Banerji, for the Appellant. Mr. Mulhtar Ahmad, for the Respond.

JUDGMENT .- The facts of the suit out of which this appeal arises are that Mulla Kachi has been in possession of three 1594/1, 1594/2 and plots Nos. eitnated in Shahjahanpur Cantonments for over 20 years before the date of suit. He has been enlivating these plots which are of an aggregate area of about balf an aere. He purchased the plot by three sale-deeds, the first of the 10th of January 1895, the seecnd of the 20th of July 1896 and the third of the 14th of August 1896. On the evidence, he has never paid any rent in respect of these plots and his title to occupy the same was never challenged until the institution of the present proceedings. It would appear that in the year 1911 Babu Shimbbu Narain was appointed as Record Officer for the Shabjahanpur Canton.

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ments. Until this appointment, Mulla had been entered as proprietor of plots Nos. 1594. 1 and 1594.2, other persons being recorded as proprietors of No. 1601. Babu Shimbbu Narain altered the entry and declared Mulla to be a tenant. Mulla holds other Cantonment land admittedly as a tenant. Later on, the rent of these three plots was recorded as Rs. 5-8-0. In 1916 the Cantonment Authorities sued to eject Mulla under the Tenancy Act as a tenant-at-will from the half asre in question in the Court of an Assistant Collector. The plaintiff describes him as a non-occupancy tenant. The suit was decreed. Mulla appealed to the District Judge. The District Judge found on the merits that Mulla was proprietor of Nos. 1594-1 and 1594-2 and a portion of 1601. He directed his ejectment from the remaining portion of 1601. The Secretary of State appeals to this Court against the partial dismissal of the claim demanding that Mulls be ejected from all the three plote.

The first point for decision is, whether a Bent Court had jurisdiction. I find that the Bent Court had no jurisdiction in the matter. The Tenancy Act applies to the territories administered by the Governor of the Province of Agra with the exception of certain specified areas. The land in dispute is situated in Cantonments. Cantonments are under the direct administration of the Government of India. This is clear from Army Regulation, Volume II, Article 400, and the following articles. The suit was thus instituted in a Court which had no juris. distion to deside it. If the land had been land to which the Tenancy Act applied, Mulla must have been held to have acquired ossupancy rights over two of the numbers and a portion of the third, but as the Tenancy Act has no application, he has not obtained the privileges of an occupancy tenant. Mulls took the objection in the Court of first instance that the suit had been instituted in the wrong Court. appeal lay, in any circumstances, to the District Judge, as he asserted proprietary title. Section 197 of the Tenancy Act thus has application and, as I have before me all the materials necessary for determination, I must dispose of the appeal as though the suit had been instituted (as it should have been) in a Civil Court, I thus

take it as an ordinary suit for ejestment. What is the position of Mulla? There can be only one answer to that question. There is a very long series of decisions from 1866 onwards; Carey v. Robinson (1), Babu Ram .. chand v. Collector of Mirzapur (2), Patterson v. Secretary of State (3), Secretary of State v. Jagan Prasad (4), Secretary of State v. Vamanrav Narayan Chiplunkar (5), Bank of Upper India Ld., Mussoorie v. Secretary of State (6) and Kaikhusru Aderji Ghaswala v. Secretary of State (7). The last decision is a decision of their Lordships of the Privy Conneil. From these decisions it is clear that the Secretary of State is absolute owner of all Cantonment land, unless it can be proved satisfactorily that he has parted with the ownership. In the absence of evidence, as is the case here, all Cantoument land balongs to the Secretary of State. There can be no adverse possession against him. The only position open to a person occupying land in Cantonments which has not been specifically. transferred by the Secretary of State, is the position of a tenant or the rosition of a licensee. It has been found on the facts that Mulla is not a tenant. He has never paid rent. His position is thus that of a lisensee, and it is open to the Secretary of State to eject him at will by revoking his license. This appeal must, therefore, succeed.

I have asked the learned Government Advocate to consider the advisability of representing to the proper Authorities that this is a hard case. Mulla purchased what he believed to be proprietary rights in Shahjahanpur Cantonments over 20 years ago. The Cantonment Authorities did not question his title until 1911. From that year they have all along permitted him to

^{(1) 1} Ind. Jur. (N. s.) 88; Bourke 399.

^{(2) (1668)} N. W. P. H. C. B. 7.

^{(8) 8} A. 869; A. W. N. (1881) 45; 2 Ind. Dec.

^{(4) 6} A. 148; A. W. N. (1894) 6; 8 Ind. Dec. (N. s.) 758.

^{(5) 80} B. 187; 7 Bom. L. R. 735.

^{(6) 8} Ind. Cas. 1096; 83 A. 229; 7 A. L. J. 1194.

^{(7) 12} Ind. Cas. 117; 86 B. I; 15 C. W. N. 909; 10 M. L. T. 97; (1911) 2 M. W. N. 23; 14 C. L. J. 263; 13 Bom. L. R. 788; 8 A. L. J. 1219; 21 M. L. J. 1100; 38 I. A. 204 (P. C.).

MAUNG PHO MYA U. DAWOOD & CO.

remain in occupation of this land. They assigned no reason for ejecting him. ease would be a hard ease in any oirenmetances. It is particularly a ease in view of the fact that Shahjahanpur Cantonments, although it remains a Military Cantonment in name, has for many years not been occupied by troops. There seems to be no suggestion that the sessation of sultivation over this area is necessary in the interests of the safety of Shahjahanpur. If the object of this suit has been to assert the Secretary of State's proprietary title, that object will be sufficiently gained by my deeree, and Mulla might, then, be restored to the occupation of the land if be agrees to pay rent for it. In the result, I decree this appeal, but inasmuch as the Secretary of State instituted the suit in a wrong Court on a wrong cause of action and on assertions which he was unable to prove, I direct that the plaintiff pay his own costs throughout and those of the defendant.

J. P.

Appeal allowed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 112 CF 1920.
July 11, 1921.

Present :- Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

MAUNG PHO MYA AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

A. H. DAWOOD & Co. (BY ITS ASTORNEY ALIMAHOMED JIVARAJ)— PLAINTIPPS—RESPONDENTS.

Partnership—Purtnership not trading partnership— Money borrowed by one partner—Remaining partners, liability of—Indorsee of pro-note, claim by, nature of.

In the case of a partnership, which is not an ordinary trading partnership, there is, in the absence of evidence to the contrary, no implied authority in one partner to bind the others by executing negotiable instruments. [p. 585, col 2: p. 586, col 1.]

Per Robinson, C. J.—There is a distinction between suits based on a promissory-note and those on the original consideration for the note. An indorsee can claim merely on the notes, and cannot fall back

on the original loan [p. 586, col. 1.]

Maung Po Sin v. Vellayappa Chetty, 62 Ind. Cas. 315; 10 L. B. R. 321 and Karmali Abdulla Allarakia v. Bora Karimji, 26 Ind. Cas. 915; 39 B. 261; 17 M. L. T. 35; 2 L. W. 153; 17 Bom. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 21 C. L. J. 122; 25 M L. J. 5 5; (1915) M. W. N. (06; 42 I A. 48 (P. C.), distinguished.

Appeal against the judgment of Mr. Young, J., on the Original Side.

Mr. Chari, for the Appellants.

Mr. Autam, for the Respondents.

JUDGMENT.

DUCKWORTH, J .- The plaintiffs respondents, A. H. Dawood & Co., are the indorsees of several promissory-notes executed by Ma Kyaw, deseased, in favour of one Jamal Aboo. As holders in due course, they brought a suit against the present appellants and certain others for the resovery of Rs. 7,818.10 6 alleged to be due on 18 pro-notes. The heirs and legal representatives of Ma Kyaw, deceased, were included other defendants, 88 defendants. The including the present appellants, Manng Po Mya and Ma Mya May, were added as partners of Ma Kyaw, deceased. In fact, it was sought to hold the defendants liable on the pro-notes executed by Ma Kyaw, because they were her partners, and because the partnership passed under the name and style of Ma Kyaw,

The execution of the pro-notes by Ma Kyaw was not disputed, and it was not denied that the money was lent by Jamal Aboo for the partnership purposes.

The partnership also is admitted.

The real defence was that Ma Kyaw had no authority to execute negotiable instruments on behalf of the partnership, or to take loans from outsiders, and that the deed of partnership specified the manner in which a loan of money could be borrowed for purposes of the partnership.

Another point raised by the defence was, that Ma Kyaw was not the name of the firm, that the words "Ma Kyaw" used in the pro-notes represented her name and her personal signature, and that the pro-notes hore her name alone, and were executed by

her in her personal capacity.

The learned Judge on the Original Side found that Ma Kyaw was the name of the firm, and that Ma Kyaw, who obviously managed the business of the Mill, which was the subject of the partnership had authority to borrow money and to bind the firm by executing negotiable instruments, as security for the loans. He, therefore, gave the plaintiffs-respondents a decree for the amount claimed with costs.

Mr. Obari, on behalf of appellants, Maung Po Mya and Ma Mya May, who alone have MAUNG PHO MYA O. DAWOOD & CO.

appealed against the decree, argued the case at very great length, but I do not think it necessary to enter into all points argued by him, because, in my opinion, it is quite clear that the partnership in question was not a trading partnership, and, therefore, there must be evidence of the authority of any partner to borrow money on behalf of the firm, or to bind the firm by executing negotiable instrumenes.

The main business of the Mill was to mill other people's paddy, convert it into rice and sell, taking its profit in its milling charges. There is no sufficient evidence to show that it was habitual for this Mill to buy paddy, convert it into rice and sell that rice. It is, therefore, impossible to hold that this was in any sense a trading partnership, in regard to which the law is now settled. In such a case as this, as already stated, evidence of authority to contract loans for the partnership business is necessary, but there is no such evidence on the record.

This is not a case in which it is possible to infer that there was implied authority to bind the firm in this manner, and the mere fact that it may be very sommon in Burma to execute pro-notes for goods supplied on credit or for loans, will not warrant me in holding that, in this instance, Ma Kyaw had authority to borrow money or execute bills so as to bind her so partners by those transactions.

I am quite unable to agree with the learned Judge on the Original Side in holding that Ma Kyaw was the name and style of the partnership. There was a notice board at the Mill which bore the sign "Oktan Rice Mill," and if there was a name of the partnership at all, I think that the designation aforesaid must be taken as the name of the business.

It is perfectly true that Ma Kyaw was apparently allowed by the other partners to manage the business, and it is apparent that in doing so she used her own name, but with one exception the documents showed clearly enough that that name was used by her in her personal capacity and not in any sense as the name of the partnership in question. The sole exception to which I refer is the document, Exhibit B, filed in Civil Regular No. 55 of 1918 which bears the words "On Demand I, the undersigned, Ma Kyaw of

Dallah, mutually and severally promise to pay, etc."

It has been argued that this dosument was sufficient to show that Ma Kyaw was used as the name and style of the firm, but I am unable to agree that this is the case. words "mutually and severally" were obviously put in by the writer of the doenment, because he thought that that was the correct and legal way of writing a document of this description, and it would be going much too far to lay so much stress upon the use of these words as to dedues therefrom that they were intentionally used to show that Ma Kyaw was not acting in her personal capacity, but was using her name to represent the partnership. I am, therefore, unable to hold that the words "Ma Kyaw" represent the name of the business. That being so, it is manifest that, inasmuch as the notes did not bear the name of the partnership, the other partners cannot be held to be liable under them.

I am, of course, dealing with this appeal on the understanding that the respondents' suit must stand or fall on the notes. He is, as stated, merely the holder in due sourse. and the notes were not made in his favour, but in that of Jamal Abco. The case of Maung Po Sin v. Vellayappa Ohetty (1) is to be distinguished for two reasons :-(a) the managing partner was given a powerof attorney, under which he was entitled to borrow money, and (b) the plaintiff was not the indorses of the bill. In the same way the Privy Council case of Karmali Abdulla Allerakia v. Bora Karim'i (2) is readily distinguishable, insamuch as the plaint. iff was not an indorsee of the negotiable instruments, as is the ease here. In the esse of Shanmuganatha Ohettiar Srinivaes (3) Aiyar distinction this referred to in the judgment of Was Srinivasa Ayyangar, J., on page 732*, though, indeed, his remarks were in the nature of obiter dicta. The point, however, seems to

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^{(1) 6?} Ind. Cas. 815; 10 L. B. R. 821.

^{(2) 26} Ind. Cas. 915; 39 B. 261; 17 M. L. T. 85; 2 L. W. 133; 17 Bom. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 21 C. L. J. 122; 98 M. L. J. 515; (1915) M. W. N. 606; 42 I. A. 48 (P.C.).

^{(3) 85} Ind. Cas. 219: 40 M. 727; (1918) 2 M. W. N. 14; 81 M. L. J. 138; 4 L. W. 27; 20 M. L. T. 172.

AMARENDRA ERISENA DUTT C. MONIMUNJARY DESI.

be that, in the present case, the suit of the respondents, as indorsees, can only be on the notes as such, and that the considerations which appear to have influenced their Lordships of the Privy Council in Karmali Abdulla's case (2) have no bearing. This was, moreover, shown by the learned Judge on the Original Side in his judgment.

There is little doubt, therefore, that, in the present case, the other partners cannot be held liable on the notes in suit.

On the other hand, there is no doubt that Ma Kyaw was personally liable, and that, since she is dead, her legal representatives are liable, so far as regards such estate of hers as came into their possession.

So far as regards the present appellants, Maung Po Mya and Ma Mya May, the appeal must be allowed, and the suit of the respondents as against them, must be dismissed with costs in both Courts.

ROBINSON, C. J.—I agree. The distinction between suits based on the pro-note and those on the original consideration for the note must be clearly borne in mind. We are dealing here with an indorsee who can claim merely on the notes and who cannot fall back on the original loan.

in the case of partnerships, not of a mereantile character, there is co implied author. ity in one partner to bind the others by negotiable instruments. He must have express authority. It is otherwise in the ease of an ordinary trading partnership. The present partnership is no: what is ordinarily recognized as a trading partnership and there is no proof on the resord that would entitle us to regard it as such. Evidence as to the nature of the business and as to the practice of persons engaged in such businesses would be admissible but none has been given. There is no express authority and, therefore the appeal must susseed. In addition to the authorities cited, I would refer to Premabhai Hemabhai v. T. H. Brown (4) and Thaith Ottathil Kutti Ammu v. Purushotham Doss (5).

W. C. A.

Appeal allowed.

(4) 10 B. H. C. R. 319. (5) 5 Ind. Cas. 851; 9 M. L. T. 120; (1911) 1 M. W. N. 45; 21 M. L. J. 526. CALCUTTA HIGH COURT.
ORIGINAL CIVIL SUIT No. 628 or 1919.
March 2, 1921.

Present: -Mr. Justice Rankin.

AMARENURA KRISHNA DUTT AND

OTHERS - PLAISTIPPS

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MONIMUNJARY DEBI-DEFERDANT.

Gift, imperfect—Shares in limited Company—Transfer deed executed—Transfer not made in Company's register, effect of—Transfer, intended, whether can be treated as trust.

A. executed a transfer deed whereby he transferred certain shares in a Company to his wife and gave possession of them to her. She, however, did not, till after his death, complete the transfer deed by getting her name entered in the registers of the Company as share-holder, nor was it in his lifetime presented for registration with the Company:

Held, that the gift was not perfected as the donor did not do everything which, according to the nature of the property comprised in the gift, was necessary to be done to transfer the property. [p. 587, col. 1.]

Held, also, that as there was no equity to perfect an imperfect gift, the gift having been intended to take effect by way of transfer the Court would not hold the intended transfer to operate as a declaration of trust. [p. 587, col. 1.]

Mr. H. D. Bose, (with him Mr. N. N. Bose),

for the Plaintiffs.

Mr. D. N. Fose, (with bim Mr. B. Ghose), for the Defendant.

JUDGMENT .- In this case, at the conclusion of the evidence and the argument, I gave judgment upon the footing that the deceased had, during his lifetime, transferred certain shares to the defendant, Sreemati Monimunjary Dabi. At the trial, it was a common assumption of both sides, that if the widow soul! show that the deceased had executed in her favour a certain transfer deed, and had made over the same to her she would be entitled to susseed. Mr. H. D. B:se, for the plaintiff, after my judgment had been given, asked me to re hear argument upon the case in view of the fact that subsequent emsideration had indused him to think that this assumption was wrong. Bather than have the rights of the parties determined assording to any other principles than those of law, I assented to having the matter re-opened in argument before me. Now I am quite elear on the facts of this ease that the gift, which the deceased intended of these shares, was intended by him to take effect by way of transfer, and that he did not intend a trust. If, upon the evidence, I thought that it was open to the AMARENDRA KRISENA DUTT C. MONIMUNJARY DEBI.

widow to say that, on this question, her opportunity for addusing evidence had not been in the sirsumstances complete, I should not disturb my previous intention, and I should give judgment in her favour. however, satisfied, that in view of the evidence given at the hearing, it is not now open to the widow to profess a desire to contend that the gift of shares by her husband was not intended to take effect by way of transfer. As regards the shares in question, the deceas. el husband was the absolute registered owner. If one may apply language which is not strictly applicable even in England except to land, one may say that he was the owner of the legal as well as the equitable interest in the shares. He executed the transfer deed, which is in evidence, and, as I have held, he gave possession of it his wife. She. however, did not, till after his death, complete the transfer deed : nor was it in his lifetime presented for registration with the Company. In my opinion the gift was not perfected. The donor must have done everything which, assording to the nature of the property somprised in the settlement, was necessary to be done to transfer the property : Mitroy v. Lord (1), Eithards v. Delbridge (2). The donee must 10 the case of shares, such as those with which I am concerned (the Articles of Association of the Company had been put in evidence), have a present, absolute and unconditional right to have the transfer registered : Societe Generale de Paris v. Walker (3), Nanney v. Morgin (4), Moore v. North Western Ban't (5), Ireland v. Hart (6).

In these circumstances, I must, in this case, apply the principle that there is no equity to perfect an imperfect gift, and that the gift, having been intended to take effect by way of transfer, the Court will not hold the intended transfer to operate as a declaration of trust. The evidence with regard to the disposition of the dividend does not alter this position and is no stronger

(1) (1862) 4 De G. F. & J. 264; 81 L. J. Ch. 798; 8 Jur. (N. s.) 806; 7 L. T. 178; 45 E. R. 1185; 185 R. B. 185.

(2) (1874) 18 Eq. 11; 43 L. J.Ch. 453; 22 W. R. 594, (3) (1886) 11 App. Cas. 20 at p. 28; 55 L. J. Q. B. 169; 54 L. T. 389; 84 W. R. 662.

(4) (1888) 37 Ch. 846; 57 L. J. Ch. 311; 58 L. T. 238; 36 W. R. 677.

(6) (1891) 2 Oh. 599; 6) L. J. Ch. 617; 61 L. T. 456; 40 W. R. 93.

(6) (1902) 1 Oh. 522; 71 L. J. Ch. 276; 86 L. T. 385; 50 W. R. 315; 9 Manson 203; 18 T. L. R. 253.

than it was in the case of Milory v. Lord (1). Two cases, Merbai v. Ferosbai (7), Bhaskar Purshotan v. Sarasvitibai (8) were cited to me from Bombay, but, in so far as they qualify or whittle down the principles which I have endeavoured to explain, I am not prepared to follow them. The fact is this that, unless those principles be adhered to, every imperfect transfer will have to be made effectual by being construed as a perfect trast.

In these circumstances, the result is that the plaintiffs must succeed in the enit, but all the costs of the defendants after the first day of the hearing must be paid by the plaintiff to the defendants. As regards the costs of suit up to, and including, the first day of hearing, those must be paid by the defendant, Sreemati Monimunjary Debi. I am not prepared to make other defendants pay any costs.

As regards my first judgment, I have a copy of it, which is unsigned. To make the matter quite clear, what I purpose to do is to make the shorthand notes of the first judgment a schedule to this judgment.

SCHEDULE. Appeal allowed.

RANKIN, J.—In this case, I quite agree with the proposition that the matter should be treated with that degree of suspicion which is proper to claims which are made after a man's death against his estate. In the present case, I am not surprised that the parties have searched high and low for corroborative evidence on either side, but having regard to the extreme unreliability of certain witnesses, I think the evidence, in the end, is within a very narrow compass.

I do not think that the evidence of the plaintiff Amarendra Krishna Dutt, about what his father is said to have told him three years before his death, is worth anything at all. The statement that a dead man three years ago had said this or said that, is almost inevitable in such a case, and I am not in the least prepared to rely upon the evidence of Amarendra when he makes a statement of that sort, particularly as it is not corroborated by the evidence of any other brother to whom it is to be presumed some knowledge of the father's intention would be communicated. As regards the statement that the transfer deed, though not as filled up in the body of it now, was taken by Akhoy some time in August, shortly before his death, to the Stock Exchange to have the shares sold by means of one Protab Chunder Roy, that is not borne out by the evidence of this broker, and I do not in the least feel satisfied that is anything except a tale. Very much the same consideration applies to the witness Bholanath, a neighbour of the deceased, who, in my indgment, gave his evi-

(7) 5 B. 268; 3 Ind. Dec. (N. s.) 178. (8) 17 B. 436; 9 Ind. Dec. (N. s.) 315.

AMARENDRA ERISANA U. MONIMENJARY DEST.

dence with some vagueness and did not in the box impress me as a man whose oath proved the things which he said. Further, I am of opinion that the whole story as to what happened at the opening of the iron safe after the death some time in September, is a story which comes to nothing in either direction. Even if it be true that this lady's brother, Rashik, who seems not to be a very reputable person, immediately shouted that there was no such thing as shares the moment the shares were mentioned, and that immediately thereupon these somewhat numerous parties assisting in this function got into a state of noise and quarrel, while the lady stood by the threshold, I am entirely unable to draw any inference useful for the decision of this case from these facts. Now, I think that the documentary evidence in this case is by far the most important, but I failed to find any importance in a minute examination of the time and manner in which the transfer form was, after the death, signed by Monimunjary Debi by the pen of Rashik for the purpose of accepting the transfer.

The position shortly is this:- The one witness, apart from the lady's evidence, who says that Akhoy Kumar Dutt executed the document now before me; that it was years ago in the condition, as regards the body of it, that it is now in, is the broker Dunanjoy Mullick. He is corroborated by the evidence of Amarendra in this respect, as it would appear from Amarendra's evidence, that Muliick's signature was on that document in August 1918. Now, it is quite true that Dunanjoy Mullick is a relation of this lady, but he is a share. broker and he is just the sort of person who might reasonably be called in for the purpose of assisting Akhoy Kumar Dutt to execute the transfer deed. There is no improbability, and merely by reason of the relationship there is all the more probability, that he would be called in for that purpose. Now, the position is this. The transfer deed has on it the date 29th November 1916, and I know that the deceased made his Will within a couple of weeks or after that, in December 1916 the same year. When I come to that fact I have before me the high probability that Akshoy was minded to arrange his affairs for some reason or other towards the end of 1916. In the Will he expressly says that he has no cash or moveable estate for distribution, and I find from the evidence of the share certificate that these shares had been transferred to him as long ago as the 15th June 1907 He is very unlikely to have forgotten about this holding in the Bengal Timber Trading Company and his statement that he has no moveable estate for distribution is, I think, pretty strong evidence, taking it with the evidence of Mullick, as to the transfer deed, that Akshoy had disposed as he thought of these shares at that time.

Now, when he was disposing of these properties in this way, we know something about his state of mind, because he says that the plaintiffs in this suit, "Abinash and Amarendra naturally bore a strong hateful feeling to my wife and quite disrespectful to me, especially Abinash." Remembering that the evidence of the testator himself is by far the best class of evidence that can be appealed to by claimants against his estate, I think I have here ample evidence for this, that the testator was minded to give these shares to his wife and was of opinion, as the recital in the Will shows, that he

had effectively done so and that they no longer belonged to his estate. In these circumstances, although the date 29th November 1916 is in type and not in manuscript, I am satisfied, reading the circumstances together with the Will, that it was executed as on the date which it purports to bear.

It being, therefore, established that the testator was minded to give these shares to his wife and thought that he had effectively done so, it remains to consider the point which Mr. H. D. Bose very properly pressed. People often are minded to make gifts and yet do not complete the gift. That is quite true, but I am satisfied not only that the transfer deed was signed and witnessed, but that it was given effect to by parting with it to the wife with the intention that from that time she was to be the owner of the shares. In the first place, there is some presumption that if a man wants to make a gift he will do all that is necessary to effectuate his purpose. He is treating the matter in the Will as though the shares were not his, and, when I come to examine the evidence that the testator handed the paper over to his wife, I find the position to be this. The lady's evidence is confused and in some places unreliable, but it does seem fairly certain that both he and she had a private box of their own and they both had access from time to time to each others. The lady is an illiterate purda-nashin. If she were to be required to make her mark upon the transfer deed and to have the shares transferred into her own name with the result that dividend warrants would come addressed to her, it is very probable that that would produce a great deal of trouble and inconvenience both to the husband and to her every time that these matters had to happen. It is not an astonishing thing at all that, in these circumstances, the transfer deed should be made over to the wife, but that the transfer deed should not be presented for registration and a new share certificate taken out in the name of the purda-nashin lady. Every probability, it seems to me, is in the lady's favour. It is probable that the husband meaning to make a gift did make the gift; he thought he had made it and it is quite consistent that they should not do what would be very troublesome in its consequences, namely, get the shares put in the lady's name during her husband's lifetime. As regards the receipt of dividends, the lady says that her husband had, of course, to collect the dividends. Sometimes he made them over to her and sometimes it seems that he spent them, I do not know, whether on household expenses or upon his own; but the mere fact that he paid the dividends, as such, on any occasion to his wife, is corroboration of the gift, and there is no doubt, having regard to the relationship of the parties, that if he did not pay the dividends over as received to his wife he did so by her implied consent or at any rate as between her and him, upon the footing that it was with her permission. I think, under the circumstances, that the evidence proves to my satisfaction not only that the document was executed in November 1916, but that it was made over to the lady and that there is room for quite sensible reasons, why the transfer was not completed by the registration of the shares in the new name. The lady must, therefore, succeed in this suit. The suit will be dismissed with costs on scale No. 2.

QUAH CHENG GWAN U. MAUNG PO MYI.

LOWER BURMA OHIEF COURT.
SECOND CIVIL APPEAL No. 241 of 1920.
August 30, 1921.

Present: -Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

QUAH CHENG GWAN-PLAINTIFF-

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MAUNG PO MYI AND OTHERS—DEFENDANTS —RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59-Attestation—Standing by without signing as attesting witness, whether sufficient—Mortgage-deed—Registration defective—Evidence—Personal covenant.

To satisfy the requirements of section 59 of the Transfer of Property Act, the witnesses must sign their names after seeing the actual execution of the deed. Standing by and seeing the executant write something on the deed, without signing as attesting witness to the executant's signature, is not sufficient. [p. 589, col. 2]

Mortgage-deeds which are invalid for want of registration, or by reason of defective registration, are admissible in evidence to prove a personal covenant to pay, and, where there is no doubt that the consideration-money was paid, and there is an unqualified agreement to pay, the lender is entitled to a decree for the amount of the money lent with the interest due thereon. [p. 590, col. 1.]

Second appeal against the judgment of the Divisional Judge, Tenasserim, confirming a decree passed by the Additional District Judge, Tavoy.

Mr. Shaw, for the Appellant.

Mr. Maung Lat, for Respondents Nos. 1 and

JUDGMENT .- The plaintiff appellant has brought this suit on a mortgage deed, dated the 18th September 1917, executed by Maung Po Myi and his mother Ma Yaing. The deed resites that they desired to mortgage the properties specified for Rs. 3,000 at the rate of Rs. 1 4 0 per cent per mensem, and it continues, "we will re pay the principal with interest at once when the money-lender demands the same. If we fail to do so, the money-lender may sell these mortgaged properties assording to law and return the exesss money, if any, to us. We will make up the amount, if it is short," and, later on, the deed resites: "Under these conditions the rish man Quah Cheng Gwan lent the amount of Rs. 3,000 to the mother and son." When the suit was brought, Ma Yaing was doed, and her heirs and legal representatives had been brought on the resord. Manne Po 11

Myi did not defend the suit, and a mortgagedecree was passed against him. As regards Ma Yaing's liability, the mortgage failed, as it had not been properly attested in respect of her signature. The deed was first executed by Maung Po Myi, and bis signature was duly attested by two attesting witnesses. At that time Ma Yaing was ill in bed, and after execution by Po Myi, the deed was taken to her. The two attesting witnesses stood at the door and saw her write on the deed, but they did not sign themselves as attesting witnesses to her signature. To satisfy the requirements of section 59 of the Transfer of Property Act, the witnesses must sign their names after seeing the astual execution of the See Shamu Patter v. Abdul Kadir deed. Rowthan (1).

Plaintiff asked for a personal decree, and the question is, whether the mortgage failing in respect of Ma Yaing, a personal decree for the money can be given. The learned Divisional Judge has felt constrained by the decision in Bunscedhur v. Sujaat Ali (2), which follows the decision of their Lordships of the Privy Council in Narotam Dass v. Shee Pargash Singh (3), and another decision of their Lordships of the Privy Council in Kalka Singh v. Paras Ram (4), to hold that no personal liability accrued or could be enforced. In this we think he is clearly wrong.

In the first Privy Council, ease cited, their Lordships were dealing with a particular case, and they held that the document in question contained no personal covenant to pay the debt out of personal estate, or any other estate than the particular talue that had been hypothesated. In Bunscedhur's case (2), the mortgagor promised to re-pay the principal on a certain specified date, and interest in a certain month year by year. If the interest was not paid, the mortgages was to be at liberty to recover the same by suit. The

(2) 16 C. 840; 8 Ind. Dec. (N. s.) 853.

(4) 22 C. 434; 22 I. A. 68; 6 Sar. P. C. J. 545; 5 M. L. J. 14; Rafique & Jackson's P. C. No. 137; 11 Ind. Dec. (N. s.) 290.

^{(1) 16} Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 823; 12 M. L. T. 888; (1912) M. W. N. 985; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 89 J. A. 218 (P. C.).

^{(3) 10} C. 740; 11 I. A. 83; 8 Ind. Jur. 275; 4 Sar. P. C. J. 522; Rafique & Jackson's P. C. No. 73; 5 Ind. Dec. (N. s.) 496.

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document then proceeded that, if the mort gaged property should ever be sold by auction for arrears of Government revenue or for any other reason, then the mortgagee might recover both the principal and interest in any manner they might consider feasible, either from the person or other moveable or immoveable property of the mortgagor; and that, if the principal was not paid by the agreed date, then the mortgages might institute a suit to recover from the mortgaged property. In other words, it was held that a special agreement had been made as to the remedies which were to be open to the mortgagee, and that, therefore, he could not recover his loan in any other way. In Kalka Singh's case (4), the same principle is laid down. Their Lordships stated: "In the next place, although an unqualified admission of a debt, no doubt, implies a promise to pay it, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case." In all three eases it will be observed that it was held that there was no general promise to pay but only a promise to pay in a particular way, and, therefore, these authorities do not apply to a case where the mortgagor has not limited his liability to pay only in a particular manner, and that was the view of the law taken in the case of Ethel Georgina Kerr v. Clara B. Ruxton (5).

It is unnecessary to refer to the authorities which lay down that mortgage-deeds which are invalid for want of registration or by reason of defective registration, are admissible in evidence to prove a personal covenant to pay. What has to be considered, therefore, in each case is the terms of a particular document.

In the present case there is no doubt that the consideration money was paid. There are concurrent findings by both the lower Courts as to this, and we see no reason to differ from them. There is an express promise to re-pay, and the dosument provides that, on failure to do so, the mortgagee may proceed against the mortgaged property. There is, further, the express admission of liability to pay any balance that might still remain outstanding after the property had

been brought to sale. There is nothing in the document to show that the agreement to pay was qualified in its terms, or that there was any idea of substituting a remedy against the property for the initial liability to re-pay the loan. The plaintiff, therefore, was, entitled to a decree against the estate of Ma Yaing for the amount of money lent with the interest due.

We accept the appeal and reverse the desisions of the Courts below with costs throughout.

W. C. A.

Appeal accepted.

CALCUTTA HIGH COURT. APPEAL PROM OBIGINAL CIVIL No. 66 OF 1920.

Fabruary 4, 1921. Present : - Sir Lanselot Sanderson, Kr., Ohief Justice.

and Mr. Justice Richardson. BISWANATH DAS GHOSE-PLAINTIFF - APPELLANT

versus

SHORASHIBALA DASI AND OTHERS DEFENDANTS-RESPONDENTS.

Hindu Law-Marriage-Sudras-Intermarriage bet. ween Bengali Kayastha and Tanti woman, validity of -

Sons, whether legitimate.

A marriage which actually takes place between a Bengali Kayastha and a Tanti woman, both regarded as Sudras in Bengal, is valid in law and the sons of the union are legitimate and entitled to inherit the property of their father. [p. 596, col. 2; p. 597, col. 1.]

Appeal from a judgment of Greaves, J., dated the 22nd December 1919, passed in the exercise of the Ordinary Original Civil

Jurisdiction,

Mr. M. N. Kanjilal (with him Messre, P. N. Chatteries and M. O. Ghose), for the Appellant.

Mr. N. N. Sircar, (with him Mr. S. O. Bose), for the Raspondent, Shorashibala.

Mr. B. O. Ghose, (with him Mr. Langhford James), for the Respondent, Niranjan Krishna.

JUDGMENT.

SANDERSON, C. J .- This is an appeal by the plaintiff against the judgment of Mr. Justice Greaves whereby the learned Judge dismissed the suit.

The plaintiff is an infant and saed by his mother and next friend. The suit was brought (i) for a declaration that the lis BISWANATH DAS GHOSE O. SHORASHIBALA DASI.

entitled to an undivided half share of and in the house and premises Nos. 155, 156.1 and 156-2, Baitakhana Road (formerly No. 155, Old Baitakhana Bazar Road) in the town of Calentta, subject to the life-interest thereon of the defendant Srimati Shorashibala Dasi; (ii) for a declaration that the indenture of conveyance, dated 25th day of March 1918, executed by the defendants, Srimati Shorashibala Dasi, Nogendra Nath Das Ghose and Srimati Golapmoni Dasi in favour of the defendant Niranjan Krishna Das, is void and inoperative as against the plaintiff; (iii) for a deslaration that the defendant Niranjan Krishna Das is not absolutely entitled to the whole of the said premises Nos. 156, 155-1, 156-2, Baitakhana Road (formerly No. 155, Old Baitakhana Bazar Road) in Caloutta.

The plaintiff further prayed for an injunction to restrain the defendant Niranjan
Krishna Das, from dealing with the said
house and premises, panding the final
determination of the suit: for a Reseiver and
in the alternative that the defendant Shorashibals might be ordered to pay to the plaintiff the sum of Rs. 12,000.

At page 155 a family tree is set out, and this may be conveniently referred to :-

GOLAK CHANDRA DAS GHOSE 8m. Jaharmani Dasi, Doyal Chandra by Sm. Golapdied 4th July 1918 Das Ghose moni Dasi, (unmarried). (defendant 1 No. 3.) . Sm. Shora. Nogendra Jogendra. Sm. Charn-- shibala Dasi, nath Das nath Das bala Dasi, (defendant Ghose, Ghose, (alleged to No. 11 (defendant died 22nd have been (unmarried), No. 2) March 1916 married (married). July for August 1905.) Biswanath Das Ghose, Sm. Provabati, (Minor), (Minor) Born 3rd Novem. Plaintiff, . Born 26th January 1911. ber 1908.

The plaintiff alleges that he is the legitimate son of Jogendra by his wife Charabala and that he was born on the 26th Japuary 1911.

Storaebibala, the 1st defendant, was eister of Jogendra; Nogendra, the 2nd defendant, was trother of Jogendra. Golapmoni, the 3rd defendant, was the mother of Jogendra, and Niranjan Krishna Das, the 4th defendant, was alleged to be the purchaser of the property in question from the first three defendants by a conveyance dated the 24th March 1918.

The main issues in the case were: (i) Was Charubala lawfully married to Jogerdra? (ii) Is the plaintiff the legitimate son of Jogerdra? The plaintiff alleged that in July or August 1905, Jogerdra duly married (Charubala, the mother of the plaintiff, according to the Hindu Shastras, and they lived as husband and wife until the death of Jogerdra on 22rd March 1916; that there was issue of the said marriage, vis., Probhabati, born on 3rd November 1908, and the plaintiff, born on 26th January 1911.

The first three defendants in the written statement alleged that Jogendra was never married to Charrbala, but that he kept her as his mistress for sometime, and that Jogendra ceased to live with her since 1909 and that the plaintiff was neither the legitimate nor the illegitimate con of Jogendra.

The 4th defendant, Niranjan Krishna. Dar, alleged that he verily believed that Charubala was a woman of the town.

The feets relating to the property in question may be taken from the statement contained in the learned Judge's judgment, as follows:—

"One Jaharmani Dasi, the aunt of Sherashitala, Nogendra and Jogendra, by ber Will, dated the 11th April 1905, appointed Shoraebitala cole executrix and directed her to pay all her just debts, and gave to Shorashibala absolutely No. 97, Beadon Street, and gave No. 156, Old Baitakhana Bezar Road (now represented by the premises in suit) to Nogendra and Jogendra absolutely in equal moieties subject to a life-interest in favour of Shorashibala, and she directed her executrix to pay monthly out of the income of her estate, Rs. 10 a month to Golspmoni for her maintenance during her life and to Nogendra and Jogendra each a like sum if they or any of them did not live under Shorashibala's eare at her own residence. The testatriz BIBWANATH DAS GROSE U. SHORASHIBALA DASI.

gave certain legacies and left all other her moveables and immoveables to Shorashibala. Jaharmani died on the 4th July 1913, without having revoked or altered her Will, and on the 4th January 1918, Probate of the Will was granted out of this Court to Shorashibala. From annexure 'B' to the affidavit of assets, it appears that no entry was made against the item 'amount of debts, due and owing from the deceased payable by law out of the estate.' On the 25th March 1918, Shorashibala, Nogendra and Golapmoni executed in favour of the defendant Niranjan a conveyance of the premises in suit for Rs. 12,800.

"The conveyance recites, inter alia, the Will of Jaharmani, the grant of Probate, the death of Jogendra on the 22nd March 1916, unmarried and intestate, and leaving his mother Golapmani as his sole beiress and legal representative, and that Shorashibala as executrix got possession of the estate of Jaharmani and paid up the legaeies and maintenance mentioned in the Will, and that Shorashibala, being in need of money for earrying out the directions in the Will as aforesaid, had agreed to sell the premises in suit, and that Nogendra and Golapmoni had agreed to join as reversioners so as to convey to the purchaser a good and valid title. Shorashibala, Nogendra and Golapmoni grant, sell, convey and transfer to the purchaser the premises in suit and all the estate, right, title, inheritance, use, trust, property, claim and demand of the vendors and of each of them into and upon the said property and the conveyance contains the usual covenant that the vendors and each of them had good right, full power, absolute authority and indefeasible title to convey and a eoverant for quiet possession and to indemnify and for further assurance.

"Shorashihala, Nogendra and Golapmoni on the same day swore an affidavit stating (paragraph 4) Jogendra's death, intestate and unmarried, and that Golapmoni was his heir and (paragraph 5) that besides themselves no other persons had any interest in the premises in suit and (paragraph 6) that the legacies and maintenance had been fully paid and discharged by the executrix. The same persons on the same day executed a bond in a sum of Rs. 25,600 in favour of the purchaser which recites,

one of the conditions of the bond being to protect the purchaser against any persons claiming to be the heirs of Jogendra. Neither the conveyance nor the affidavit nor the bond makes any reference to any debts of the deceased Jaharmani."

After referring to the evidence, doenmentary and oral, the learned Judge held
that a seremony of marriage was gone
through between Jogendra and Charnbala,
and that Charnbala was recognised as Jogendra's wife, and her children were recognised as his and that she lived with
him as his wife in Upper Chitpore
Road.

He forther held that Jogendra was a Kayestha and that Charnbala was of the weaver class and he then stated that it was necessary to consider whether a marriage between them could be a valid marriage and the children legitimate.

In this Court, the above mentioned findings of fact of the learned Judge have not been challenged by the learned Counsel who appeared for the first three respondents or by the learned Counsel who appeared for the 4th respondent, Niranjan Krishna Das.

The learned Counsel, who appeared for the appellant, challenged the learned Judge's finding that the plaintiff's mother was of the weaver class and urged that the Court should hold that she was a Kayastha: I see no reason, however, to differ from the learned Judge's finding in this respect and, consequently, the case must be decided upon the learned Judge's findings of fact.

The learned Judge further said that he must hold that, according to the law as laid down in Bengal, Kayasthas are Sudras and that the two (by which I understand him to mean the Kayasthas and weavers) are sub-divisions of the same caste. The learned Counsel for the first three respondents said that he disputed that finding, but he did not discuss the cases to which the learned Judge referred and on which he based his judgment in this respect. The case of Asita Mohan Ghose Moulik V. Nerode Mohan Ghose Moulik (1), one of the cases to which the learned Judge referred,

the regenerate."

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was decided by Chandhari and Newbould.

JJ., in 1916 and at pages 904 and 905*

will be found the following passages:—

Judge that Kayasthan, according to the law prevalent in Bangal, are considered as Sudras. The question has frequently arisen in connection with cases of adoption, and it is settled that as Sudras no religious ceremony is in their case necessary, but that the mere giving and taking of a son is sufficient to give validity to adoption amongst them . . . They have been treated as Sudras in our Courts for a long series of years and their status as such cannot now be questioned.

"Bangali Kayasthas have been uniformly treated as Sudras in our Courts and the question does not appear capable of serious argument, although attempts may have recently been made by some members of the community to trase their descent from Khatriyas, and some of them may have actually taken the sacred thread as belonging to

This judgment, as I have already said, was not in any way shallenged by either of the learned Counsel who appeared for the respondents.

It must, therefore, be taken, as the learned Judges said in the above-mentioned ease, that the Bangali Kayesthas are treated as Sudras in this Court.

It follows, therefore, that Jogendra, being a Kayastha, and Charubala, being a Tanti, were members of two sub-divisions of the same easte, viz, the Sudras. The question, therefore, arises whether the marriage between Jogendra and Charubala was invalid by reason of the fact that they belonged to two sub divisions of the Sudra easte.

The learned Judge relied upon the opinion expressed by Mitter, J., in Narain Dhara v. Rakhal Gain (2), and upon the opinion of Sir Gooroodas Banerjes to be found at pages 75 and 76 in the 4th edition of his book on the Hindu Law of Marriage and Stridhan.

Council in Inderun Valungypooly Taper v. Ramawermy Pandia Tulaver (3) that if (2) 1 C. 1; 23 W. R. 334: 1 Ind. Dec. (N. s.) 1.

(8) 13 M. I. A. 141; 3 B. L. R. P. C. 1; 12 W. R. P. C. 41; 2 Suth. P. C. J. 267; 2 Sar. P. C. J. 498; 20 E. R. 504.

*Pages of 20 C. W. N.-[Ed.]

there has been a marriage in fact, there would be a presumption in favour of there being a marriage in law.

In this case the learned Judge, as I have already stated, found that there was in fact a marriage between Jogendra and Charubala, that Charubala was recognised as his wife, and her children were recog. nised as his, and that she lived with him as his wife in Upper Chitpore Road, Calentta. These findings stand unchallenged. There is, therefore, a presumption that the marriage was valid and according to law, and the onus rests on the respondents to displace this presumption. No evidence of any usage or eustom applicable to the parties was given, except that Charubala, of the plaintiff, in erossthe mother examination, said that Jogendra Nogendra were Kayastbas, and that they could only marry Kayasthas: bala, however, was, at the time, asserting that she and her father also were Kayasthas and that there was a valid marriage between Jogendra and herself. The validity of a marriage between a Kayastha and Tanti was obviously not present to her mind.

In this Court the learned Counsel for the first three respondents urged us to remit the case for a further hearing upon the question whether, by the usage and eustom in this part of Bengal, a Kayastha could marry a woman of the Tanti class, and the learned Counsel was willing to submit to any terms as to costs which we might fix. This was opposed by the learned Counsel for the plaintiff. The case of these respondents in the Court below was, in the first place, that Charnbala was a kept mistress and that Jogendra had not married her; but the case was not confined to that as appears from the evidence and also from the learned Judge's judgment. It was obviously contended on behalf of these defendants that, even if there was a marriage between Jogendra and Charubala, it was not valid, breause Jogendra was a Kayastha and Charubala was a Tanti, and evidence was called by the defendants to show that Charabala was a Tanti; that being so, in my judgment, if the defend. ants were desirous of relying on any usage or sustom which went to show the invalidity of such a marriage, they should BISWANATH DAS GROSS &. SHORASHIBALA DASI.

have produced evidence in respect thereof at the trial. No such usage or custom was pleaded, nor was any evidence given thereof and, under these sireumstances, in my judgment, we should not now be justified in remitting this case for a further bearing in respect of this point. already stated, the defendants abstained from calling any evidence as to usage and evetom prevailing in this part of Bengal, but, for the purpose of rebutting the above-mentioned presumption, reliance appears to have been placed upon the to which the learned Judge opinion referred. In Narain Dhara v. Rakhal Gain (2), it was decided that, according to the doetrine of the Bengal School of Hindu Law. a certain description only of illegitimate sons of a Sudra by an unmarried Sudra woman is entitled to inherit the father's property in the absence of legitimate issue. viz, the illegitimate sons of a Sudra by a female slave or a female slave of his slave.

That decision has been disapproved of in a recent Fall Bench case, Rajani Nath Das v. Nitsi Chandra De (4). But the opinion of Mitter, J., in Narain Dhara v. Rakhal Gain (2), upon which Greaves, J., relied, was not overruled though it was pointed out by Mookerjee, J., in Raiani Nath Das v. Nitai Chandra De (4) at page 373,* that, "although it has been sometimes asserted that inter-marriages between different castes is prohibited in the present age, the authorities are not unanimous as to how far this prohibition extends to intermarriages between different castes of the Sudra elass in Bengal."

The opinion of Mitter, J., in Narain Dhara v. Rakhal Gain (2) was as follows:—
"In an ordinary case, where it is established that parties have lived together as husband and wife for a long length of time, it is consonant with natural justice to presume a valid marriage between them; and I am not aware of any peculiar provision in the Hindu Law which is inconsistent with such a presumption as this. But in this case there is no room for it, for the parties are of different castes, and a valid marriage between them is impossible unless same.

(4) 63 Ind. Cas. 50; 32 C. L. J. 333; 25 C. W. N. 433; 48 C. 643 (F. B.).

tioned by any peculiar social custom governing them: see Vayavastha Darpana, p. 1038, and Ward's Account of the Hindus, Volume I, page 94."

Markby, J., however, in giving judgment said:- "The only doubt I have is as to the reasons given by my learned colleague for holding that the District Judge is wrong in presuming that there was in this case a valid marriage, and that the son of Radhoo was, therefore, legitimate. I understand my learned colleague to consider that the presumption is excluded, because the alleged wife is of a different easte from the husband and that, unless sanctioned by custom, such a marriage is not legally binding. Upon a question of this kind I should hesitate greatly before I differed from my learned colleague, it being a question with which he is peculiarly well qualified to deal, I only wish to point out that no legal authority is quoted for this position. In the ancient text books no such authority could be found, because it is admitted (i) that in ancient times the Sudras were but one general easte or elass; (ii) that in ancient times the marriage of a man with a girl of a different class or easte was not prohibited. Whether the comparatively modern prohibition against inter-marriage of persons of a different class or easte extends in this part of India to the modern sub divisions of the Sudra caste or elass is a matter of very great importance. The restrictions thus imposed would be very numerous; and restrictions upon marriage, however convenient socially, assume quite a different aspect when recognized by the law. If the law does recognise them, of course, they cannot be ignored. But if it does not, it would be wrong to impose them, and I feel great hesitation in saying, for the first time, that there is a legal bar to these marriages." It is to be noted that the learned Judge dwelt upon the point that he was averse to holding for the first time that there was a legal bar to these marriages. The date of this case was 1875.

In Upoma Kuchain v. Bholaram Dhubi (5), which was a case from Assam, it was held that there is nothing in Hindu Law prohibiting marriages between persons belonging to different sections or sub-divisions of the

^{*}Page of 32 C. L. J.-[Ed.]

^{(5) 15} C. 708; 13 Ind. Jur. 108; 7 Ind. Dec. (N. 6.)

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udra caste. The matterial part of the judgment was as follows:-

"The question remains, however, whether, according to Hindu Law, this was a valid marriage. It was contended, on the authority of a judgment of Mr. Justice Mitter in the 0380 of Narain Dhara v. Rakhal Gain (2), that marriage between two persons belonging to different sub-divisions of the Sadra easte is invalid. But that we think amounted to no more than an expression of opinion. The opinion of Mr. Justice Mitter was dissented from by Mr. Justice Markby, and the case was not desided on that ground. We further think that the opinion there expressed is inconsistent with the decision of the Judicial Committee of the Privy Council in the case of Inderun Valungypooly Taver v. Ramasawmy Talaver (3). The question there was, whether the plaintiff, being illegitimate, and, therefore, as it was argued, of no easte at all, could son. tract a legal marriage with a person of the Sudra easte, and their Lordships said: - Their Lordships are not aware that there is any authority-there has been none quoted, and it does not appear that there is any authority supporting any such proposition as that which is contended for by the Pundits; and though their Lordships do not agree in everything that has been stated in the High Court of Appeal, they are satisfied that, in the Sudra caste, illegitimate children may inherit, and have a right to maintenance; and that, in this very instance, the illegitimate father of the mother of the plaintiff as well as his daughter, were treated as members of the family: and, on the whole, seeing that these parties are both of the Sudra caste, and that the utmost that has been alleged really is that the Zemindar was of one part of the Sudra caste and the lady to whom he was married was of another part, or of a subeaste, their Lordships hold the marriage to have been valid; to hold the contrary would, in fact, be introducing a new rule, and a rule which ought not to be countenanced.'

"The same view was taken in the case of Ramamani Ammal v. Kulanthai Natchear (6). There a similar objection baving been taken, their Lordships said (page 352):—"On the

argument of this appeal this objection was not insisted on; it was conceded on both sides that resent decisions had declared the legality of a marriage between persons of those two sub classes of the Sudra caste.'

"We think that those decisions are conclusive as to there being no rule of law rendering such marriages invalid. It is true that the saces referred to were cases from the Madras Presidency; but it has not been shown to us that in this respect any principle of Hinda Law followed in that Presidency is inapplicable to the Presidency of Bengal, nor has any case or any authority from ancient writers been eited to show that such marriages are invalid. Mr. Mayne in his work on Hindu Law treats such marriages as obsolete; and, most probably, they are so in the more advanced parts of Bengal; in which eastes have become sub-divided in such a way that the sub-divisions are regarded as distinct castes in themselves. But the fast that these marriages are not resorted to is no ground for holding that they are invalid assording to law. Our attention was also called to another case-an unreported one-(Reg. App. 274 and 322 of 1886) which came before Mr. Justice Wilson and Mr. Justice O'Kinealy. In that ease, it was not necessary to deside the precise point which is now before as, but both the learned Judges intimated very distinctly their opinion that, if it were necessary to dissent from the opinion of Mr. Justice Mitter, in the case to which we have referred, they would have done so. We hold, therefore, that there is nothing in the Hindu Law prohibiting a marriage between the parties to this suit."

We have referred to the judgment in the unreported ease to which reference is made by the learned Judges in the last mentioned ease. It was an appeal from an original decree Nos. 274 and 322 of 18:6 and the judgment was that of Wilson and O'Kinealy, JJ. I will read the material portion of it:—

Then, it is said that, if the adoption took place in fact, it is invalid in law, and for this reason that, although the alleged adoptive father and the alleged adopted son were both Sudras, they did not belong to the same branch of the caste or class of Sudras and that, by some rule of law the adoption by a person belonging to a particular class of the general

^{(6) 14} M. I. A. 346; 17 W. R. 1; 2 Suth. P. C. J. 493; 2 Sar. P. C. J. 736; 20 E. R. 816.

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aste of Sudras, of a person belonging to the Sudra caste but to a different sub-division of it is invalid. It has always been accepted that the question of inter-marriage between two elasses and the question of adoption from one of these classes into the other is practically the same question. An opinion has, no doubt, been expressed by one of the learned Judges of this Court, Mr. Jastice Mitter, in the case of Narain Dhara v. Rakhal Gain (2) that a between parties marriage in different sub-divisions of the Sudra caste is probibited unless sanctioned by any special custom. That, I think, did not amount to a decision, but it does amount to a distinct expression of opinion by ore whose opinion earries very great weight. On the other hand, it was dissented from by Mr. Justice Markby who heard the case with Mr. Justice Mitter. If it were necessary for us to decide that question, we should, as at present advised, not be prepared to follow that rule. That there is no such rule of Hindu Law generally is now authoritatively settled by two decisions of the Privy Council, one in the case of Inderun Valungypooly Taver v. Ramasawny Pandia Talaver (3) where their Lordships deal with the matter very decisively. express their view on this question thus at page 159: 'On the whole, seeing that these parties are both of the Sadra caste and that the utmost that has been alleged really is that the Zemindar was of one part of the Sadra easte, and the lady, to whom he was married was of another part, or of a subeaste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be contenanced.' The same question was before the same tribunal in another case from Madras, the ease of Ramamani Ammal v. Kulanthai Natchear (6), and again the same law was distinctly laid down. That is conclusive against the existence of the rule contended for as a rule of Hindu Law generally. And we know of no principle accepted as belonging to the Bangal School of Hinds Law which distinguish it from could the other schools; nor is such a rule laid down in the books upon whose authority we are accustomed to rely. On the contrary, we know that any approach to such a doctrine is distinctly negatived by the highest authority of the Bengal School of Hindu Law, the Dayabhaga,

In the case before Mr. Justice Mitter, the Privy Conneil desisions are not referred to and only two authorities are cited, one is Ward's 'Accounts of the Hindus'-that is a Madras book-and if the writer rather intend. ed to lay down a rule of law and not merely to describe the habits of the people, the Privy Council has deslared that he was wrong. The second authority is also a passage in Shyama Charan's Vyavastha Darpana, but that writer has sited no authority in support of his position. If, therefore, it had been necessary to decide this question of law we should have been inclined to discent from the opinion of Mr. Justice Mitter. But it is not necessary to do so, because the utmost that has been said is that the rule is a rule which prevails in the absence of special oustom."

In view of these decisions, in my judgment, it must be held that there is no general rule of Hindu Law which renders the marriage between Jogendra and Charubala, which in fast took place, invalid, merely by reason of the fact that Jogendra was of one part of the Sadra caste and that Charubala was of another part of the same caste. In the jadgment of Wilson and O'Kinealy, JJ, it was stated that the learned Judges knew of no principle accepted as belonging to the Bengal School of Hindu Law which could distinguish it from the other schools, nor is such a rule laid down in the books upon whose authority we are accustomed to rely. The date of that case was 1838.

The position, therefore, is as follows: -A marriage between Jogandra and Charubala did in fact take place. Charubala lived with Jogendra, was recognised as his wife and had two children by him, who were recognised as his children.

The presumption, therefore, is that it was a valid marriage-there is no general rule of Hindu Law which rendered their marriage invalid. There was no evidence of any special usage or sustom applying to the parties or to that part of Bengal in which they lived, showing that the marriage was invalid, and, in the absence of such evidence, and in view of the decisions of this Court to which I have referred, in my judgment the general rule of the Hindu Law must be applied and the marriage must be held to be valid. The learned Counsel for the first three respondents strongly urged, as already BISWANATH DAS GHOSE U. SHORLSRIBALA DASI.

stated, that if an order for remand were made, he would be able to sall evidence to prove the existence of such special urage or enetom in this part of Bengal; we have desided that, in this case, it would not be right to make such an order. It was urged on behalf of the respondents that, from the social point of view in the part of Bengal in which the parties live, a marriage between a Kayastha and a Tanti would be almost impossible. In this ease there is not much to be said from the social point of view, for Jogendra, according to the evidence of his sister Shorashibale, was a man of bad character and a drunker! who, when under the inflance of liquor, used to assault people, and Shorashibala herself was kept as a mistress. But this is not the question which we have to decide: we have to be estisfied that the restrictions upon marriage alleged by the learned Connsel for the respondents have been recognised by the law and that the marriage which in fact took place between Jogendra and Charubala was not valid assording to Hindu Law. It may be that a special usage or eastom prohibiting inter marriages between two persons of the Kayastha and Tanti sub-divisions of the Sudra easte in some part of Bengal may be established by proper evidence. It is sufficient for us to say that in this case there is no evidence of any such usage or custom, prohibiting the marriage of Jogendra and Charubala, on which we could act. In my judgment, therefore, the marriage between Jogendra and Charubala must be beld valid according to the law and eustom prevalent in Bangal and the plaintiff must be held to be the legitimate son of Jogendra.

At the end of the judgment, the learned Judge said: "If I had been able to hold that the marriage was a valid one, I should have held that, by virtue of the conveyance, the share of the plaintiff did not pass and I should have held on the evidence that Jaharmani left no debts which were appaid at the date of the conveyance and that the purchaser bought with notice of this and that Shorashibala was not entitled at the date of the sale to sell as executrix. It is a well-settled rule of conveyancing, and laid down in the authorities, that, under eirenmetances similar to the present, if an executor cells, as such, within 20 years of the death and purshaser has no knowledge that there are no debts (and he is not bound to enquire) the whole interest passes, but this is not so if, as here, the purchaser knows there are no debts. I disbelieve the evidence of Pannarani and of the other woman who swore to debts and payment, and I disbelieve the evidence of Niranjan that he was told there were debts which is inconsistent with all the documents in the ease."

These findings of the learned Judge have not been challenged. It follows, therefore, in view of these findings and the marriage being held to be valid, that the share of the plaintiff did not pass by virtue of the conveyance, that Jaharmani left no debts and that the respondent, Niranjan Kishna Das, bought with notice of this and that Shorashibala was not entitled, at the date of the sale, to sell as executrix.

This being so, in my judgment, the appeal must be allowed and a declaration must be made in accordance with the first three paragraphs of the prayer in the plaint. The respondent must pay the costs of the plaintiff of the suit and of this appeal.

During the opening of the appeal reference was made to the above mentioned Fall Bench 1330 of Rajani Nath Die v. Nitai Chanira De (4), and it was argued on behalf of the appellant that, even if the marriage batween Jogendra and Charubala was invalid, the plaintiff was entitled to inherit a share of his father's (Jogendra's) estate. The learned Counsel for the respondents objected to this ease being disposed of on that ground, and he urged that the case had not been investigat. ed from that point of view, and that it might be that there were other persons who would have preference over the plaintiff : the learned leading Counsel for the appellant in his reply admitted that the appellant must stand or fall by the case which he had made in Court balaw. So that in this appeal it is not nesseary for us to consider farther the above mentioned point.

RICIARDSON, J.-1 arges. In my opinion the current of authority on this topic, ancient and modern, is strong to show that this marriage between a Kayastha and Tanti, however unusual, however opposed to carrent ideas it may be, was valid in law.

The Tantis are Sidras, and there are desisions binding on us which compel us to bold that the Kayasthas are also Sudras

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[such as Raj Coomar Lall v. Bissessur Dyal (7)]. The parties, therefore, belonged to different sub divisions of the Sudraca ste and, that being so, it is not disputed that, according to the classical law, according to Manu's Institutes and the Dayabhaga, the marriage would be a good and legal marriage and the issue legitimate.

The Dayabhaga is still the store house of the common law of the Hindus of this Province: "It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal." [Moniram Kolita v. Keri Koliani (8).]

It follows that the burden of proving a modern sustom varying the Dayabhaga lies on those who set up the sustom.

Here the marriage was solemnized in fact, and strict proof must be required of a custom which would invalidate the marriage and basterdize the issue.

Of proof by cral evidence there is none worth mentioning.

As to modern judicial authority, no doubt Inderun Valungypooly Tater's case (3) and Ramamani Ammal's case (6) came from Madras, but there are the Bengal decisions to which copious reference has already been made by the learned Chief Justice. The only judicial pronouncement which can be brought against the legality of the marriage is the expression of Mitter, J., in Narain Dhara's cue (2), that inter-elass marriages are "impossible," a pronouncement which went beyond the actual necessities of the case, to which his colleague demurred at the time, and which has not been accepted as good law in subsequent cases. It would have been sofficient for the purpose then in hand to say that inter class marriages were so rare that the presumption of a legal marriage could not, in the circumstances, be drawn from the mere cohabitation of the parties. But enough has already been said about that case. The trend of judicial opinion in Bengal undoubtedly upholds the marriage.

The unsupported dicts of modern commentators, however eminent, do not make the law. Mitter, J., refers to the Vyavastha (7) 10 C. 688; 8 Ind. Jur. 621; 5 Ind. Dec. (N. s.)

462.

(8) 7 I. A. 115 at p. 150; 6 C. L. R. 322; 4 Sar. P. C. J. 163; 5 C. 776; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 1918; 2 Ind. Dec. (N. s.) 1102 (P. C.).

Darpana. The first edition (1859, Volume II, page 1172, Principle 601) eites no authority. Nor does Mr. J. C. Ghose (1917, Principles of Hindu Law, Volume I, page 792). Sir Gooroo Das Banerjee, whose opinion is always entitled to the greatest respect, in his Hindu Law of Marriage and Stridhan, adopted the view of Mitter, J., but it is still the duty of the Courts to consider and give effect to the cases as a whole.

Dicts on the other side are not wanting. Reference may be made to Golap Chandra Sirear's Hindu Law (3rd Edition, page 103). Dr. Dwarkenath Mitter, in his "Position of Women in Hindu Law" (1913, page 346), does not discuss the Bengal cases, but asems to lean towards the more liberal view.

Any argument based on the fact that inter class marriages are so infrequent as to be obsolete is now met by the observations of Sir Asutosh Mukerjee as Officiating Chief Justice in the judgment which he delivered on behalf of the majority in Rajani Nath Dos v. Nitra Chundra De (4). It is right to remember that that case had not been decided when the present case was tried in the Court of first instance.

The respectability and the distinction of the Kayaethas of Bengal as a class or caste stands unquestioned and unassailable. The Tantis of the Province, though their social status, according to the rules which govern matters, is undoubtedly inferior to that of the Kayasthas, are still described "elean caste," and as one of the superior Sudra eastes (Bhuttaebarya's Hindu Castes and Tribes). Nevertheless, such a marriage as that in question may be regarded with disapprobation by the friends and relations of the husband or by the Kayasthas as a class. There may be reasons, sufficient or insufficient, why such marriages should be socially reprehensible from the point of view of either or both of the classes to which the parties belong. But both elasses are equally members of And while it is true the body politie. that Hindu Law, Hindu religion and Hindu social observances are elosely interwoven, a declaration that all inter class marriages are illegal cannot safely be founded on social considerations alone. There are still social observances which, if they are to be

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enforced, must depend on social and not on legal sanctions.

As to the particular circumstances of the present case, regard being had to the character and standing of the Kayastha family to which the husband belonged and to his own character and reputation, I also agree that there was perhaps no such great metalliance on his part as might at first be supposed.

I agree that the appeal should be allowed.

J. P. Appeal allowed.

LAHORE HIGH COURT.
MISCELLANBOUS CIVIL PETITION No. 151
of 1920.

(CIVIL APPEAL No. 1430 of 1919.)

November 25, 1921.

Present:—Mr. Justice Abdul Recof

Present:—Mr. Justice Abdul Racof.
ALLAH DIN-PLAINTIFF—PETITIONER
versus

SHANKAR DAS OR SHANKAR SHAH AND OTHERS-DEFENDANTS-RESPONDENCE.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Appeal—Temporary injunction pending appeal—Irreparable injury.

Plaintiff, who was the mortgagee of a plot of land, built a house on the plot under the terms of the mortgage-deed. The plot was subsequently sold by the owner to the defendant. Plaintiff sued for possession of the plot by pre-emption. His suit was dismissed by the first Appellate Court and he preferred a second appeal to the High Court. Defendant in the meantime obtained a decree for redemption and wanted to pull down the house. Plaintiff applied to the High Court for a temporary injunction restraining the defendant from pulling down the house pending the decision of plaintiff's pre-emption appeal:

Held, that if the defendant were permitted to pull down the house, the plaintiff would be deprived of the very ground on which he based his preferential right of pre-emption and would thus suffer irreparable loss, and that, therefore, this was a fit case in which a temporary injunction

should be granted. [p. 60), col. 1.]

Petition under Order XXXIX, rule 1 and section 151, Civil Procedure Code, for issue of a temporary injunction restraining respondent No. 1 from enforcing the redemption decree, dated the 9th December 1918.

Mr. Dev Raj Sawhny, for Diwan Ram Lal, for the Petitioner.

Diwan Mehr Chand, for Shankar Das, Respondent.

ORDER.—I have heard lengthy arguments on behalf of the respective parties.

The matter appears to be a hotly contested one. The facts are somewhat peculiar and may be stated as follows. One Karim Bakbsh was the owner of two plots described A and B in the order of my brother, Broadway, J., dated the 27th May 1920. mortgage with possession was effected in respect of these two plots in favour of Allah Din. It is admitted that under one of the clauses of the mortgage Allah Din was given the power to construct a house on the mortgaged land. He constructed a building on plot B. Karim Bakhsh's sons then sold the plots to Shankar Das, vendee. Allah Din thereupon instituted a suit for pre emption elaiming a preferential right of pre emption on various grounds, one of them was that, being the owner of a build. ing standing on the plot B, he was entitled to pre-empt under elause "sscondly" of section 16 of the Pre-emption Act. That suit was decreed by the First Court. In appeal the decree for pre emption was set aside on the ground that a preferential right of pre emption had not been established by Allah Din. Mr. Petman, who appeared on behalf of Allah Din in the lower Appellate Coart, stated on behalf of the plaintiff that his elient based his right of pre-emption on section 16, " secondly," Pre-emption Act. The learned Judge of the lower Appellate Court had, therefore, to decide this question. He eame to the conclasion that, in order to be the owner of a building, one ought to be the owner of the site as well. The learned Judge. however, stated in his judgment that he was not quite sertain of the soundness of this proposition, I am not, however, concerned with the decision of this question at this stage at all. It will be for the learned Judges of the Division Bench before whom the appeal will eventually come up for hearing to decide this point. I have simply to decide whether this is a proper case where an injunction prayed for should be granted.

Putting aside other grounds which may be urged, there is an outstanding ground that the very fate of the appeal before this Court depends upon the existence of the building. If Shankar Das is allowed to pull down the building before the appeal comes up for hearing, it will afford a ground to him to argue that the ground for pre emption has been out from under the feet of the preemptor, A Court of Justice cannot allow

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Moreover, a Court of Equity has to balance the convenience and inconvenience of both sides. When I take the question of convenience into my consideration, I can come to no other conclusion than this that Shankar Das cannot lose much by waiting until the decision of the pre-emption appeal in this Court. If the appeal succeeds and the preferential right of pre-emption of the plaintif is recognized, irreparable loss would have been done to him before-hand, if I allowed the building to be pulled down.

I accordingly make the Rule absolute and grant the injunction prayed for, but make no

order as to costs.

Counsel for the parties request that an early date for the hearing of the appeal may be fixed. I order that the papers be laid before the Hon'ble the Chief Justice for orders.

z. K.

Rule made absolute.

CALCUTTA HIGH COURT.

OBDINARY ORIGINAL CIVIL

February 16, 1921.

Present:—Mr. Justice Greaves.

In re MANICK OHAND MAHATA

tersus

THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVE-MENT TRUST.

Land Acquisition Act (I of 1894), s. 6 (3)—Calcutta Improvement Act (V of 1911)—Calcutta Municipal Act (III of 1899), ss. 20, 357, 556—Evidence Act 11 of 1872), s. 4—Proceedings before Land Acquisition Officer—High Court, power of, to inquire—Specific Relief Act (I of 1877), s. 45 (e).

An application was made under section 45 of the Specific Relief Act by the owner of certain premises situated in Calcutta and about to be acquired by Government for the widening of a street under the scheme of the Calcutta Improvement Trust on the ground that there was no sanctioned project for the widening of the street near which the premises were on the part of the Trust nor was any sanction obtained by the Calcutta Corporation which was acquiring the land at the cost of the Trust for any project in connection with that street, It was urged on behalf of the Corporation that under section 357 of the Calcutta Municipal Act the Chairman with the approval of the Corporation could acquire the land, that the procedure under section 45, Specific Relief Act, was not applicable and that under section 6 (3) of the Land Acquisition Act. The declaration was conclusive evidence that the land was needed for

public purpose:

Held, that though a notification issued under section 6 of the Land Acquisition Act was conclusive so far as section 4 of the Evidence Act was concerned, yet the High Court was entitled to inquire into the validity of the steps which led up to that declaration and into the legality and otherwise of the acts of the Calcutta Corporation and of the Improvement Trust. [p. £01, col. 2: p. 602, col. 1.]

Held, also, that it was not the policy of the Calcutta Municipal Act that the special powers given to the Corporation for acquiring land for certain purposes named in the Act were to be used to enable another body to acquire land through the medium of the Corporation, however estimable the purpose and that the powers of acquisition of land under the Act were limited to cases in which the Corporation itself intended to widen a street or effect an improvement. [p. 602, cols. 1 & 2]

The Legislature when, under the Calcutta Improvement Trust Act, it conferred powers of acquisition of land with certain well-defined safeguards, did not intend that the Trust should abrogate those safeguards and acquire land through the medium of the Corporation of Calcutta for the purpose of street widening and street improvements. [p. 603, col. 2.]

Rule.

Sir B. O. Mitter, (with him Messrs. N. N. Sircer and S. O. Bose), for the Petitioner. Mr. T. O. P. Gibbons, K. O., Advocate-

General, (with him Mr. D. N. Basu), for the Calcutta Corporation.

Mr. Langford James, for the Calentta Im-

provement Trust.

JUDGMENT.—On the 6th January last I granted a Rule at the instance of Maniek Chand Mahata calling on the Calcutta Corporation and the Calcutta Improvement Trust to show sause why they should not be restrained from acquiring or taking any further steps to acquire the premises No. 38, Banctolla Street, in this City, the property of Manick Chand, and the Rule now somes before me for hearing. Manick Chand purchased the premises now in question in June 1919 for a sum of Rs. 72,000, so he stated, and on the 25th February 1920, he obtained the sanction of the Corporation to the erection of a new building on the site ontside the Municipal alignment of Banstolla Street, He states that he has ercoted on the site, in accordance with the canctioned plan, a rew building at a ecet of over Ro. 70,000, and that the market value of the premises is Rs. 2,50,000. On the 13th November 1920, te ressived notice from the Land Acquisition Collector of Calcutta that the premises were about to be acquired by Government for the widening of Banetolla Street,

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It appears that, on the 7th April 1920, a resolution was passed by the Corporation in

the following terms: -

That the proposal to acquire premises No. 38, Banstolla Street (falling within the Barabazar alignment) under the provisions of the Land Acquisition Ast at the east of "the Trust be sanctioned."

The Trust is the Improvement Trust as would appear from the proseedings of the Corporation wherein the followingappears:-

Aequisition of 38, Banstolle Street. Committee were asked to consider the question of acquisition of premises No. 35, Banstolla Street falling within the Barabazar

alignment of the Improvement Trust.

Sanction has been accorded to the construction of a new three-storied building at No. 38, Banstolla Street, which falls entirely within the Improvement Trust's 60 feet north and south alignment in the Barabszar not yet sanstioned by Government. The Trust propose that the property be acquired under the Land Acquisition Act, the cost being borne by them. The estimated cost of acquisition is Rs. 59,30C.

Resolved: That the proposal to asquire premises No. 38, Banstolla Street (falling within the Barabazar alignment) under the provisions of the Land Acquisition Act at the cost of the Trust be resommended for sane.

tion."

Maniek Chand alleges, and it is not denied, that the Improvement Trust have not obtained or even applied for sanstion to any scheme affecting Baustolla Street and that the Board of Trustces of the Trust have not passed any sebeme for widening that street, and that the Corporation have obtained no sanction from the Local Government for any project in connection with Bunstolla Street.

The Calcutta Gasette of the 25th August 1920 contains the following Deslaration No. 7087 L. A., dated the 20th August

1920:-

"Whereas it appears to the Governor in Council that land is required to be taken by Government at the expense of the Corporation of Calcutta for a public purpose, vis., for widening Baustolla Street at. No. 33 in the Town of Calcutta, it is hereby declared that for the above purpose a piece of land measuring, more or less, '1415 of an aere bounded on the north by premises No. 37

and 39. Banstolla Street, east by premises No. 37, Banstolla Street, south by Banstolla Street, west by public passage, is required within the aforesaid Town of Calcutta. This declaration is made, under the provisions of scotion 6 of Act I of 1894, to all whom it may concern,"

It is signed by the Secretary to the Govern-

ment of Bengal.

An affidavit was filed by the Deputy Surveyor of the Corporation on their behalf in which he states (paragraph 6) that the Board of Trustees have in contemplation a scheme for a proposed public street under section 63 of the Calcutta Improvement Act affecting 33, Banstolla Street, and that they requested the Corporation to take steps to acquire those premises to keep down the expense of acquiring the same later on, and that, accordingly, the resolution of the Corporation was passed and it was arranged with the Board of Trustees that the Board should pay the cost of acquisition to the Corporation, which has been done.

The Advocate-General on behalf of the Corporation contended that the Rule should not be made absolute on three main grounds: (i) That under section 357 of the Calcutta Municipal Act, 1899, the Chairman, with the approval of the Corporation, may asquire any land and the building thereon for widening, extending or otherwise improving any public street and that, under section 555 of the same Act, the Corporation may acquire any land and buildings needed for earrying out any of the purposes the Act, and that the provisions of these sections are not necessarily confined to eases where the Corporation is going itself to do the widening and that, in any ease, the street, when widened, would be handed over to the Corporation. The second ground urged against making the Bule absolute was that the procedure under section 45 of the Specific Relief Act was not applicable having regard to sub-sections (o) and (e), it being suggested that Maniek Uhand had another spesific and adequate legal remedy, namely, by suit, and that the remedy was not complete, as the matter was now in the hands of the Land Asquisition Collector and the Local Government who sould not be restrained under Motion 45. Thirdly, it was orged that under section 6 (8)

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ration of the 20th August last was conclusive evidence that the land was
needed for a public purpose, and that
under section 48 of the Act the Government alone could withdraw from the Land
Acquisition proceedings. On behalf of the
Improvement Trust, Mr. Langford James
relied, in addition to the above, on section 52
of the Land Acquisition Act and on the
meaning given to the word "conclusive" in
section 4 of the Indian Evidence Act.

I can dispose of Mr. Langford James' arguments very shortly. Section 52 of the Land Acquisition Act clearly application, as these are not proceedings commenced against any person for anything done in pursuance of that Act whatever the indirect effect may be of any order which I may make. And as regards section 4 of the Evidence Act and section 6 (3) of the Land Acquisition Act the fact that the declaration may be conclusive as to the land being needed for a public purpose does not, I think, in any way debar me from enquiring into the validity of the steps which led up to that declaration.

On behalf of Maniek Chand, I was referred to section 20 of the Municipal Act and the necessity of the sanction of the Local Government (which it is not enggested has been obtained) having regard to the fact that the cost of acquisition, it is said, must exceed one lac of rupees.

I now some to the three points urged by the Advocate General. With regard to the first point, I am inclined to think that section 3.7 (1) of the Calentta Municipal Act does not assist the Corporation as the land is outside the street alignment. Sub-section (2), again, cannot be called in aid on their behalf as no sanction of the Local Government has been obtained. Section 556, again, does not help them having regard to the fact that, under the provisions of section 558, it is only on payment of the compensation moneys by the Corporation out of Municipal funds

in the Corporation.

But, on broad grounds, I do not think that it was ever the policy of the Calcutta Municipal Act that the special powers

that the land or buildings acquired vest

given to the Corporation for acquiring land for certain purposes named in the Act were to be used to enable another body to acquire land through the medium of the Corporation, however estimable the purpose. If this were so, the Corporation could use its power under Chapter XXV of the Act to acquire land for a private Corporation minded to erest for profit, sanitary dwellings for the poorer classes, or minded to improve Calentta by removing slum areas and erecting dwelling houses on the area cleared. This, I do not gather from the Act, was the intention of the Legislature, and I think the powers of acquisition of land under the Act are limited to eases in which the Corporation itself is going to widen a street or effect an improvement. Again, I do not think that the Legislature, when, under the Calcutta Improvement Trust Ast, it conferred powers of acquisition of land with well-defined safeguards, ever eertain intended that the Trust should abrogate those safeguards and acquire land in this manner through the medium of the Corpora. tion for the purpose of street widening and street improvements.

It remains to deal with the second and third points raised on behalf of the res-

pondents.

With regard to the second point, I think "specific and adequate remedy" in subsection (d) of section 45 of the Specific Relief Ast refers not to a general right of suit which must, unless expressly barred, always exist, but to some spesific remedy expressly given by a particular Act. Again, with regard to sub section (e), am I to assume that the Local Government and the Land Acquisition Authorities will ignore any injunction which I may grant and continue the acquisition proceedings? It will be sufficient, I think, in this connection to assume that they will stay their hands in view of my desision and not be parties to what I hold to be illegal and ultra vires action on the part of the Calentta Corporation and the Improvement Trust. As to this see, generally, Rex v. Speyer (1) and the statement by Lord Reading, C. J., on page 610: "This is the King's Court:

^{(1) (19:6) 1} K. B. 595; 85 L. J. K. B. 630; 114 L. T. 463, 32 T. L. R. 211,

DULARI KOBB C. SALIG BAH,

we sit here to administer justice and to interpret the law of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown." A statement which I venture to think is as apposite here in India as in the United Kingdom.

With regard to the third point, I have already expressed my opinion and I see nothing in section 6 (3) of the Land Acquisition Act to prevent me inquiring into the legality and otherwise of the acts of the Calentta Corporation and of the Improvement Trust. I make the Rule absolute with costs against the Corporation and the Trust.

J. P.

Rule made absolute.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPRAL No. 1(62 or 1920.
March 28, 1922.

Fresent: - Mr Justies Lindsby.

Musammat DULARI KOER-PLAINTIFF
APPELLANT

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SALIG RAM AND OTHERS-DEVENDANTS-RESPONDENTS.

Landlord and tenant-Demolition of structures-Estoppel, equitable-Acquiescence-Decree, form of.

Where, in a suit for demolition of structures erected by a tenant, acquiescence on the part of the landlord is pleaded, it is not enough for the tenant to show that the plaintiff landlord stood aside and allowed the structures to be erected, for one of the essential elements of equitable estoppel is that the person who sets up that estoppel must have acted in good faith and must have been under the belief that he had a right to put up the buildings, which it is not possible for a tenant to put forward. [p. 603, col. 2.]

Where a Zemindar brings a suit for demolition of structures erected 12 years before the suit, the decree should only declare the plaintiff as proprietor of the site but should not order demolition of the structures. [p. 604, col. 1.]

Second appeal against a decree of the District Judge, Moradabad, dated the 29th April 1920,

Mr. A. Sanyal, for the Appellant. Mr. 8. O. Das, for the Respondents.

JUDGMENT.—The appellant in both these cases is Musammat Dulari Kunwar, who is a Zeminder in the village Ganaura. She brought two suits against certain tenant of this village alleging that about a year ora year and a half before the suits were brought, these persons had eneroached on her land in the village by putting up buildings. In short, ber ease was that these defendants occupied houses in the village and that they had enlarged them by eneroach. ing upon land which belonged Musammat Dalari Kunwar elaimed that, in the eircumstances, she was entitled to a deeree directing the defendants to demolish these new structures.

Both the Courts below have dismissed the plaintiff's suits. They have not believed the evidence which she put forward for the purpose of showing that the buildings, demolition of which was sought, had been erected shortly before the suits were filed.

The Courts also appear to have decided both eases on the consideration that Musammat Dulari had stood by and acquiesced in the construction of these buildings.

It has been argued before me that the judgments of the Courts below are erroneous, inasmuch as the learned District Judge has taken a wrong view of the law relating to acquiescence.

It is not enough in eases like these for the defendants to show that the plaintiff landlord stood aside and allowed the struetures to be erested. One of the essential elements of equitable estoppel is that the person who sets up that estoppel must have asted in good faith and must have been under the belief that he had a right to put up the buildings. In cases like the present, where there can be no doubt that the plaintiff is the Zemindar of the village and the defendants are tenants, it cannot, I think be said that the defendants fulfil the condition above required. It would not be possible for a tenant to put forward the plea that he erested buildings on land belonging to his Zemindar in the belief that the land was his own and that he had a right to erest buildings thereon. If the decision of these eases rested solely upon the ground of equitable estoppel the learned District Judge

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could not, I think, be supported. However, I have gone into the evidence in the case and the situation appears to me to be as follows:—Both the Courts below have definitely found that the statements of the plaintiff's witnesses to the effect that the buildings complained of were erected a year or a year and a half before the suits were brought, are untrue.

On the other hand, there is a considerable volume of evidence on behalf of the defend. ants which goes to show that, as a matter of fact, these buildings, which the plaintiff now wants to have pulled down, have been in existence for a very long time, and certainly for more than 12 years. It is true that the Courts below have not pronounced any regarding the opinion reliability defendants' evidence. It seems to me, however, after baving it all read to me, that there is no good reason for disearding it or for supposing that these witnesses are wilfully telling a false story.

I must take it, therefore, that the defend. ants' evidence does establish that these buildings in dispute have been in existeres for a long period, and sertainly for over 12 years. In those circumstances, the plaintiff, aithough she is the proprietor of the sites on which the houses are built, ought not now to be given a deeree for the removal of the houses. It is, I think, sufficient, in the eirenmetances, to declare that the plaintiff is entitled to be regarded still as the proprietor of the sites on which these houses stand but that she certainly is not entitled to the relief which she elaimed, namely, that the houses should be demolished. In this state of things, the order is, that the appeals stand dismissed with costs including in this Court fees on the higher seele.

J. F.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 225 OF
1919.

April 18, 1921.

Present: -Justice Sir John Woodroffe, Kr.,
and Mr. Justice Cuming.

SHIVA RUMARI DEVI -PLAINTIPE-APPELLANT

versus

BECHARAM LAHIRI-DEFENDANT-RESPONDENT.

Defamation, suit for, against Pleader - Pleader acting in professional discharge of his duty.

While commenting on certain documents in the course of his argument in a suit for rent, the defence Pleader used the expression that the plaintiff,—'a lady) had forged the documents by means of fraud ("Juschuri Kariya Kagaj Pata Jal Kariyache") In a suit for defamation against the Pleader:

Held, that the Pleader was not liable for damages for defamation inasmuch as what he did was in the professional discharge of his duty and in good faith for the protection of the interest of his client, and his remarks were not irrelevant but pertinent to the enquiry which was being made before the Judge and had a direct bearing on the case. [p. 606, col. 2]

Appeal against a decree of the Subordinate Judge, Nadia, dated the 29th of May 1919.

Babus Dwarka Nath Chuckerbutty, Mritunjoy Chatterjee and Amuly 1 Charan Bhattachar ee, for the Appellant.

Mr.B. Chalrabarty, (with him Babus Bertin Behari Ghose, Amarendra Nath Bose and Jatindra Mohun Choudhury), for the Respondent.

JUDGMENT.

Woodress, J.—This is a suit for defamation against a Pleader. The defamation is alleged to have taken place during the course of the defence to an action brought for rent. It is alleged in the plaint that the plaintiff, who is a lady, was described as a cheat. It is alleged the defendant had said that that she had forged papers fraudulently, that she was a rogue, etc., and that the defendant "expressed wrath and contempt towards the plaintiff by making various accusations against her."

In the defence to the suit the defendant stated that these allegations were not true and that he merely commented upon certain Exhibite, Nos. P and Q, after reading them SHIVA KUMABI DEVI V. BACHABAM LAHIBI.

and that he did not use the expressions alleged by the plaintiff. Farther, the defendant says that he never used the expressions "Badmash," etc. The case in which the defamation is said to have occurred was tried in the Court of the Munsif who made a note at the time of the incident and stated in his evidence that he remembered one expression only, namely, that "(she) forged dosuments by means of fraud." This is also recorded in order 51 of the order sheet on the 8th May 1917. The learned Subordinate Judge, who has tried and dismissed this suit, has accepted the Munsit's evidence and held that the defendant used the expression Juochuri Kariya Kagaj Patra Jal Kariyache," The Subordinate Judge in his judgment says that: "It seems to me probable that he added to the aforesaid expression words, importing—it has been held so in the previous rent suit." He further cays that he cannot hold upon the evidence that he (the defendant) need the expression "Juashor" or "Badmash." Accepting the Judge's finding as to that, the question is, whether the defendant is liable for defamation. If this be a question of absolute privilege, the answer would be in the negative. If the question is one of qualified privilege, then it has to be shown that the statement was made pertinently and so forth. There is no need in the present care to go into the question of law bearing upon the general question of liability of Counsel and Vakils in respect of defamatory statements made by them in the scurse of proceedings in which they were professionally engaged having regard to firding on the facts. Upon the question of melies it is to be observed that the plaintiff herself states in her evidence that there was no enmity between her and the defendant before the institution of the suit. And it has not been sontended by the learned Vakil on behalf of the appellant that there was any enmity or any malice in fact. The malice alleged is such as, (it is said), should be inferred from the fact that the statement was not justifiable. The eireumstances up to the statements complained of are these: plaintiff's husband had previously brought a suit for rent. In the judgment of that suit, the learned Munsif who tried the suit made the following observations :-"As to the Collection Papers filed on behalf

of the plaintiff, they seem to have been manufactured for the purposes of the present suit, for they were produced long after the written statement had been put in." After that suit by the plaintiff's husband, the plaintiff hereelf filed another suit for rent as her bushand had done before her, and relied upon the Collection Papers which were produced on her behalf. Her suit was also dismissed and in the course of that suit, the Munsif who tried the suit, in his judgment observed, with reference to enhancement, that, "the enhancement must have been surreptitionaly made and tenants refused to pay further rent." The Muneif also says that : "The landlord attempted on two occasions to realise a larger amount by suit but could not get mcre than Rs. 36."

In the suit in respect of which this claim for damages arose, the learned Vakil for the defence referred to the previous proceedings in the suit brought by the precent plaintiff's husband and in doing so, be made the remark which the learned Subordinate Judge has stated in his judgment and which I have quoted.

It is contended on behalf of the respond. ent that it has been found by the learned Subordinate Judge that the remarks, such as he has found them to be, were justifiable on the part of the defendant as Pleader who was making legitimate comments on the ease. As I have already cb. served, the Subordinate Judge has found that it is not proved that the Pleader used the words "Jusehor" or "Badmash." As to the other statement which is found by the Judge to have been used, it seems to me that it does not by itself necessarily imply that any charge was made against the plaintiff of having herself personally and knowingly instituted a false suit. The comment made was, that the suit by the plaintiff war, in fact, false; and reliance was placed on the earlier suit by the plaintiff's husband for the purposes of establishing that fact. This, as I have said, is not necessarily a personal charge against the lady in question, who, so far as we can see from the evidence on the record, may have had nothing personally to do with the suit, beyond the fact that she was, the plaintiff in it. Probably the suit was, as is generally done in such cases, looked MAUNG BYA U. MAUNG KYI NYO.

after by officers of the plaintiff, one of whom was named Chandra Sanyal whom the Subordinate Judge has found to have had a grievance against the present defend. ant. The Subordinate Judge says: "The present suit is the outcome of malice that the plaintiff's man, Sanyal, bore against the defendant," In any case I am of opinion that the learned Subordinate Judge has come to a right conclusion in holding that what the defendant did was in the professional discharge of his duty and in good faith for the protection of the interest of his elient, and that his remarks were not irrelevant but pertinent to the enquiry which was being made before the Judge and had a direct bearing on the case. I am of opinion, therefore, that the learned Subordinate Judge's decision in holding that it has not been shown that the defendant is liable for damages should be affirmed.

The appeal is accordingly dismissed with

eoste.

Coming, J .- I agree.

B. N.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANGOUS APPLICATION No. 32 OF
1921.

August 29, 1921.

Present :- Mr. Justice Robinson, Chief Judge, and Mr. Justice Duckworth.

MAUNG BYA AND ANOTHER—APPELLANTS

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MAUNG KYI NYO AND OTHERS-RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110, scope of—Privy Council Appeal-Subject-matter of suit, value of, determination of—Principle governing.

In a suit for damages for erection of a bund and the alleged consequent inundation of the plaintiff's paddy field valued at above Rs.10,000, the First Court gave a decree for less than Rs. 10,000 which was set aside on appeal. On an application to appeal to the Privy Council it was objected that this was merely a suit for damages and that, in dealing with applications for leave to appeal to the Privy Council, the Court could not go beyond the amount of damages actually decreed by the Court of first instance:

Held, (1) that in granting leave to appeal to His Majesty in Council, the correct principle to consider the subject-matter of the appeal was to look at the judgment, as it affected the interests of the parties,

who were prejudiced by it, and who sought to relieve themselves from it by an appeal; [p. 607, col. 1.]

(2) that the subject-matter of the suit in the Court of first instance exceeded Rs. 10,000 and the decree or final order involved indirectly a question respecting property worth more than that sum, and that, therefore, the applicant was entitled to the leave, [p 607, col. 1.]

Per Robinson, C. J.—The second paragraph of section 110 of the Civil Procedue Code is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. If the decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. [p. 607, col. 2.]

Mr. Higinbotham, for the Appellants.

Mr. Leach, for the Respondents, JUDGMENT.

DUCKWORTH, J .- The value of the suit exseeded Rs. 10,000. By the First Court's deeree a sum of Rs. 8,821-8-0 was decreed by way of damages for the tort complained of, vis., the erection of the bund, and the alleged consequent inundation of plaintiffs' paddy-fields about 12 to 2 miles away. whereby some 13,500 baskets of paddy were lost to them. On appeal, the Bench of this Court dismissed the suit, setting aside the decree of the District Court, thereby, in effect, holding that defendant was entitled to maintain the bund, and thereby preventing the plaintiffs from suing again for its removal, and forcing them to asquiesce for the future in the alleged extensive damage to their fields. Now, these fields are obviously worth more than Rs. 10,000 and so would any portion thereof be, which sould yield over 13,500 baskets of paddy in one year, if ordinary prices of land and yield per aere, prevailed.

It is manifest, therefore, that section 110, Civil Procedure Code, will permit the appellants respondents to appeal to their Lordships of the Privy Council. The value of the subject matter of the suit in the Court of first instance was worth over Rs. 10,000 and the decree or final order appears to involve indirectly a question respecting property worth over Rs. 10,000.

Further, the District Court and the Bench of this Court differed on the facts of the case, and as to the law applicable, the latter involving questions of substantial difficulty.

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It was argued that this was merely a suit for damages, and that, in dealing with applications for leave to appeal to the Privy Council, this Court sould not go beyoud the amount of damages actually decreed by the Court of first instance more especially as there bad been no prayer for an injunction restraining defendants from closing the bund. The cases of De(1)Silva and De Silva ٧. Bhaunath Gir v. Bihari Lal (2) which Jenkin's followed Sir Lawrense sion in the Bombay case, were relied on, but they relate to a state of affairs which is entirely different from that in question here, and seem to me not to apply. In Macfarlane v. Leclaire (3) (an appea Canada)-their Lordships laid from down that the correct principle in such a case as this was to look at the judgment, as it affects the interests of the parties, who are prejudiced by it, and who seek to relieve themselves from it by appeal. This principle has been adopted in India.

In the ease of Lala Bhugwat Sahay v. Rai Pashupati Nath Bose (4) Maelean, O. J., and Mookerjee, J., dealt with a case where it had to be decided whether the valuation for purposes of the appeal depended upon the value of plaintiffs' share in an estate or the value of the whole estate. They decided that the latter value was in that ease the true eriterion. They followed the unreported case of Biraj Mohini Dasi v. Ohintamoni Dasi, in which Maelean, O. J., and Banerjee, J., had some to the same conelusion. In my opinion these decisions were sorrest. Further, I consider that the case of Sri Kishan Lal v. Kashmiro (5), was rightly decided. There Sir Henry Richards, C. J., and Banerjee, J., dealt with the case of an award by which all the property, including the mortgage rights, was divided amongst defendant Kashmiro, the widow of the deseased, and certain other persons, including the plaintiff. The lady obtained thereunder an eight-anna share in the mortgage rights. while plaintiff was given four annas. The lady alone filed a suit on the mortgage and recovered the money. The plaintiff thereupon brought the suit in question to recover his four anna share in the mortgage The suit was valued at over money, Rs. 10,000. The First Court gave plaintiff a decree for Rs. 8,800. On appeal the High Court held that the award was fraudulent and collusive, and dismissed the suit. The learned Judges held, in the matter of the application for leave to appeal to the Privy Council, that the provisions of section 110, Civil Procedure Code, applied, inasmuch as the award, if the High Court's deeree became final, would be invalid as regards property other than the property in dispute in the suit-the said award admittedly relating to property far exceeding Rs.10,000 in value.

Applying this decision to the present case. I think that there is no doubt that section 110, Civil Procedure Code, is applicable, and that a certificate should issue.

It will issue accordingly. Respondents will pay appellants, costs three gold mohurs.

Robinson, C. J.—I am of the same opinion. The value of the subject matter of the suit in the Court of first instance was over Rs. 10,000. In addition to this, the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be the same sum or upwards or the decree must involve directly or indirectly some claim or question to or respecting property of like amount or value. The matter to be decided now is, whether this Court's decree involves indirectly some question to or respecting property of like amount or value.

The second paragraph of section 110, in my opinion, is intended to deal with property other than that forming part of the actual subject matter in dispute and which would be affected by the final decree or order. If the decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. The whole question is very fully argued in Subray

^{(1) 6} Bom. L. B. 403.

^{(2) 52} Ind. Cas. 723; 4 P. L. J. 415; (1919) Pat. 257.

^{(3) (1862) 15} E. R. 462; 15 Moo. P. C. 181; 8 Jur. (N. s.) 267; 10 W. R. 824; 187 R. R. 24.

^{(4) 10} C. W. N. 564; 8 C. L. J. 257.

^{(5) 21} Ind. Cas. 617; 35 A. 445; 11 A. L. J. 654.

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mania Aiyar v. Sellammal (6), and with the decision arrived at therein, I entirely agree. The petitioner's rights are clearly thus affected.

A certificate will, therefore, be granted. I concour in the order as to costs.

This disposes of both applications and the two appeals may be consolidated, one scourity of Rs. 4,000 only need be taken and one paper-book printed.

J. P.

(6) 31 Ind. Cas. 296; 39; M, 843; 2 L. W. 1057; 18 M. L. T. 450; (1915) M. W. N. 941; 30 M. L. J. 317.

OALCUITA HIGH COURT.

APPEAL FROM ORDER No. 93 of 1919.

April 30, 1920.

Present:—Justice Sir N. R. Chatterjes,

Kt., and Mr. Justice Panton.

KAMINI KUMAR BHOUMIK—DEPENDANT

—APPELLANT

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PROTAP CHANDRA BHOUMIK

AND OTHERS—PETITIONERS, AND

JASUDALAL BANIKYA AND OTHERS

—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Execution of decree for costs by attachment of mortgage-decree obtained by judgment-debtor and by sale of mortgaged property, validity of—Sale, if absolutely void.

A mortgage suit brought by A. against B. and C. was dismissed with costs so far as B. was concerned and decreed against C. B. in execution of his decree for costs attached the mortgage-decree of A. against C. and the decree for costs was satisfied with the sale-proceeds of some of the mortgaged properties. In an application by C. under section 47 of the Code of Civil Procedure to have the sale set aside:

Held, that the sale was not absolutely void, but was certainly irregular and could be set aside if proper proceedings were taken for the purpose, and that the judgment-debtor could waive the irregularity and the sale could not be treated as a nullity. [p. 609, col. 1.]

Appeal against an order of the District Judge, Tipperab, dated the 20th of January 1919, affirming that of the Subordinate Judge, Second Court of that district, dated the 23rd of August 1918.

Babus Brojo Lal Chuckerbutty and Upenira K. Roy, for the Appellant.

Dr. Sarat Oh. Basak and Babu Chandra S. Sen, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree.

It appears that certain persons referred to as the "Banikyas" brought a suit ppon a mortgage against the appellants before us and certain other persons. Their suit against the appellants was dismissed with costs, but they obtained a decree upon a mortgage against other persons. The appel. lants in execution of their decree for costs against the "Banikyas" attached the mort. gage deeree they had obtained against the other persons, got themselves substituted as attaching decree-holders and proceeded to execute the decree. The mcrtgage-decree was for about Rs. 5,000. The appellants, bowever, executed their decree for realising only the amount of costs due to them vis, Rs. 259, and a share of certain property out of the mortgaged properties was sold and the deeree for costs was satisfied with the saleproceeds.

The judgment debtors applied to have the sale set aside under Order XXI, rule 92 and rection 47. Civil Procedure Code, one of the grounds alleged being that the decree could not be executed only for the amount of costs.

The Court of first instance dismissed the application treating it as one under Order XXI, role 20. On appeal the learned Judge observed that there was "no machinery" for making a declaration that the sale was illegal under the provisions of section 47. On second appeal to this Court, the learned Judges (Wcodroffe and Huda, JJ.,) were of opinion that the case had been fought out in the First Court as if it were a essa under Order XXI, rule 90. So far as the application under section 47 was concerned, the learned Judges expressed the opinion that their judgment would not debar the appellants from proceeding in the matter under section 47 if they had any rights under that section. Thereupon they made the present application under section 47.

The Courts below have held that the sale was void and accordingly set it aside under

section 47.

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not think that the sale was We do absolutely void. It was certainly irregular and sould be set aside if proper proceedings were taken for the purpose. The judgmentdebtors could waive the irregularity and we do not think, therefore, that the sale can be treated as a nullity. Upon a consideration of the orders of this Court, however, we think that the question whether the applicant is entitled to have the sale set aside under ssetion 47, Civil Procedure Code, was left open by this Court, and the present application seems to have been made in pursuance of that order. The application was made within three years of the date of the sale and, therefore, was not time-barred.

It has, however, been contended on behalf of the appellant that the application was made after the confirmation of the sale and that, unless the respondents can show that they had no notice of the sale or the confirmation thereof by reason of fraud or otherwise, they are precluded by the order confirming the sale from questioning the validity thereof under section 47.

This part of the case has not been gone into

by the lower Appellate Court.

Our attention has been drawn by the learned Pleader for the appellant to the fact that the sale was attacked also on the ground that the decree-holders put up a share of one of the properties to sale. It is said that under the decree the appellants were entitled to sell the property which was not ensumbered, and that the share in dispute which was put up to sale was not ensumbered. The Pleader for the respondent says that that is not so. This question, therefore, will also have to be gone into by the lower Appellate Court.

We accordingly set saids the order of the lower Appellate Court and send the case back to that Court in order that the above questions may be gons into and the appeal disposed of assording to law. The Court below may

take further evidence, if necessary.

Costs-two gold mohurs-to abide the result.

B. N.

Order set aside; Cases sent back,

PRIVY COUNCIL,

APPRALS FROM THE LOWER BURNA ORIES COURT.

August 1, 1921. Present :- Viscount Haldane, Lord Atkinson, Lord Phillimore and Sir John Edge.

MA YAIT-APPELLANT

tersus MAUNG CHIT MAUNG -

RESPONDENT.

Burma Laws Act (XIII of 1898) - Hindu - Kalai, whether Hindu,

If a twice-born Hindu migrates across the sea to Burma and marries a Burmese woman, his descendants, who are born and have always lived in Burma and who have inter-married with its people, form a community known as kalais, and as the usages and religion of this community are very divergent from Hinduism, the community cannot be regarded as Hindu within the meaning of the expression as used in the Burma Laws Act of 1898. [p. 613, col. 2.]

Consolidated appeals from judgments and decrees of the Chief Court of Lower Burms (dated September 7, 1916 and reported as 37 Ind. Cas. 780; August 20, 1917; November 7, 1917), modifying decrees of that Court in its

Original Civil Jurisdiction.

Mr. DeGruyther, K. O. Mr. Dunne, K. O., and Mr. T. B. W. Ramsay, for the Appellant.

Mr. Upjohn, K. O., and Mr. Draper, for the Respondents.

JUDGMENT.

VISCOURT HALDANE .- These are consolidated appeals from the judgments of the Chief Court of Lower Burma, which varied judgments of that Court on its original side. The real question to be determined is, whether one Maung Ohn Ghine, who died on the 10th June 1911, and who was an opulent and prominent mershant in Rangoon, was a Hindu within the meaning of section 13 of the Burma Laws 'Ast, 1898. If he was, it is not in controversy that Hindu Law so governed the succession to his estates, that a voluntary settlement made by him of the 5th May 1908 could not be fully operative. Section 13 of the Act referred to is in these terms :-

"(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or easte, or any religious usage or institution, (a) the Buddhist Law in eases where the parties are Buddhists, (b) the

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Muhammadan Law in cases where the parties are Muhammadans, and (c) the Hindu Law in cases where the parties are Hindus, shall form the rule of decision except in so far as such law has, by enactment, been altered or abolished, or is opposed to any custom having the force of law.

"(2) Subject to the provisions of subsection (1) and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its Ordinary Original Civil Jurisdiction.

"(3) In cases not provided for by subsection (1) or sub-section (2) or by any other enactment for the time being in force, the decision shall be according to justice, equity

and good conscience."

The concolidated appeals arise out of two suits. In one of these a declaration was sought that the settlement referred to was wholly inoperative, and, alternatively, for a declaration that the dispositions in favour of persons unborn at the date of the settlement were void. The other suit was for adminis. tration of the estate under the direction of the Court. The Judge of first instance held that Maung Ohn Ghine was not a Hindu or a Buddhist within the meaning of the Ac', and it was not suggested that he was a Muham. madan. He, therefore, held that the law which applied was that provided by the Indian Succession Act of 1865, according to which, excepting in the case of succession to some one belonging to one of these three elasses, there are laid down provisions equivalent to rules of justice, equity and good conscience, which permitted the validity of the settlement of the 5th May, 1°C8 Under this, Maung Ohr Ghire conveyed property, reserving his life interest in it, to trustees for his wife and shildren and their issue, some of whom might be unborn, as in the deed provided. If the learned Judge was right in thinking that the settler did not some within any one of the three specified classes, it is not disputed that this further conclusion was correct.

The answer to the question raised in these appeals, therefore, turns on the question of the status of Maung Ohn Ghine. If he was not a Hindu within the meaning of the two Acts

eited, in each of which the term Hindu is used in the same sense, this decision of the learned Judge was right. But the Chief Court on appeal held him to be a Hindu.

In order to deside which of the views of his status was right, it is necessary to turn to the story of Maung Ohn Ghine's life. He was a merchant in Rangoon who died during a visit to England. Among other positions, he held that of a Municipal Commissioner and Magistrate in Rangoon. It is clear that he was a Kalai, which means that he was the descendant of a Hindu who had married a Barmese woman. His parents also were Kalais, and he himself married a Kalai. His paternal grandfather was apparently a Hindu who had migrated from Madras to Burms and had married a Burmese. His son was, therefore, a Kalai, and the latter married a Kalai. Maung Ohn Ghine was, therefore, a Kalai, and he lived in Burma all his life, excepting when absent on short visits. Twomey, J., when delivering his judgment in the Court of appeal, gave a description of Maung Ohn Ghine's eareer, which is instructive : -

"In matters of daily life, apart from his religion, Ohn Gine was hardly distinguish. able from the Burmese community in general, and it appears that he was as a prominent member of the Barmese community that he was sent to England at the time of King Edward's Coronation. Great stress has been laid on the leading part taken by Ohn Grine in supporting various important Baddhist interests. In 1900 he wrote to the Governor of Madras urging that certain Buddhist relies lying in the Madras Museum should be made over to him to be placed in a shrine which he was preparing at Rangoor, and be referred in this letter to his Buddhist so. religionists. In a letter, dated the 18th February 1901, to the Colonial Ceylon, he joined with several others in advocating the cause of the Burmese Buddhist pilgrims to the Buddhist temple of the Sacred Tooth Relie at Kandy, and the writers of this letter describe themselves as Burmese pilgrims now on a visit to Ceylon.' As one of the community of the Buddha Gaya Missionary Society he also championed the cause of the Burmese Buddhists against the Mohunt of a Hindu temple at Gaya with reference to a certain Zayat erected there by King Mindon for the use of the Burmese pilgrims. He was one of the residents of Rangoon who presented MA YAIT U. MAUNG CHIT MAUNG.

an address on behalf of the Buddhist Community to the Vicercy, Lord Curzon, on his visit to Rangcon in 1901."

The learned Jadge goes on to make some

observations on this evidence : -

"At first sight, there incidents in his career appear to support the contention that Ohn Ghine was as much a Buddhist as a Hindu. To understand their real meaning it is necessary to look at Ohn Ghine's career and aspirations as a whole. He was a man of ambition who had amassed a considerable fortune by his business capacity and industry. Sprung from an obscura class, he had little prospect of taking a leading place so long as be was identified merely with the Kalais. Caste prejudices kept Indian Hindus aloof from him and would prevent him from any kind of leadership among the Hindus general. ly. Bat by throwing in his lot with the tolerant Barmese, who formed the balk of the population of the province, he sould hope to attain some distinction. He was as much Barmese as Indian by blood, and in dress, language and manner of life he was more Barmese than Indian. He admired the Baddhiet doetrices and found much that was attractive in Buddhist religious practices. Material interests chimed with his inclinations and Ohn Ghine stood forth as a representative of the Barmese. He received more than one mark of distinction from Government, and probably hoped for more. In these circumstances, no special significance ean be attached to his posing as a member of the Burmese Buddhist Community, by assoelating with which he had achieved most of his success in life. His readiness to figure as a co-religionist of Baddhists in 1901 may be compared with his attitude of conservative Hinduism in Ma Na's sase five years later. On each occasion there was exaggeration with a purpose, and neither incident affords a safe guide to Ohn Ghine's astual religious The evidence shows that he never renounced or repudiated his membership of the Kale Community, and in spite his liberality to Baddhist monks and his liking for Buddhist prayers and practices, he draw the line at having his sons shinbyued (that is, initiated as Buddhist novices). He continued his Hinda worship at the Kale Temple, and when he died it did not occur iscontace teirpetco sid evad ce glimat sid et assording to any rites except those of the

Hindus, and his ashes were sent to Benares. The marriage of his son, Chit Maung, with a Barmese girl, according to Burmese eastom in 1910, was no doubt a serious lapse from rectitude for a Hindu, but this incident can only be regarded as an example of the general laxity of the marriage customs of the Kale Community as compared with those of the recognised Hindu castes."

This description of Ohn Ghine's life their Lordships have but little occasion to question, excepting in the conclusions which the learned Judge draws about the religious status of the dead man. Before, however, proceeding to this it is desirable to supplement the narrative on sertain points. The ease of Ma Nu in 1906, to which reference is made by Twomey, J, was one in which Ohn Ghine was prosecuting a Barman for abdusting his daughter, and the question was whether she was abdusted or had merely eloped. Ohn Ghine, who objected to any suggestion of marriage, swore that he himself was a Hindu, in which case no marriage could properly have taken place. He had obviously a special motive for taking this course, and the incident comes to very little. As against it may be set the fact that ha sent his sons to a Baddhist Kyaung for instruction in the Baddhist faith, and that to one of his sons who was in England he despatched a card of admonition enjoining him to "daily think of the Buddha." This was in August 1907. As for the sending of Ohn Gnine's ashes to Benares, this seems to have been permitted by his widow in consequence of some suggestion made to When Ohn Ghine's daughter, Mya, died in 1910, he appears not to have himself sent her ashes to the Ganges. They were only sent there after his death along with his own. No doubt, Ohn Ghine's body was cremated when it was brought to Rangoon But the eremation took England. place in a compound which was not an exclusively Hindu cemetery, and, although Hindu rites were observed, Baddhiet priests or ponguis were standing round the body and reseived offerings, while the burning was earried out by Burmans. It is true that Ohn Gaine had supported the Hindu temple in Phayre Street, Rangoon, and was a trustee of it. Bat this temple was built by subscrip. tions from Kalais who frequented it, and does not appear to have been one where

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strict Hinduism was observed. Moreover, he also supported and went to Buddhist Pagcdas and worshipped there regularly, observing the Buddhist Lents, and making gifts to the priests.

Their Lordships have examined the evidence relative to Ohn Ghine's religious life, and the conclusion to which they have come is that Robinson, J., the learned Judge who tried this case, was right in thinking that Ohn Ghine observed to a certain extent the rites and seremonies of the Hindu religion, but that he also observed and followed the Buddhist religion to a great extent and was far from being an orthodox Hindu. this should have been so appears to them to have been far from unnatural, considering the nature of the Kalai Community, of which he was a member. They think that the real question in the appeal is, whether the Kalais community are Hindus within the meaning of the expression as used in the Burma Laws Act of 1898, It is not necessary for their Lordships to express any opinion upon the construction which Ormond, J., put upon the judgment of the Judicial Committee in Abraham v. Abraham (1). Whatever might be the conclusion on that matter would not dispose of the present controversy. If Ohn Ghine had been born a Hindu, mere deviation from orthodoxy would not have been sufficient to deprive him of Hindu status. He might have continued to possess it had he become a member of the Brahmo Somaj, as was decided by this Board in Bhagwan Koer v. Jogendra Chandra Bose (2), and he would not have the less possessed the status if he had been, say, a Sikh or a Jain, or probably if he had even at times worshipped with Buddhists. But Ohn Ghine was not born Hindu unless the Kalai Community generally is Hindu, and this raises a question of much more difficulty than that which arises in the case of a sirgle individual to whom considerable latitude of action is extended before he is deemed to have deprived himself of the religion which gave him his law by anything that does not amount to elear renunciation of that religion. In the instance of a community, the question must always be whether there has been continuity of character. No doubt, there may develop gradually among a set of people who live and worship together, variations from the regular practices of those who are Hindus which, though considerable, ought not to be taken to be such as have destroyed continuity of relationship.

In the valuable judgment delivered in 1909 by Sankaran Nair, J., in Muthusami Mudaliar v. Masilamani (3), that learned Judge considers the criteria according to which new eastes which have been evolved among the descendants of Hindus are to be consider. ed as having retained the Hindu religion. He points out that the formation of new castes is a process which is constantly taking place. Usage has modified old principles and it governs in the seets which have adopted such usage. Contact with other religious may well have evolved seets which have disearded many characteristics of orthodox Hinduism, and have adopted ideas and rites which are popularly supposed to belong to other systems. Continuity may not in such eases have been destroyed; but there is a limit to such processes. Continuity may be so broken that the new seet is outside the original pale. The Hindu Law which the Courts administer rests on the Shaetras, which elaim Divine sanction and are followed by Brahmins generally. There may have been introduced neages which constitute a departure from the principles of the Shastras so great that the community which has adopted them must be taken to have lost the character of being one in which Hindu religion governs. In the case of a seet at a distance from Hindu centres, where the surroundings are Borman and Buddhist and the mode of life is different from that of the Hindu communities in India proper, popularly known as such, it is easier to determine it as being outside Hinduism than it is in the ease of an isolated individual who has merely lapsed into unorthodox practices. It is obvious that few influences can be more potent in produeing new communities of this ceparate kind than the combined operation of migration, inter marriage and new occupations. When these influences have operated for sufficiently

^{(1) 9} M. I. A. 195; 1 W. R. P. C. 1; 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716,

^{(2) 30} I. A. 249; 31 C. 11; 7 C. W. N. 895; 5 Bom. L. R. 845; 13 M. L. J. 381; 84 P. R. 1903; 135 P.; L. R. 1903; 8 Sar. P. C. J. 543 (P. C.).

^{(3) 5} Ind, Cas. 42; 23 M. 342; 7 M. L. T. 17; 20 M. L. J. 49.

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long a different community, with its peculiar religion and usages, may well result and be so outside Hinduism in the proper meaning of the word. To the members of such a community the expression Hindu in the Indian Succession Act and the Burma Laws Act would not be applicable.

Act would not be applicable. Of the mode in which this principle is applied, the judgment of this Committee, delivered in 1903 by Sir Arthur Wilson in Bhogwan Koer v. Jogendra Chandra Bose (2), is a good illustration. There it was explained how Sikhe and Jains can properly be treated as Hindue, and how even entry into membership of the Brahmo Somaj does not necessarily destroy continuity with a religion which is so elastic in its scope as is Hinduism. It is plain that the application of any merely abstract principle may be insufficient to solve the problem in concrete cases. A method which takes account of historical as well as other considerations must be applied, and the subjectmatter must in each instance be looked at a whole. In the recent appeal of Abdurahim Ha i Ismail Mithu v. Halimabai (4), a case of migration of a sect from India to East Africa, their Lordships laid down that, where a Hindu family migrates one part of India to another, from prima facie they earry with them their personal law, and if they are alleged to have become subject to a new local custom, this new enstom must be affirmatively proved to have been adopted; but where such a family emigrate to another country, and, having earlier become themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined should be made. All that has to be shown is that they have so acted as to raise the inference that they have out themselves off from their old environment. It was observed that the analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of enstom on migration within India. The question is simply one of the proper inference to be drawn from eireumstaness.

If a twice born Hindu migrates across the

sea to Barma and marries a Barmese woman that in itself may not necessarily deprive him of his Hindu status in the eye of the law. But if he has descendants who have been born and have always lived in Burma, and who have inter-married with its people, then, even though they may form a community of their own which inherits many traces of Hindu usage, if the usages and religion are of a character so divergent from Hinduism as those of this community are. the community cannot, in their Lordships' opinion, be regarded as Hindu. They think that the Kalais asquired a non-Hindu status of their own of this kind, and, further, that Maung Ohn Ghine had so distinctly identified himself with the Kalais that his status was determined by theirs.

They are, therefore, unable to draw the inferences made by the learned Judges of the Appellate Court. They think that the contention of Ma Yait is well founded, and that her appeal ought to succeed, while the cross-appeal of Maung Chit Maung must fail.

It follows that the decrees of the Appellate Court in the two suits should be set aside and the decrees of Robinson, J., restored, excepting in so far as that in the Appellate Court coats were given out of the estate. This part of the decrees may stand.

Their Lordships will humbly advise His Majesty accordingly.

Maung Chit Maung must pay the costs of the appeals.

W. C. A.

Solicitors for the Appellant, -Messrs, Bramall & White.

Solicitors for the Respondents.-Massrs, Waterhouse & Co.

ALLAHABAD HIGH COURT, SECOND CIVIL APPEAL No. 1158 or 1920. April 3, 1922.

Present :- Mr. Justice Stuart.
SHAKIRA BIBI-PLAINTIPF-APPRILANT

NANDAN RAI AND ANOTHER-DEPENDANTS-RESCONDEATS.

Custom-Finding as to custom-Question of law or

^{(4) 32} Ind. Oas. 418; 43 I. A. 35; 30 M. L. J. 227; 20 O. W. N. 362; (1916) 1 M. W. N. 176; 18 Bom. L. B. 685 (P. O.).

SHAKIRA BIBI D. NANDAN RAI.

Where a question arises as to the existence or non-existence of a particular custom and the lower Appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and a High Court is entitled in second appeal to consider whether the finding is based on sufficient evidence.

[p. 6:4, cols. 1 & 2]

But where the Court has not rejected admissible evidence, has applied its mind correctly as to what the essentials of a custom are, and at the end has found that it is not satisfied on the evidence produced that such a custom exists, there is no point of law which can be taken in second appeal. [p. 615, col. 2.]

Second appeal against a decree of the Additional Subordinate Judge, Azamgarb, dated the 16th July 1920.

Mr. U. S. Baipai, for the Appellant. Mr. P. L. Baneri, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises has been instituted by a Zemindar in the Azamgarh District against certain riaya on the allegation that they have appropriated the wood of a tree which was standing upon land of which they were in occupation after the tree had fallen down. She ascerted that under a custom of the village, she, as Zemindar, was entitled to half the value of all fallen timber, and she instituted a suit for small damages and for an injunction prohibiting the defendants from questioning her rights in such matters in future.

The defendants admitted that they were riaya; they admitted that the tree stood upon lard of which they were in compation; they admitted that the tree had fallen down and that they had appropriated it but they denied the existence of any sustom entitling the plaintiff to half its value.

The Trial Court found that such a sustem did exist and decreed the suit. The lower Appellate Court found that no such sustem existed. The Zemindar appeals here.

It has been laid down by a Full Bench of this Court in Ram Bilas v. Lal Bahadur (1) that where a question arises as to the existence or non-existence of a particular enstom, and the lower Appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged enstom, the question is one of law, and the High Court is entitled in second appeal to

(1) 80 A. 311; 5 A. L. J. 456; A. W. N. (1908) 112; 4 M. L. T. 169 (F. B.),

consider whether the finding is based on sufficient evidence. It was further held by Beneh in Roo Girraj Singh v. Hargobind Sahai (2), that a High Court in second appeal has jurisdiction to consider the evidence given in support of an alleged custom and to determine whether or not that evidence is sufficient in point of law to establish the oustom set up. But it appears, on reading the judgment of the Bench in question, that the learned Judges did not intend to go beyond what was laid down in the Full Bench decision. It is to be noted that the view taken by the Fall Bench was that it is open in second appeal to go into the question of law as to whether the evidence which the lower Appellate Court found sufficient to establish a sustom was adequate for the purpose : but neither of those decisions laid down that where a lower Appellate Court found that the evidence was insufficient to establish a custom, a point of law arose in second appeal that it was in fact sufficient. And it would appear to me that where the lower Appellate Court, after examining the evidence legally and properly and not having rejected admissible evidence, finds that the evidence is not sufficient to establish a custom, ro question of law can arise. This view appears to be borne out by the decision of their Lordships of the Privy Conneil in Muhammad Kamil v. Imtiae Fatima

"The judgment of the first Court in this case decided that the rights of the parties were governed by the Muhammadan Law, and not by family custom, as had been alleged, and this was affirmed on appeal. The existence of such a custom is a question of fact, and as to this question the Courts in India concurred in their judgment."

In a somewhat similar ease to the present, a Bench of this Court decided in Baru Mal v. Tansukh Rai (4) that where a lower Appellate Court refused to find upon an entry in a wajib-ul-arz and the evidence of two decrees that a custom of pre emption existed in a certain village, the finding that no custom

^{(2) 4} Ind. Cas. 804; 32 A. 125; 7 A. L. J. 36.

^{(3) 4} Ind Cas. 457; 31 A 557; 10 C. L. J. 297; 11 Bom. L. R 1210; 14 C. W. N. 59; 19 M. L. J. 697; 13 O. C. 183; 35 I A. 210 P. C.).

^{(4) 29} Ind Cas. 1001; 13 A. L. J 717; 87 A. 524.

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existed was a finding of fact binding upon a Court in second appeal.

The question as to how far a decision that B given state of fasts does not or does binding enstom or usage, establish 8 is a question of fast or law was discuss. ed very thoroughly by Mookerjee, J., in the case of Kailas Chandra Dutta v. Padma Kishore Roy (5). The view taken by that supports my conclusion. learned Judge The question of the existence of an alleged eastom is generally a question of fact, but it is conseivable that the desision may involve an error of law so as to justify the interference of the High Court in second appeal. Undoubtedly, the High Court could consider whether irrelevant evidence had been received or relevant evidence had been excluded or whether a enstom was found to exist on legally insufficient evidence or whether legal principles or tests had been erroneously applied. But where the Court, as the lower Appellate Court has done here, has not rejected admissible evidence, has applied its mind correctly as to what the essentials of a enstom are, and at the end has found that it is not satisfied on the evidence produced that such a custom exists, it appears to me that there is no point of law which can be taken in second appeal. If it had been opened to me to decide the question as res integra, I should not have taken a view different from the view taken by the lower Appellate Court. It appears that in the Settlement of 1826 no such eustom was recorded, that in 1872 the existence of the enstom was recorded in the wa; sb-ul are by the Settlement Officer; but it is to be noted that he added that the villagers in many instances denied that any such eustom existed and subsequently there have been a few instances in which the existence of such a custom has been recognised. A suit by certain tenants for a declaration that no such onstom existed was dismissed not on the merits but owing to a misjoinder of parties. One question remains. Were the defendants restrained on the principle of res iudicata from advancing their present defence? This much is clear. They are members of a joint Hindu family. Their father was sued by the plaintiff a few years ago for damages for having appropriated certain trees and out down

The suit failed in respect of the others. greater part of the reliefs sought but it was found that he had appropriated one tree which had fallen down and as against him it was held that the custom which it was now sought to establish did exist and he was directed to pay half the value of the wood as damages. That suit, however, was a suit for damages pure and simple. If the cause of action had arisen within the jurisdiction of a Court having Small Cause Court powers the suit would have lain in a Small Cause Court. It was a suit of a Small Cause Court nature. It was beard by a Munsif in the absence of an officer with Small Cause Court powers as a regular suit. But it remained a suit of a Small Cause Court nature to which the provisions of section 102 of the Code of Oivil Procedure applied as the subject matter was less than Rs. 500. The present suit is not a suit of a Small Cause Court nature, for it includes a plea for a mandatory injunction. I am inclined to think that, in these eircumstances, the previous judgment does not operate as res judicata as the Munsif in his espacity of an officer hearing a suit of a Small Cause Court nature was not competent to try the present suit. It is true that, apart from his capacity as an officer trying suits of a Small Cause Court nature, he was competent to try the present suit but the combination of two functions in the same officer does not affect the question of competency. In many cases, Sabordinate Judges who have, as Sabordinate Judges, practically unlimited powers in the desision of suits, are also Small Cause Court Judges. Apart from the question that the previous suit was against the father of the defendants, from which both the Courts below argue that inasmuch as he did not represent the family in that suit, the family being joint, this would seem to me sufficient reason for not considering the defendants estopped in their defence by a plea of res ju licata.

For the above reasons, I dismiss this appeal. The appellant will pay her own costs and those of the respondents.

J. P.

Appeal dismissed.

^{(5) 41} Ind. Cas. 939; 21 O. W. N. 972; 25 C. L. J.

ABDULLA SHAH U. MUHAMMAD SHAH.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 571 of 1918, January 12, 1922.

Present: - Justice Sir William Chevis, Kr., and Mr. Justice Abdul Qadir.
ABDULLA SHAH AND OTHERS-PLANTS

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MUHAMMAD SHAH AND ANGTHER-DEFENDANTS-RESPONDENTS.

Pleadings—Suit based on breach of agreement— Breach specified in plaint not proved—Decree, whether can be granted on ground that pleadings amount to breach.

No doubt in exceptional cases a Court can take cognisance of events since the institution of the suit where the adoption of such a course tends to shorten litigation, but where a suit is based on a breach of an agreement and the plaintiff fails to prove that breach he cannot demand a decree on the ground that something which has been alleged by the defendant in his pleadings or statement amounts to a breach of the agreement which gives him a cause of action. [p. 617, col. 2]

Chinta Hararan Das v. Radha Charan Poddar, 37 Ind. Cas. 962, and Subbaraya Chetty v. Nachiar Ammal, 44 Ind. Cas. 863; (1918) M. W. N. 199; 7 L.

W. 403, distinguished.

Plaintiff alleged that he was owner of a half share in a certain village, defendant being the owner of the other half, and that he had given defendant a 1/6th share in the village out of the half owned by himself, under an agreement whereby the defendant undertook to pay the malba and other miscellaneous expenses for the whole village. The agreement went on to provide that, "if any of the contracting parties or their descendants break the contract the parties would have to revert to their original half and half share in the village land." The plaintiff now sued to recover the 1/6th share on the ground that defendant had for some years ceased to pay the dues which he had undertaken to pay. The defendant pleaded that the agreement was invalid, and in the alternative that no breach of it had taken place. It was held that the plaintiff had failed to prove breach of the agreement. In second appeal the plaintiff contended that the defendant's plea that the agreement was invalid amount. ed to a breach of the contract and that he was entitled to a decree on the basis of that breach :

Held, (1) that the plaintiff was not entitled to a decree on the basis of something which had occurred after the suit was filed and which would not necessarily have occurred in any case; [p. 617, col. 2.]

(2) that if the plaintiff desired to take advantage of the alleged breach of agreement he could only do so by means of a fresh suit. [p. 617, col. 2.]

Second appeal from a decree of the District Judge, Multan, dated the 15th November 1917, reversing that of the Junior Subordinate Judge, Multan, dated the 13th June 1916,

Mr. Muhammad Raft, for the Appellants. Mr. Zofrulla Khan, for the Respondents.

JUDGMENT .- The suit which has given rise to this eecond appeal was between descendants of two brothers, Amir Shah and Mubarik Shab, who owned all the land in. Chak Hatar of village Akbar Shah in equal The plaintiffs are grandsons of sharea. Mubarik Shah. The case for the plaintiffs is that in 1877 an arrangement was arrived at by the ancestors of the parties by which a two thirds share of the land, instead of one. half, was given to the descendants of Mabarik Shah on the condition that the latter would be responsible for paying the swai dues and other miscellaneous expenses and also the cost of maintaining burkis and sehaddas and of supplying uniforms to the villege Chankidars. It is stated that this oral agreement was reduced to writing in 1901, when a registered deed was executed and signed by the parties, which provided that, "if any of the contracting parties or their descendants break the contract the parties would have to revert to their original half and half share in the village land," The plaintiffs slaimed back the one sixth share of the land which had been given to the defendants under the said agreement, on the ground that for five years previous to the suitthe defendants had ceased to pay the dues which they had undertaken to pay. The defendants admitted that there was an oral arrangement in 1877, but denied the validity of the written agreement of 1901, which they said was obtained by fraud and was not binding on them. They added, however, that they had not committed any breach of the contract but had continued to pay the dues above mentioned. The Court of first instance found that the agreement of 1901 was valid and binding on the defendants and gave the plaintiffs a decree for possession of the one-sixth share of land which had hitherto been in the possession of the defendants holding that the defendants had broken the contract by not paying the dues. The defendants appealed to the District Judge, who reversed the decree of the Trial Court, finding that the evidence relied on to prove the breach was vague. He held that there was nothing to show that the defendants had really backed out of the agreement. The plaintiffs have now preferred a second appeal against the above decision and we have

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heard Mr. Muhammad Refi on their behalf and Mr. Zafrulla Khan for the re-

spondents.

The decision of the lower Appellate Court that no breach of the agreement is proved to have taken place cannot be questioned in second appeal and is not assailed. It is argued, however, that even if no such breach had occurred before the suit, it did certainly take place during the pendency of the suit, when the defendants repudiated the agreement of 1901 and said that they were not bound to pay the malta dues and would sack their proper remedy against such liability. Mr. Muhammad Bafi urges that the defendants by this pleading gave a cause of action to the plaintiffs and the latter should not be made to bring a fresh suit in order to get a relief to which they are clearly entitled after it has become patent that the other side are not going to abide by the terms of the agreement. He refers to Subbaraya Chetty v. Nachiar Ammal (1) and Chint: Hararan Das v. Radha Charan Poddar (2) in support of the contention that the relief claimed can be granted to him in the present suit, even if the cause of action arose subsequent to the institution of the suit.

Another ground of appeal which is pressed before us is, that under the agreement of 1901 it was open to either party to revert to the status quo ante by going against the terms of the contract and that the plaintiffs would be, in any case, entitled to say that they were no longer willing to adhere to the contract and would in future prefer to pay their share of the dues and to get back the one. sixth land, the profits of which the defendants were enjoying. This argument, however, is taken for the first time in second appeal and the plaintiffs cannot now be allowed to set up a new case. Their case was originally confined to the definite allegation that the defendants had broken the contract. So far as the ground first discussed is concorned, Mr. Zafrulla Khan argues, in the first place, that the pleadings of the defendants have not been correctly understood or interpreted. He says that what the defendants said about seeking proper remedy was, at the outside, a mere declaration of an intention to do something in future. He also points.

(1) 44 Ind. Cas. 868; (1918) M. W. N. 199; 7 L, W. 408; (2) 87 Ind. Cas. 962;

out that in the statement on behalf of the defendants made before the issues were framed it was declared by them that they would continue to pay the dues in question, He says that, in the face of this changed position taken by the defendants, it cannot be orged that a cause of action based on a breach of the agreement has arisen and contends that the plaintiffs should bring a separate sait for anything fresh which they allege has happened since the suit under appeal was lodged. Mr. Zafrulla Khan distinguishes the rulings quoted on behalf of the appellants from the present case, on the ground that the events which occurred subsequent to the filing of the suits, in the cases dealt with in those decisions, were such as would have nesessarily occurred even if the suits had not been filed and would have given the plaintiffs a cause of action. We agree with the contention that the sases cited are distinguish .. able. In Subbaraya Chetty v. Nachiar Ammal (1) there was a suit for money, which be came really payable after the filing of the suit and it was held by the Madras High tte plaintiff should not be Court that compelled to institute another suit and a desree should be passed in his favour in the enit already filed. In Chinta Hararan Das v. Radha Charan Poddar (2) plaintiff was holding land on an itara lease at the time of the suit, but the lease expired before the deeres was passed and he was given a decree for khas possession of the land in the same suit, as he was found to be entitled to possession, and the Calcutta High Court laid down that in exceptional cases Courts can take cog. nizance of events since the institution of the suit where the adoption of such a course tends to shorten litigation." We think the present ease is somewhat different from the cases above referred to and if the plaintiffe in this case desire to sue on the alleged breach of contract owing to the pleadings of the defendants in the suit, they can do so only by means of a fresh suit and they are at liberty to bring such a snit, if so advised, in which the questions of the exact significance and effect of the pleadings can be gone into. The result is that both the grounds of appeal pressed before us fail and this appeal is, therefore, dismissed with soats.

z. K.

Appeal dismissed.

MOHAN LAL U. PREMRAJ.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL No. 1316 OF 1919. January 12, 1922.

Present: - Mr. Justice Ryves and Mr. Justice Gokul Prasad. MOHAN LAL-DEPENDENT-APPELLANT

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PREMRAJ-PLAINTIFF, AND HARI SINGH AND OTHERS - DEFE DANTE -RESPONDENTS.

Mortgage-Subrogation-Several mortgages in favour of same mortgagee-First mortgage, person paying, right of-Transfer of Property Act (IV of 882), scope of.

A person who pays off a prior mortgage in favour of a mortgagee who holds subsequent mortgages on the same property, is entitled, by the principle of subrogation, to hold up that mortgage as a shield against the mortgagee's subsequent mortgages. [p. 619, col. 2.]

The Transfer of Property Act does not purport to consolidate the law relating to mortgages in India, it merely defines and amends certain parts of the law, [p. 619, col. 1.]

Second appeal from a decree of the Subordinate Judge, Meernt.

Messrs. D. O. Banerji and K. O. Mital, for the Appellant.

Dr. S. N. Sen, for the Respondents.

JUDGMENT .- This appeal arises out of a suit for sale on a mortgage. It appears that there were two brothers, Ramji Lal and Baldeo, who owned a 1/12th share each in a certain property. Baldeo died leaving two sone, Babadur and Nathu. Ramji Lal applied for mutation of names in place of Balden and obtained an order in his favour; and on the 5th of December 19.5, he mortgaged with possession the whole share, that is, 1/6th, belonging to his deceased brother and himself. On the 15th of June 1906, he executed a simple mortgage of the 1/oth share in favour of the plaintiff Premraj.

One Hari Singh, who is a defendant in the suit, had two simple money decrees against Ramji Lal and Baldeo separately. He brought to sale the 1/12th share of each of the two brothers in execution of his decrees and purchased them himself. He purchased the share of Ramji Lal subjest to the plaintiff's ensumbrance of the On the 4th of 5th of December 1905. March 1907 Premraj sued the mortgagor Ramji Lal, Hari Singh and Bahadur and Nathu the sons of Baldeo on his mortgage

of the 5th of December 1905 and obtained a deeree for sale.

On the 16th of August 1911 Hari Singh mortgaged the property purchased by him to Beopar Shahayak Bank and paid off the deeree of Premraj.

On the 22nd of December 1911 Hari Singh mortgaged the property to Mohan Lal defendant and with the money so taken paid off the mortgage of Beopar Shahayak Bank.

The plaintiff Premraj now sues for sale of the whole property on his mortgage of 1905. Mohan Lal contended inter alia that Ramji Lal had no authority to mortgage the whole of the property and his half share, that is, a 1/12th, only could be sold. He also claimed priority to the extent of the amount due on the mortgage of 1905 which he had satisfied.

The Munsif came to the conclusion that Ramji Lal was not competent to mortgage the whole of the property in the presence of Baldeo's two sons, but sould mortgage only his 1/12th share. He decreed the claim subject to the payment of Rs. 1,157 the principal and interest on the mortgage of 1935 to the defendant Moban Lal.

The plaintiff went up in appeal, and the learned Judge of the lower Appellate Court came to the conclusion that Hari Ram, Bahadur and Nathu were made parties to the previous suits, as legal representatives of Ramji Lal and sould not be heard to say that the mortgage by Ramji Lal of the whole of the family property was incompetent, He then went on to say that the mortgage security became extinguished as soon as Premraj obtained the decree for sale on his mortgage of the 5th of December 1905 and, therefore, no right of subrogation could be elaimed by Hari Singh. On these findings he modified the decree of the Court of first instance by giving the plaintiff an unconditional deeres for sale of the whole of the property.

The defendant Mohan Lal comes here in second appeal and contends that (1) it was open to him to contend that Ramji Lal was not the owner of the entire property but of half, (2) that he was not the legal representative of Ramji Lal, (3) that Ramji Lal was not competent to mortgage the share of his brother Baldeo, and (4) that having satisfied the plaintiff's own MOHAN LAL U. PREMEAJ.

mortgage of 1905 he was entitled to

priority to that extent.

As to the first contention urged on behalf of the appellant, we do not think that it has any force. Hari Singh was made a defendant in the previous suit by the plaintiff as he had purchased the property which was already mortgaged to the plaintiff. The Court had found in that case that the mortgage given by Ramji Lal was partly on account of the debts owing by both Ramji Lal and his brother Balder.

As to the second and third points raised which are connected with the first, we are of opinion that the appellant who had parchased the whole of the family property in execution of a simple money decree was the legal representative of both the brothers Ramji Lal and Baldeo. In the pravious suit of Premraj the Court decided in effect that Ramji Lal was competent to mortgage the share of his brother Baldeo also We do not think the defendants can now go behind that finding.

The fourth contention, namely, that the the defendant-appellant having satisfied plaintiff's first mortgage of 1905 WAS has entitled to hold it up as a shield, It been hotly contested on both sides. was argued by Mr. Durga Charan Binerji, the learned Advocate for the appellant, that according to the dostrine of subrogation the defendant-appellant was entitled to do so. On the other hand, Dr. Sep, the learned Advocate for the respondents, contended that the doctrine of subrogation as applied in India was confined to the provisions of section 74 of the Transfer of Property Act (IV of 1882) and referred only to a subsequent mortgages redeeming the next prior mortgage. In our opinion this argument cannot be accepted. The Transfer of Property Act does not purport to consolidate the law relating to mortgages in India but only defines and amends certain parts of the law (see the Preamble to the Ast and paragraph 10 of Dr. Gour's Law of Transfer in British India). Farthermore, their Lordships of the Privy Council have applied the principle in the case of purchasers also [see Gokaldes Gopaldas v. Puranmal Premsuhh (1)].

(1) 10 C. 1035 at p. 1044; 11 J. A. 126; 8 Ind. Jur. 896; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. s.) 632 (P. C.).

Another contention of Dr. Sen is that, where there are two mortgages in favour of the same person, no question of subrogation can arise because a creditor can claim no subrogation against himself. No authority has been cited before us in support of this contention and we do not think that on principle there is any difference between the case where a purchaser pays off a prior mortgage in favour of a third person and the case where he pays off a prior mortgage against the same creditor against whom he claims the right of subrogation. We are of opinion that the contention of the appellant on this point is correct.

We, therefore, allow the appeal, set aside the decree of the Court below and in lieu there. of pass a decree in favour of the plaintiff for sale of half the mortgaged property unconditionally and for sale of the remaining half if the sale-proceeds of the former does not prove to be sufficient, subject to his paying Rs. 1,157 to the defendant appellant Mohan Lal. The defendants must pay the amount due to the plaintiff within six months from this date. In ease of their failure to do so the plaintiff will be entitled to recover his money by sale of half the mortgaged property. In case his mortgage is not satisfied by such sale and he wants to sell the remaining half he will have to pay Rs. 1,157 to the appellant Moban Lal within six months of the sale of the former half be entitled to sell and be will then the remaining half of the property also to recover the balance due to him and the amount of Rs. 1,157 so paid to Mohan Lal. The plaintiff is entitled to balf his costs in all Courts and the defendant appellant Mohan Lal will get half his costs in all Courts from the plaintiff. Costs in this Court will include fees on the higher scale,

J. P. & W. O. A.

Appeal allowed.

BABU RAM U. BABU RAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 240 OF 1920.

February 14, 1921.

Present:—Mr. Lyle, A. J. C.

Munihi BABU RAM—PLAINTIFF—

APPELLANT

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BABU RAM—DEFENDANT—RESPONDENT.

Land Improvement Loans Act (XIX of 1883), s. 7

(1) (c)—U. P. Land Revenue Act (III of 1901), ss.

160, 151, 162—Evidence Act (I of 1872), s. 114, Ill,

(e)—Taqavi—Land sold for arrears—Incumbrance—

Presumption.

Where land is sold for arrears of taqavi and the sale-certificate shows that it was sold under the provisions of sections 100 and 161 of the U. P. Land Revenue Act, free of all encumbrances, the Court may presume that the sale-proceedings were lawfully taken and that the facts stated in the sale-

certificate are correct. [p. 621, col. 1.]

A sale under sections 160 and 161 of the U. P. Land Revenue Act for arrears of taqavi can only take place if the taqavi had been granted for the benefit of the property sold. Where the sale certificate states that the sale has taken place under those sections, the burden of proving that the taqavi had not been granted for the benefit of the property sold, lies on the person alleging it. [p. 621, col. 1.]

The plea that taqavi is not revenue and that land cannot be sold free of all encumbrances for arrears of taqavi is not maintainable in view of section 7 (1) (c) of the Land Improvement Loans Act, read with section 161 (1) of the U. P. Land Revenue

Act. [p. 621, col. 1.]

Appeal from a decree of the First Additional District Judge, Lucknow, dated the 23rd April 1920, upholding that of the Munsif, North Lucknow, dated the 12th November 1919.

Babu Rajeshwari Irasal, for the Appel, lant.

Mr. A. Rauf, for the Respondent,

JUDGMENT.—Suraj Prasad was the owner of certain plots in Mahal Latifnagar. He took a taquet advance from the Government for the construction or repair of a well and gave the plots as security for the advance. He failed to pay the advance and the plots were put to sale and purchased by Babu Ram, plaintiff, on the 17th of February 1919. The tale certificate is on the file and it declares that the plots were sold under sections 160 and 161 of the Land Revenue Act free of all enumbrances, Another Babu Ram, the

defendant-respondent, held a mortgage on these plots. He brought a suit on the basis of his mortgage and obtained a decree for sale. The decree was put into execution and the plots were purchased by the decreeholder. In the execution proceedings the plaintiff-appellant objected to possession being delivered to the defendant respondent on the ground that he (the plaintiff appel. lant) had purchased the plots "free of all encumbrances" under the sale for tagavi, His objection was disallowed and he, therefore, brought the suit out of which this appeal arises for a declaration that he was the owner in possession of the plots which were purchased by him free from all encumbrances and that they were not calcable in execution of the defendant's decree. The defendantrespondent pleaded that his mortgage was prior to the tagavi advance and that though the land could have been sold free of all encumbrances for any revenue due upon it a tagati debt could not take precedence of a prior mortgage.

The Court of first instance held that as the tagavi advance was not for the benefit of the property in suit and the property was merely a collateral security for payment of the tagavi the sale of the property was governed not by sections 160 and 161 of the Land Revenue Act but by section 162 of that Act and that, therefore, the property must have been sold subject to the prior mortgage. The lower Appellate Court has agreed with the view taken by the Court of first instance and the plaintiff comes to this Court in second

appeal.

The first point to be noted is, that there is nothing on the record to show that in fact the mortgage held by the defendantrespondent was a prior debt to the tagars advance. Both the Courts below appear to have assumed that the mortgage was a prior debt. But even if we assume that the defendant-respondent's mortgage was a prior debt it seems to me that the decision of the Those Courts lower Courts is not correct. have held that as the tagavi advance was not taken for the benefit of the property in suit sections 160 and 161 of the Land Revenue Act could not apply. The defend. ant respondent did not plead that the tagavi advance had not been taken for the benefit of the land in suit and that, therefore, the property must have been sold subject to the

UMA CHAND SETT U, KANAI LAL SETT,

prior incumbrance; and the lower Courts have set out a case for the defendant. respondent which was not pleaded by him, The plea was that tagavi was not revenue and that land sould not be sold free of all encumbrances for arrears of tagari. In view of section 7 (1) (c) of the Land Improvement Loans Act, read with section 161 (1) of the Land Revenue Act, this plea is clearly not The plaintiff produced his maintainable. sale-certificate which showed clearly that the land was sold under the provisions of sections 160 and 161 and was purchased by the plaintiff free of all enoumbrances. Omnia præsumuntur rite esse acta. The Court may presume that the saleproceedings were lawfully taken and that the facts stated in the sale certificate are correct. The sale under sections 160 and 161 of the Land Revenue Act for arrears of tagari could only have taken place if the tagavi had been granted for the benefit of the property sold. It, therefore, lay upon the defendant-respond. ent to show that in fact the tagavi had not been advanced for the benefit of the property in suit and the lower Courts were not right in presuming that the tagavi had been advanced for the benefit of some other property and that the property in suit was given as collateral security. The defendant respondent has made no attempt to discharge the burden which was upon him. In these eireumstances, the decree of the lower Appellate Court cannot be maintained. The appeal is allowed, the decree of the lower Appellate Court is set aside and the plaintiff's suit is deereed with costs in all Courts.

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Appeal allowed.

OALOUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO PRIVE COUNCIL No. 6 OF 1921.

April 18, 1921.

Present:—Sir Lancelot Sanderson, Kr., Chief Justice, and Mr. Justice Richardson. UMA CHAND SETT AND ANOTHER—

PATITIONERS TO ENGLAND

COPPOSITE PARTY.

Oivil Procedure Code (Act V of 1903), s, 110-

Leave to appeal to Privy Council-Decree of affirmance-Substantial question of law.

Where a decree of the lower Court is varied by the High Court in favour of one of the appellants at the instance of the Vakilacting for all the appellants, the Vakil, in the absence of any reservation as to the rights or positions of other appellants, must be deemed to have made it with the consent of the other appellants and consequently the decree is one of affirmance and the other appellants are not entitled to obtain leave to appeal to the Privy Council unless they show that there is some substantial question of law involved. [p. 622, col. 2.]

Application for leave to appeal to His Majesty in Council.

Babu Rupendra Kumar Mitter, for the

Petitioners.

Dr. Dwarka Nath Mitter and Babu Narendra Nath Chowdhuri, for the Opposite Party.

JUDGMENT.—This is an application by Uma Charan Sett and Annoda Prosad Sett for a Certificate that this is a fit and proper case for appeal to the Judicial Committe of the Privy Conneil. The relationship of the parties appears in the judgment of my learned brother Mr. Justice Mookerjee. After stating that the appeal was by the first three defendants in a suit for partition and accounts of a joint family property, he went on to say: "The founder of the family was one Bhola Nath Sett who died in or about Agrahan 1284, that is, towards the end of the year 1877. He left three sons Uma Charan (defendant No. 1), Annoda (defendant No. 2) and Nogen who died in 1279. He also left a widow Nritya Moyi, who is the third defendant. The fourth defendant in the suit is Rajendra who is the son of the first defendant Uma Charan. The plaintiffs in the suit are Kanai and Jyotindra—the two sons of Nogen. second plaintiff was, at the date of the institution of the suit and is even now, an infant represented by his mother Hari Priya,"

The appellants to this Court were the first three defendants. Uma Charan, Annoda and Nritya Moyi, and they were represented by the same learned Vakil, Babu Ram Chander Mozumdar, and the plaintiffs were represented by Dr. Dwarks Nath Mitter.

The real issue in the ease was, whether certain premises had been bought by the widow out of her own separate estate so as to make the premises her own property, or whether the premises had been bought

BISHESHAR DAYAL U. HAR RAJ EVAR.

by the deceased man Bhola Nath in the name of his wife.

The appellants in this Court were basing their title upon a deed of gift by Nritya Moyi to the two appellants Uma Charan and Annoda. The First Court held that the property had been bought by Bhola Nath in the name of his wife, and this Court same to the same conclusion and held that the decree made by the Sabordinate Jadge must be affirmed subject to one variation; as to this variation the learnel Judge said: "On behalf of Nritya Moyi the third defendant, Babu Ram Charan Mozumdar has pointed out that if it is established that the shop was not purchased by ber in 1868 but was in reality purchased by her husband Bhola Nath the question arises whether she is not entitled to a share of the properties on partition. Tais aspect of the case does not appear to have been raised in the Court below nor pressed before the Subordinate Judge. The point is also not taken in the grounds of appeal presented to this Court for the reason that if such a ground were taken it might weaken the defence that the property belonged not to Bhola Nath but to Nritya Moyi. But, in the eireumstances of this case, we are of opinion that when the properties come to be divided share should be allowed to one-fourth Nritya Moyi in lieu of her right to maintenance to be held by her during her lifetime."

"Subject to this variation the decree of

the Subordinate Judge is affirmed."

The result, therefore, was that, instead of getting one-third of the property in accordance with the judgment of the First Court, the effect of the judgment of this Court was that Uma Charan and Annoda would each get a quarter of the property and Nritya Moyi would get one-quarter during her life-time. The question, therefore, is whether the judgment of this Court is one of affirmance or reversal. In my judgment, it is one of affirmance except in so far as it was varied with the consent of the appellants to this Court.

It is clear that the decree of the lower Court was varied at the instance of Babu Ram Chunder Mczumdar acting on behalf of the appellant Nritya Moyi. But for his application the judgment of the First Court would have been affirmed, without any

variation. The learned Vakil appeared not only for Nritya Moyi but also for the other two appellants, and inasmuch as it is suggested that the learned Vakil in making that application made any reservation as to the rights or position of the first two defendants, who now desire to appeal to the Privy Council, in my judg. ment, the considerion must be that, when the learned Vakil made that application on behalf of Nritya Moyi he must be taken to have made it with the consent of his other two clients, namely, the present appellants to England. Consequently, the position is, that this Court affirmed the decision of the lower Court except as regards the variation which was made at the request of Nritya Moyi and with the consent of the other appellants. The decree of this Court, therefore, was one of affirmance and, under these circumstances, it is necessary for the appellants who desire to appeal to the Judicial Committee of the Privy Council to show that there is some substantial question of law involved. This, they have failed to do, and consequently the application must be refused with costs, five gold mohurs.

J. P.

Application refused.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 4 or 1920. January 31, 1921.

Present: -Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

BISHESHAR DAYAL AND OTHERS—
PLAINTIPPS—APPELLANTS

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Musammat HAR RAJ KUAR
AND OTHERS—DEFENDANTS—

RESPONDENTS.

Construction of document—Sale—Agreement to sell—Transfer of Property Act (IV of 1882), 5. 54— "Price", what constitutes—Limitation Act (IX of 1908), Sch. I, Art. 113—Specific performance—Limitation,

BISHESHAR DAYAL U. HAR BAJ KUAB.

In order to construe a document the Court must look to all the covenants in it. [p. 624, col. 1.]

A sale may be effected in lieu of the amount to be spent in a particular litigation, for, although the amount is unascertained, it is certainly capable of being ascertained. [p. 624, col. 2.]

The term "price" in section 54 of the Transfer of Property Act is used to denote consideration in the shape of money, or what is its equivalent. [p. 624,

col. 2.]

A deed was executed in order to provide money for the defence of a suit brought against the executant for possession of his property. The deed conveyed a share in this property to the transferee. It was described as a sale-deed and was stamped as such and it contained a statement that the executant had made an absolute sale of the share. The ostensible consideration was a sum of Rs. 14,0 0, Rs. 13,800 of which were left with the vendee to be spent in the litigation, together with the "labour, efforts and hard work of the vendee." If less was spent the executant was not to be able to recover it while if more was spent he was not to be liable for it. In the event of success the vendee alone was entitled to the costs of the litigation recovered through the Court. The vendee was to be entitled to have possession of the share sold after success in the suit After obtaining a decree the management of the decreed property and the collections was to vest with the vendee and the vendor and each party was to be entitled to have the partition made. After the registration of the deed the executant was not to be entitled to admit the right of inheritance of any one else either directly or indirectly, by his act or word, with respect to the share sold. If the executant made collusions against the interests of the vendee or acquired any undue advantage for private benefit then the vendee was to be entitled to step in. Rs. 5, wo of the consideration money were left with the vendee to pay off a certain charge on the property only in the event of his getting a title to it by success in the suit:

Held, (1) that the real intention of the parties to the deed was that the transfer of title as well as of possession should be conditional on the executant's success in the suit and should only take effect upon the passing of a final decree in his favour; [p. 625,

col. 2.]

(2) that, therefore, the deed was only an agree-

ment to sell ; [p. 626, col. 1.]

18) that the limitation for a suit to enforce the agreement was contained in Article 113 of Schedule I to the Limitation Act; [p. 626, col. 1.]

(4) that limitation began to run from the date on which the suit against the vendor was finally dismissed on appeal. [p. 626, col. 2.]

Appeal from a decree of the Subordinate Judge, Rae Bareli, dated the 22nd September 1919.

The Hon'ble Syed Wasir Hasan, for the

Appellants.

The Hon'ble Pandit Gokaran Nath Misra and Pandit Jagmohan Nath Chak, for Respondent No. 1,

JUDGMENT, -This appeal arises out of a suit for possession of certain properties on the basis of a sale deed executed on 26th Ostober 1912 by Sheo Ratan Singb, deceased. in favour of the plaintiffs and of the defendants Nos. 3 to 5 and for mesne profits. plaintiffs also elaimed a sum of Rs. 928 realised by the first defendant Musammat Har Raj Kuar, widow of Sheo Ratan Singh, on assount of sosts in connection with the litigation set out below. The suit property consists of a share in four villages Uttarpara, Rajwapur, Muhammadpur and Kutwarmau. The deed in suit was executed in order to prosure money for the defence of a suit brought against Sheo Ratan Singh by Madho Singh and others for possession of his property consisting of Muhammadpur and Kutwarmau and an 11 biswa 2 biswansi 22; desimal share in Mouzas Uttarpara and Rajwapur. Sheo Ratan Singh was successful in the litigation and the suit of Madho Singh and his co-plaintiffs was dismissed both in the original and the Appellate Courts. Madbo Singb was likewise assisted in those proesedings by sertain professional litigants to whom he had transferred shares in the property and who were joined in the suit as coplaintiffs.

The present suit was resisted on various pleas of which two only are material to this appeal, the others having been rejected by the learned Subordinate Judge. The pleas on which the defendants have succeeded in the Court below are:—

(1) that the deed, though in form a sale, was really an agreement to transfer the property in the event of the suit brought by Madho Singh being dismissed,

(2) that the deed was procured by undue

influence.

On these findings the lower Court has given the plaintiffs a decree for amounts actually spent by them with simple interest at twenty per cent, per annum, amounting in all to Rs. 3,059 2.7, together with future interest at six per cent. A high rate of interest was allowed in view of the plaintiff's exertions in connection with the litigation and the risk they ran of losing their money. The lower Court followed the precedent set in the case of Loke Indar Sngh v. Rup Singh (1) a case which was affirmed by the Privy

(1) 11 A. 118; A. W. N. (1889) 72; 6 Ind. Deg.

BISHESHAR DAYAL V. HAR RAJ KUAR.

Council in Ra a Mohkam Singh v. Raja Rup Singh (2). The plaintiffis appellants contest the finding of undue influence, which they assert was never set up by the defendants, and plead that the transaction in suit was an out and out sale of the property and that they were entitled to a decree for the share sold. The issues are:—

(1) Was the transaction evidenced by the deed in suit a sale in præsenti or merely an

agreement to sell?

(2) Were the plaintiffs in a position to dominate the will of Sheo Ratan Singh and was the bargain unconscionable, so as to render the transaction voidable on the ground of undue influence within the meaning of section 16 of the Indian Contract Act?

The first issue has to be decided with reference to the terms of the deed which is Exhibit I on the record. The deed is described as a sale deed and was stamped as such and it contains a statement that the executant has made an absolute sale of the property in suit. This is a strong point in favour of the plaintiffs but it is not conclusive. We have to look to all the covenants in the deed and see whether the intention of the parties as expressed in the deed was to effect an immediate transfer of proprietary right in favour of the plaintiffs.

The ostensible consideration was a sum of Rs. 14,000, Rs. 13,800 of which were left with the vendees to be spent in the litigation, together with the "labour, efforts and hard work of the vendees," but as the deed contained a covenant that if less was spent the executant should not be able to recover it, while if more was spent he should not be liable for it, the real consideration was the amount to be spent by the vendees in the litigation, less any sum they might recover as costs from the opposite party. The deed contains a covenant, which is material on the question whether the bargain was unconscionable, that in the event of success the vendees alone shall be entitled to the costs of the suit recovered through the Court. In the event they were unable to recover any costs as they were not made parties to the suit. Sheo Batan Singh at first applied that they

should be made parties. The opposite party objected. Subsequently, on 11th January, Sheo Ratan Singh repudiated the agreement, and the Court ruled that as the transferees took their transfer pendente lite they were not necessary parties and should not be joined.

We need not seriously consider the sugges. tion that the transaction was bad as a sale because the astual amount which would be spent by the defendants was unascertained. If not ascertained it was certainly capable of being ascertained, and no authority has been shown us to support the view that a sale cannot be effected in lieu of the amount to be spent in a particular litigation. It is true, however, that the consideration consisted in part of a promise by the defendants to spend their labour and effort in defending the suit and it may be doubted whether this part of the consideration can be considered as "price" as the term is used in section 54 of the Transfer of Property Act. As Dr. Gour says in his commentary on the Transfer of Property Act, Fourth Edition, Article 960, page 599:-

"Although the term 'price' has been nowhere defined, it is no doubt used to denote consideration in the shape of money, or what is its equivalent, for if the transfer is otherwise, it may be either an exchange or a

gift, but not a sale."

The most that can be said on this score is that the fact that part of the consideration consisted of services to be rendered in the future makes it rather more probable that the parties had in mind an agreement to sell rather than an immediate sale.

The covenants contained in clauses (4), (6), (10) and (11) of the decd, particularly the last three of these, are of great importance in determining the true intention of the parties. They are as follows:—

- (4) That after success in the suit, the vendees shall be entitled to have possession of the shares sold, with all the dakili and kharii rights, sir and khudkasht lands, sayer and groves, etc., pertaining to the shares sold along with the executant.
- (6) That after obtaining a decree the management of the decreed property and the collections will vest with the vendees and the vendor and each party will be entitled

^{(2) 15} A. 352; 20 I. A. 127; 6-Sar. P. C. J. 327; 17 Ind. Jur. 376; 7 Ind. Dec. (N. s.) 943,

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to have the partition made either perfect or

imperfect.

(10) That after the registration of this sale deed I, the executant, shall not be entitled to admit the right of inheritance of anyone else either directly or indirectly by my act or word, with respect to the shares sold. If I will do so it will be invalid and illegal and will have no effect on vendess' right to the share sold.

(11) That if anyone of the vendees or I, the executant, directly or indirectly make collusions against the interest of other sharers or acquire any undue advantage for private benefit then all the vendees and I shall be entitled to recover damages and costs proportionate to the shares from the person and all sorts of the property of that person through Court, and under these circumstances the said person will lose all his proprietary rights in the property sold and the vendees and the executant shall proportionately be entitled to that.

Clause (4) makes the transferees' right to possession contingent on success suit. Clause (6) gives them a right to obtain partition, and, till partition a joint right in the management and sollections of the property, when and only when a decree has been obtained in their favour. is the only clause in the deed which refers in any way to the profits of the preperty, and, though the point is not elearly stated, seems to indicate an intention that Sheo Ratan Singh should continue to collect and appropriate the income of the property until the suit was decided. It is common ground that no claim to the profits of the property during the period when the litigation was pending has ever been made by the plaintiffs. It is important to remember that Sheo Ratan Singh was defendant in the suit filed by Madho Singh and that he was in possession of the property at the time when the agree. ment was made. It is not merely that delivery of possession was deferred, but delivery of possession and apparently a right to participate in the profits of the property was deliberately made contingent on the success of the suit. Clause (10) is meaningless if there was an immediate transfer of proprietary right. If the proprietary right in the property was to pass to the present plaintiffe immediately on completion

of the deed their rights could in no possible way be affected by the executant admitting the right of any person to inherit property which was no longer his. It is only on the assumption that he still retained a proprietary interest in the property during the pendency of the suit that it could be necessary to provide against his admitting some third party as his heir, whether by Will or otherwise, and dying before the final desision of the suit. Clause (11) is very inartistically expressed, but so far as it provides against sollusion by the executant it also assumes that during the pendency of the litigation he still retains a proprietary right in the land sold which he will be liable to forfeit by colluding with the other side without the consent of his transferees. If he attempted any such collusion the vendees would be entitled to step in and say that the compromise made was of no effect as regards the property covered by the deed, since, by the very act of making it, all his right had passed to them, "and the vendees and the executant shall be proportionately entitled to it "apply strictly only to collasion by one of the vendees, but the clause is directed against collusion by either party and the penalty of loss of proprietary right in the property sold is imposed equally on both.

Rs. 5,000 of the sonsideration money was left with the vendees to pay off a charge on the property held by one Rani Jagannath Kuar. This also was only to be paid by them in the event of their getting a title to the property by success in the suit. Sheo Ratan Singh expressly covenants that in the event of the suit being lost the debt due to Rani Sahiba will be paid by him.

Looking to these covenants and to the whole tenor of the deed it appears to us that the real intention of the parties was that the transfer of title as well as of possession was conditional on the suit of Madho Singh being dismissed and was only to take effect upon the passing of a final decree in favour of Sheo Ratan Singh.

A number of cases have been eited at the Bar, on both sides of the argument, in which the construction of deeds purporting or alleged to be sale-deeds has been in question, but as none of these deeds contain envenants similar to those of the deed in suit it is unnecessary to discuss them in detail.

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The Privy Council case of Lal Achal Ram v. Raja Kazim Husain Bhan (3) is elearly dictinguisbable. The deed most nearly recembling that now in suit is that which came before their Lordships of the Privy Council in Rance Bhotosoondree Dasseah v. Issur Chunder Dutt (4). In that case the deed purported to be a sale-deed of an eightanna share for a sum of Rs. 3,000 left with the transferees to be spent in litigation. In the event of the suit being decided in favour of the executant both parties to the deed were to take the costs, mesne profits, jole jummah and the taluk in the shares mentioned above. If more than the agreed consideration was spent by the transferees they were not to be entitled to elaim it from the transferor. The deed concluder: "In whatever way the suit is deereed, I will give and receive 8-annas thereof as aforesaid, that is, in half shares."

The suit filed was, as their Lordships observe on page 40 of the report, not one claiming specific performance of contract but a suit in the nature of ejectment. It was a suit to recover possession of the property mentioned in the deed by virtue of the title acquired under it. The question before their Lordships was whether the deed operated as a present transfer of the property or only as an agreement to transfer it on certain contingencies which did not happen, and they decided that the latter was the correct interpretation.

If, as we hold, the learned Subordinate Judge has rightly interpreted the deed as being an agreement to transfer the property in the event of success in litigation the question arises whether The Article of elaim was within time. limitation applicable in such a case is admittedly Article 113 of the Indian Limitation Act of 1908, which allows a period of three years from the date fixed for the performance. The date fixed by elause (4) of the agreement was the date of success in the suit. Now the suit was dismissed by the first Court on 23rd Desember 1913 and by this Court in

appeal on 21st September 1915, (Ex: hibits A133 and A135). On the face of it, therefore, limitation expired on zlat September 1918 whereas the present suit: was not filed till 25th October 1918. The learned Subordinate Judge has extended the period of limitation by allowing a further six months' time from the date of the decision of this Court for a possible application for leave to appeal to the Privy Council under Article 179 of Limitation Act, as it then stood. have no hesitation in holding that the learned Subordinate Judge was in error on this point. The appeal to this Court was dismissed and Madho Singh's slaim rejected on a occentrent finding of fact that he had failed to establish his relationship to the person whose property he was claiming which formed the basis of the title. Not only could the plaintiffs in that suit not have claimed leave to appeal as of right under the provisions of sections 109 and 110 of the Code of Civil Procedure, but even the conditions necessary to enable a party to apply for special leave to appeal were entirely wanting. After making his submission on the question of limitation the learned Advocate for the respondents intimated on behalf of his elients that they did not wish to press this point and were willing, as a matter of right dealing between the parties, to accept the decree passed against them for the amount spent by the appellants. They have also abandoned the cross-objection put in by them as to the amount of interest. That portion of the deeree, therefore, which awards Rs. 3,059 2 7 with interest against the defendants must be treated as a decree by concent.

In view of our finding on the first issue it is not strictly necessary to enter into the question of undue influence, but as the point has been fully argued on both eides it will be convenient briefly to dispose of it. The appellants' learned Advocate in arguing this part of the case has accepted the findings of fact arrived at by the Court below but contends that they are not sufficient to establish a plea of undue influence. That the bargain was in fact unconscionable can hardly be doubted. The whole property was valued at Rs. 10,000 in the suit filed by Madha

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616; 3 Sar. P. C. J. 136 (P. C.).

^{(3) 8} O. C. 155; 9 C. W. N. 477; 27 A 271; 32 I. A. 113; 15 M. L. J. 197; 8 Sar. P. C. J. 772 (P. C.).

(4) 11 B. L. R. 36; 18 W. R. 140; 2 Suth. P. C. J.

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Singh (vide Exhibit A 133). The learned Subordinate Judge has given reasons for thinking that this was an undervaluation and that the true value of the half share covered by the deed in suit is Rs. 40,000. It may be admitted that it would not fetch anything like this price while a suit for possession of it was pending. If the ostensible consideration, Rs. 14,000, had been the true consideration there might have been something to be said on behalf of the bargain but, as we have seen, the real consideration was the amount to be spent in the litigation plus Rs. 200 paid in each and Rs. 5,100 to be paid on account of the charge on the property, which latter sum was only to be paid when the purebasers got possession. The actual amount spent by the plaintiffs apart from interest has been found to be Rs. 1,501. Owing to the dispute between the parties the costs of the appeal were borne by Sheo Ratan Singh, but even if the appellants had borns these the amount enald not have been increased by more than a half. This amount might possibly have to be doubled if the case had gone to the Privy Council. Even this amount was not in the long run to be paid by the appellants. The deed provided that they alone should be entitled to realise and appropriate any costs which the Court might award in the suit. It comes to this, therefore, that in the event of sussess they were to get property worth approximately Rs. 40,000 for Rs. 5,000 and such portion of the amount spent in the litiga. tion as they might fail to recover from the opposite party. In the event of failure they risked the loss of Ra. 2,000 or in the case of an appeal to the Privy Council possibly R. 4,000. On the other hand, the chances of success were certainly more than even. The barden of proof in the suit which was pending lay on the plaintiffs in that suit. Shee Batan Singh was in possession of the property and, as the event showed, had a perfectly good title to

What, then, induced Sheo Ratan Singh to consent to a bargain so disadvantageous? Madho Singh had obtained the assistance of certain professional litigants, Muhammad Husain and others, in prosecuting his suit and this fact had considerably alarmed

Sheo Ratan Singh. These persons made a practice of buying up claims and prosecuting them in the Courts. Sheo Ratan Singh felt that he must get the assistance of some one experienced in litigation as a counterpoise. Beni Prasad, plaintiff No. 2, was such a person. It is admitted by the plaintiffs' witness Naud Kishore that for the last fifteen years Bani Prasad has been speculating in litigation. Shee Ratan Singh had already been to two other persons, Bhagwat Prasad and Raja Sukhmangal Singh, to attempt to induce them to finance his suit for him. Bhagwat Prasad refused point blank and Sukhmangal Singh put him off by saying that he could not give a definite reply until he had consulted his lawyers. Sheo Ratan Singh was at the time in debt to the extent of at least Rs. 10,000. He had been advised by his agent Bhagwant Rai to approach Beni Prasad, and he seems to have been in that condition of mind in which he was ready to accept any terms for the purpose of obtaining Beni Prasad's assistance. This Bhagwant Rai was an old servant on whose advice Sheo Ratan Singh was in the habit of relying in matters of business and in whose hands the management of the estate largely rested. The evidence of Gauri Shankar, one of the plaintiffs' witnesses, shows that though Sheo Ratan Singh stated at the time of execut. ing the deed that he wanted to consult some of the residents of Ras Bareli he completed the deed without stopping to do so. One of the purchasers was the brother of the plaintiffs' agent Bhagwant Rai, the man named above, at whose suggestion the transaction was entered into.

These facts appear to be sufficient to justify the finding that Beni Presed was in a position to dominate the will of Sheo Ratan Singh and that he used his power to obtain a contract the terms of which were unconscionable. This raises a presumption of undue influence under section 16 of the Contract Act which the plaintiffs have failed to rebut.

It is urged that a case of undue influence was not set up in the written statement. It is true that the defendants relied largely on a case of fraud which they failed to establish but they did allege in the written statement that the

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transaction was unconscionable and extortionate and that Sheo Ratan Singh was
in such perplexity as not to understand the
real effect of the transaction. In the proceedings of the 29th November 1918, tin
explanation of the 16th paragraph of he
written statement, the defendants' Advocate
pleaded undue influence in express terms.
The parties went to trial on a clear issue
of undue influence, and evidence was adduced on both sides upon it, and it is too late
for the appellants to urge in appeal that
the plea of undue influence was not
raised.

It has been pleaded in this Court that even if undue influence is found against the appellants, the transaction was afterwards affirmed by Sheo Ratan Singh therefore, the respondents are presluded from succeeding on this issue. This point was not raised in the Court below and no issue was joined on it. Of the twelve issues framed the only one which even by implication could cover this issue is the ninth issue, which rops-"should not the contract be specificially enforced?" A reference to the judgment of the learned Subordinate Judge shows that this issue was decided against the plaintiffs on the basis of the findings on specific issues already decided. Even, however, if the plaintiffs are allowed to urge this plea in appeal there appears to be nothing in it. The plea is based mainly on a reciept, (Exhibit A), dated 14th April 1914, executed by Sheo Ratan Singh on account of Rs. 2,000 spent by the defendants in connection with the litigation. This resiept was given only a short time after the agreement in suit. It is quite elear that by the time the ease reached the stage of appeal Sheo Ratan Singh was repudiating the agreement and refusing to be bound by it. In the order of this Court dated the 21st September 1915 rejecting the plaintiffs' application to be made parties, it is stated that Sheo Ratan Singh was even then proposing to institute a suit against the appellants for a declaration that the deed of transfer was null and void. The same thing appears from a reply (Exhibit A 12) cent by him to a notice issued to him by the appellants before the appeal was filed. A few days later the appeal was set down for hearing. They sent a notice to him stating that they were prepared to engage Counsel for the appeal. This notice

(Exhibit All) was treated as unproved in the lower Court but has been admitted and relied on by both parties before us. In his reply (Exhibit Al2) Sheo Ratan Singh repudiated the agreement, which he alleged they had got him to sign by holding out false promises and hopes.

On the above findings we uphold the decree of the Court below and dismiss the appeal with costs. We also dismiss the cross-objections but without costs, as if they had been pressed the objection regarding limitation would have succeeded.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 311

OF 1918.

April 30, 1920.

Fresent: -Mr. Justice Richardson and Justice Sir Asutosh Chaudhuri, Kr. SUDHAMANI DAS, MINOR, BY HIS MOTAER

Srimati RADHA RANI DASSYA
AND ANOTABR—PLAINTIFFS—APPELLANTS

versus

SURAT LAL DAS AND OTHERS-DEPENDANTS-RESPONDENTS.

Will, construction of—Absolute devise to Hindu widow—"Malik," meaning of—Right of pre-emption given to heirs and co-sharers, whether restricts absolute devise in favour of widow.

A Hindu testator by his Will authorised his widow to adopt five sons in succession and provided that if a son were adopted, the widow and the son should take the estate in equal moieties as owners . maliks) with full power of gift and sale to be exercised by each of them. There was a clause in the Will which ran as follows :- "If for any reason the adopted son or my said wife is required to sell any property left by me, he or she shall sell it to my heirs and co-sharers for proper price, that is to say, the highest price, offered by them, but if they refuse to purchase the property on paying the proper price, it may be sold to others." The next clause of the Will ran thus :- "If my said wife do not adopt any sons, then on my decease, my said wife would be the owner (malik) of all my property with power of gift

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and sale and shall be able to give and sell it according to the directions contained in the previous clause." The widow did not adopt any son and died having herself made a Will by which she dedicated the property to religious uses In a suit for the construction of the Will of the husband:

Held, that the widow took an absolute estate in the property left by her husband, which was not cut down by the right of pre-emption given to the heirs

and co-sharers. [p 630, col. 1]

Per Richardson, J .- The word "malik" usually

denotes an absolute owner. [p. 630, col. 1.]

Per Chaudhuri, J.—In all cases of gift by Will whether to male or to female, unless the instrument shows that a restricted interest was intended to be created, the legatee or the devisee must be entitled to the whole interest of the testator. [p 630, col. 2.]

The word "malik" imports full proprietary rights unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose. [p. 631, col. 1.]

Appeal against a decree of the Subordinate Judge, Second Court, Dassa, dated the 12th of September 1918.

Babu Jegendra Chunder Ghose and Babu Promode Chunder Ghose, for Babu Tarit Mohan Das, for the Appellants.

Dr. Sarat Chandra Basak and Babu Jitendra Nath Roy, for the Respondents.

JUDGMENT.

RICHARDSON, J .- The learned Vakil for the appellant has given us an interesting address. But in my view the case is a very elear one. The question depends on the construction of the Will of Banka Behari Das who died in May 1893. The Will is dated the 30th Bayeak 1303 B. S. There is a codicil to the Will which, however, does not affect the point at issue. Banka Behari had a brother named Ganga Charan Das who survived him but has since died. The plaintiffs in the suit are the widow and the minor son of Ganga Charan Das. By bis Will, Banka Behari authorized his widow to adopt five sons in succession and the Will provided that, if a son were adopted, the widow and the son should take the estate in equal moieties. It goes on to say: "They will be the owners (malike) in possession with full power of gift and sale to be exercised by each of them." As I understand that devise, if the widow had adopted a son, she and the son would each have taken a moiety of the estate in absolute right. As a matter of fast, however, no son was adopted and it is unnecessary for us, therefore, to deside what estate the widow would have taken if she had adopted a son. The point turns on clauses (4) and (5) of the Will which I shall read, Clause (4) runs as follows :- "If, for any reason, the adopted son or my said wife is required to sell any property left by me, he or she shall sell it to my heirs and co-sharers for proper price, that is to say, the highest price offered by them; but if they refuse to purshase the property on paying the proper price, it may be sold to othere," Clause (5) is this: "If my said wife do not adopt any sons, then, on my decease, my said wife would be the owner (malik) of all my property with power of gift and sale, and shall be able to give and sell it accord. ing to the directions contained in clause (4)." Now, the widow, Kamini Sundari, acted on the supposition that she took an absolute estate under her husband's Will. She died in 1911 having herself made a Will by which she dedicated the property to religious uses in favour of a diety known as Thakur Banka Behari and appointed sertain persons, who are the defendants Nos. 1 to 6 in this suit (the diety being the defendant No. 7), as executors. The suit was brought by the plaintiffs for the construction of Banka Bahari's Will and for the purpose of recovering the property from the diety and the executors of the widow's Will, on the ground that the widow had only a widow's estate in the property of which she affected to dispose.

As I have stated, the question turns on the two clauses of the Will which I have read. Speaking for myself, I can conceive of no language which would have more elearly indicated the intention of the testator that his widow should take an absolute estate. I entirely recognise and appreciate the fact that, ordinarily, a Hindu leaving property to his widow to be enjoyed by her after his death would desire that the widow should take the usual widow's estate so that the property should not go out of the testator's family. But it is too late to contend that, if the husband's devise in terms confer upon the widow an absolute estate, even then the widow can only take the limited widow's estate. The law has been otherwise, at any rate, since 1872, whom the ease of Porsunno Koomar

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Chose v. Tarrucknath Sirkar (1) was decided. A recent illustration will be found in the case of Nanda Gopal Sinha v. Fareshmoni Debi (2), and between these two cases there are numerous authorities which might be referred to.

Now, turning to the words used in the Will, the testator has used the word " malik" which usually denotes an absolute owner. To my mind, there is nothing in clause (4) which curtails the force of the word "malik" in elause (5) or the power of gift and sale conferred by that clause and outs down the meaning of the language so as to make the estate devised an ordinary widow's estate. It is argued that under clause (4) a restriction was put upon the disposal of the property by the It is true that clause (5) lays down that the widow is to give and sell the property according to the directions contained in clause (4). But what do those directions come to? The widow was enjoined, if she should sell, to sell in the first instance to the testator's heirs and eo sharers for a proper price which was defined as the highest price, meaning, I suppose, the highest price obtainable in the market at the time. If, however, the beirs or the so sharers refused to purchase the property paying the proper price, then the widow was to be at liberty to sell the property to others. Now, I am not considering the ultimate effect of the words. It is unnecessary to decide whether, if the widow had sold the property without first offering it to an heir or a so sharer, the transfer would or would not have been valid. But assuming for a moment that it would not have been valid, is the restraint, such as it is imposed by the clause sufficient to out down the plain meaning of the words in the succeeding clause? In my cpinion, that question can only be answered The right which the the negative. testator purported to give to the heirs and co sharers was a mere right of pre-emption. I agree entirely with the conclusion arrived at by the learned Subordinate Judge and, generally, for the reasons which he has stated in his judgment. I am of opinion,

(1) 10 B. L. R. 267.

that the suit was properly dismissed. The appeal, therefore, fails and should be dismissed with costs.

CHAUDHURI, J .- The learned Vakil for the appellants has placed before us the whole history of the law relating to gifts to a wife by a Hindu husband, beginning with Maulei Mohamed Shumsool Hooda v. Shewukram (3), down to Bhoba Tarini Debya v. Peary Lall Sanyal (4). He concedes that the result is that it is now practically settledlaw that, in all cases of gift by Will, whether to male or to female, unless the instrument shows that a restricted interest was intended to be ereated, the legatee or the devisee must be entitled to the whole interest of the testator. He has also called our attention to the ease of Sures Chandra Falit v. Lalit Mohan Dutta (5), which lays down that, in constraing the Willof a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, namely, that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family and also that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritates which they are enabled to alienate. The learned Judges also say in that case that the instrument must receive a ecostruction according to the plain meaning of the words and centerces therein contained, that is, the words are to be read first in their grammatical and ordinary sense unless the context shows otherwice. There is no difficulty in accepting there general principles. In fact, they are always recognised by Courte in constraing Hindu Wills. The testator in the second paragraph of the Will in this case clearly says that, if his wife should adopt a son in accordance with the authority given by him by the first clause, the adopted son and the wife "shall sneed to the ownership of the entire properties in equal shares vested with the power of sale and gift and

^{(2) 17} Ind. Cas. 478; 17 C. L. J. 464.

^{(3) 2} I. A. 7; 22 W, R. 409; 14 B, L. R. 226; 3 Sar. P. C. J. 405.

^{(4) 24} C, 646; 1 C. W. N. 578; 12 Ind Dec. (N. S.)

^{1100.} (5) 81 Ind. Cas. 405; 20 C. W.I.N., 463; 22 C. L. J. 816.

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no violation of such iprovision shall be permitted." The Bengali words used are Dan bikrah sattadekarateh malik dakhilkar hos be." It is conceded that by that clause au absolute half is given to the son and the other half is given to the wife. Clause (5) of the Will deals with the case if no son is adopted by the wife. It says that the wife shall succeed to all the properties left by the testator after his death with powers of sale and gift and that she shall be the malik and be in presession and that she shall have power of sale and gift in assordance with the provisions of paragraph 4 to which I shall refer later. The Bengali words are "Dan bikrah datwa adhikare o melik dakhiltar hoe be." The expression "Ditta adhikari" is apparently a mistake for "Sattaadhikari." Bat whether that is so or not, it is quite clear that the same words or words which practically have the same meaning have been used in slauses (2) and (5) and, therefore it is difficult to avoid the conclusion that the testator intended to give his wife an absolute estate if she did not adpot. It has been argued that this has to be read in conjunction with the provisions of paragraph 4. It is said that that olsase restricts the right of alienation because it says: "If the aforesaid adopted son or my wife aforesaid should find it nessessary to sell any of the properties left by me, they shall be entitled to sell it to a stranger if my heirs and so sharers rofuse to purstage it for adequate consideration," and reliance placed upon Macleay, In re (6), in which a devise to a brother on the condition that he was never to sell out of the family was considered a valid condition. Tast case doss not seem to me to be applicable, in the present sironmetances. Here, there is no absolute restriction of the sale; the power of sale is not interfered with by that direction. It practically says that the widow should sell to the highest bidder. It is also to be noticed that it gives power to her to sall any of the properties ineluding in that expression properties both moveable and immoveable. I do not think that we can accept the argument that this restricted the right to sell, thus showing that a trusted estate was being given to the widow. It seems to me that words

(6; (1875) 27 Eq. 186; 44 L. J. Ch. 441; 33 L. T. 632; 23 W. R. 713.

elearly and unequivocally gave the estate to the lady absolutely. Clause (4) refers to the adopted son also. He did not take under the Will but by virtue of adoption .: The restriction was not operative against him and I do not think it out down gift. to the wife and an absolute one-half or the absolute whole if she did not adopt a son. With regard to the use of the word "malik" I may refer to the case of Mani v. Rabi Nath O,ha (7), where their Lordships of the Privy Council say: "The word malik imports full proprietary rights unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for the purpose." We think that the words used here are stronger than the word malik. The same words were used when the gift was made to the son; and that also indieates that an absolute estate was being given to the wife. I agree that the appeal should be diemissed.

B. N. (7) 35 I. A. 17; 5 A. L. J. 67; 12 C. W. N. 231; 18 M L. J. 7; 10 Bom. L. R, 59; 7 C. L. J. 131; 3 M, L. T. 14'; 30 A, 84 (P. C.).

Appeal dismissed.

NAGPUR JUDIOIAL COMMISSIONER'S COURT, FULL BENCH.

SECOND CIVIL APPEAL No. 218 or 1919. July 9, 1921.

A. J. O. and Mr. Dhobley, A. J. C.

JOGESHWAR-PLAINTIPP-APPRILANT

MOTI—Dependent—Respondent.

Civil Procedure Code (Act V of 1808), O. XXXIV.

r. 1—Mortgages—Suit by prior mortgages—Puisne mortgages not made party, effect of—Subsequent suit by prior
mortgages for possession against puisne mortgages—
Transfer of Property Act (IV of 1882), s. 52—Lis
pendens, applicability of—Interpretation of Statute—
Equitable principles.

Where a mortgagee sues for foreologure without impleading a puisne mortgagee, and after that suit is barred by time as against the puisne mortgagee, the latter sues the same mortgager, for foreologure of the same property without impleading the prior mortgagee and gets his decree first and obtains possession of the property, the prior mortgagee is

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entitled to a decree for possession subject to the puisne mortgagee's right to redeem, inasmuch as the transfer to the puisne mortgagee was made during the active prosecution of the prior mortgagee's suit.

Per Dhobley, A. J. C.—Order XXXIV, rule 1, Civil Procedure Code, is merely a rule of procedure enacted with the object of preventing multifariousness of suits in respect of the same property and cannot affect the plaintiff's rights. Its object is not to punish a plaintiff for his failure to join as parties, persons of whose interest he is ignorant and whose title-deeds he has no means to inspect. [p. 636, col. 1.]

In interpreting law equitable principles as its consequences cannot be overlooked. In determining the respective rights of parties the fact that by a certain interpretation unjust results would follow and that a rightful person would suffer for no fault of his, on account of circumstances over which he had no control and for which he could not be held responsible, cannot be lost sight of. If by another interpretation this result would not follow that interpretation should be adopted. [p. 637, col. 1.]

Appeal against the decree of the District Judge, Nagpur, dated 1st December 1919, in Civil Appeal No. 105 of 1918.

ORDER OF REFERENCE TO A FULL BENCH.

HALLIFAX, A. J. C .- (July 8, 1920.)-Facts such as that a part of the decree in this case still subsists against one of the two defendants who do not appeal, and that the immoveable property in dispute is now represented by a sum of money do not affect the decision of the one matter now in issue and may be left out of considera. tion. The facts that do concern us are as The plaintiff sned a third party, his mortgagor, for foreclosure on a mortgage dated 25th May 1882. He filed his suit in the first week of August 1910, within a few days of its being barred by limitation, and obtained a final deeree for foreelosure on 3rd January 19.6. defendant filed a suit on 25th August 1910 against the same mortgagor on a mortgage dated 12th March 1901. He was given a final decree for foreslosure on 18th July 1911, and obtained possession of the prop. erty on 4th September 1911, more than four years before the plaintiff got his final decree on his prior mortgage in the suit instituted a few days before the defendant's. Neither party impleaded the other in his forcelosure suit, and the plaintiff now elaims that the defendant is bound to redeem his prior mortgage or give him possession of

the property. He was given the deeres for which he prayed in the Court of the Subordinate Judge. This was set aside and his suit was dismissed on appeal in the Court of the District Judge, and he has now some here in second appeal. My learned brother Masnair, who decided the appeal as District Judge, followed the ruling of Mittra, A. J. O. in Raghunath v. Sheolal (1) admitting that there was a very large distinction between the two cases. There the plaintiff sued the mortgagor after the equity of redemption had already passed from him to the puisne mortgagee. In this case the equity of redemption was still in the mortgagor when the prior mortgagee sued and had not then passed to the puisne mortgagee who was not impleaded. There is this further distinction that in Roghunath v. Sheolal (1), the plaintiff sought to enforce his rights by making the puisne mortgagee, whom he had not impleaded to begin with, a party defendant to the sait after the passing of the conditional decree.

2. In Raghunath v. Sheolal (1) Mittre, A J. C., considered the ruling in Har Pershad Lal v. Dalmardan Singh (2) in which it was held by Brett, J., in a case very similar to this, that the plaintiff was entitled to a deeree for possession subject to the defend. ant's right of redemption, while Rampini, J., was of a contrary opinion, based to a large extent on the fact that the prior mortgegee's right had become barred by limitation before he sued the puisne mortgages. The case was referred to Mr. Justice Mitra who held with Mr. Justice Brett that the plaintiff was entitled to the decree he sought. In this Court Mittra, A. J. C., preferred to follow Rampini, J., pointing out that the other two learned Judges had ignored his argument to the effect that the prior mortgagee's right to forcelosure on his own mortgage was barred by limitation. The learned District though with Judge accepted this view, some hesitation, supporting it further with the remark that if the plaintiff had disobeyed the rule in Order XXXIV, rule 1, Civil Prosedure Code, which clearly directs him to implead the puisce mortgagee his disobedienes should surely entail some inconvenience, and to hold that he can elaim to be put in the same possession as if he had obeyed the

(1) 39 Ind. Cas. 849; 13 N. L. R. 69.

^{(2) 32} C, 891; 9 C. W. N. 728; 1 C. L. J. 871.

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order is to render the existence of the forder fatile.

3. The view taken by the majority in the Calentta case was approved and followed in the same Court by Mookerjee and Holmwood, JJ., in Ganga Das Bhattar v. Jogendra Nath Mitra (3) and in the Allahabad High Court by Piggott and Lindsay, JJ., in Babu Lal v. Jalakia (4), and in these cases each of the learned Judges considered the question of limitation discussed by Rampini, J., in Har Pershad Lal v. Dalmardan Singh (2). Both deeisions, however, as well as that of the majority in Har Pershad Lal v. Dalmardan Singh (2) appear to have been it figeneed to some extent by the fast that both parties in each case appeared in Court as auction-purchasers under a decree for sale. The weight of authority is thus distinctly on the side of the appellant here and I find myself inclined to that view. This, however, may be considered as opposed to the view taken by Mittra, A. J. C., in Raghunath v. Sheolal (1), although, as I have pointed out, that case is distinguishable on some points. Therefore, under section 9 of the C. P. Courts Ast I refer the following question for the desision of a Bench:-

A mortgages sues for foreclosure without impleading a puisne mortgages. After that sait is barred by time the puisne mortgages ares the same mortgagor for foreclosure of the same property without impleading the prior mortgages. The puisne mortgages gets his decree first and obtains possession of the property. Can the prior mortgages maintain a suit against him for possession subject to his right to redeem?

[Hallipax, A. J. O.—(July 8, 1920).— A point of law is referred for the desision of a Bench.

Batten, Oses. J. C.—(September 4, 1920).

—It is not absolutely necessary to have a Banch as the case is not exactly covered by the ruling of Mittra, A, J. C., but it is desirable to have a Bench as the arguments in this case, pro and con, are on similar lines. The Bench will consist of Messrs, Hallifax, Kotval and Mudholkar.

DRAKE-BROCKMAN, J. C .- (April 5, 1921).

-Reo Bahadur W. R. Dhobley will sit as a

member of the Full Bench, tice Rao Bahadur R. N. Mudholkar deceased.]

Messrs, G. L. Subhedar and Gangadhar

Sitaram, for the Appellant.

Messrs. M. B. Kinkhede and W. R. Puranik, for the Respondent.

JUDGMENT OF THE FULL BENCH.

HALLIPAX, A. J. U.— (July 7, 1921).—I have seen the judgment which my brother Kotval proposes to deliver, and I concur in both the conclusions at which he arrives. The judgment in Byram; i Jamset; v. Chunilal Lalchand (5) shows that the doubts held in the High Court of Bombay on the question whether section 52 of the Transfer of Property Act applies to involuntary transfers effected through a Civil Court, were set at rest by the ruling of the Privy Council in Moti Lal v. Karrabuldin (6) cited by my learned brother.

KOTVAL, A. J. O.—(July 7, 1921).—The facts of the case out of which this reference arises are sufficiently given in the Order of Reference. The question referred for the decision of the Full Bench is:—

A mortgagee sues for forcelosure without impleading a puisne mortgagee. After that suit is barred by time the puisne mortgagee sues the same mortgager for forcelosure of the same property without impleading the prior mortgagee. The puisne mortgagee gets his decree first and obtains possession of the property. Can the prior mortgagee maintain a suit against him for possession subject to his right to redeem?

Admittedly, a suit to enforce the plaintiff's mortgage against the defendant was barred when the present suit was instituted. It is the right to possession under the foreelosure decree against the mortgagor that is now sought to be enforced. For the plaintiff reliance is placed upon the view taken by the majority in Har Pershad Lal v. Dalmardan Singh (2) which was followed in Ganga Das Bhattar v. Jogendra Nath Mitra (3) and Babu Lal v. Jalakia (4). On the other hand, the defendant respondent relies on Raghunath v. Sheolal (1) in which the contrary view of

^{(8) 5} C. L. J. 315; 11 C. W. N. 408.

^{(4) 37} Ind. Cas, 843; 14 A. L. J. 1146.

^{(5) 27} B. 268; 5 Bom, L. R. 21.

^{(6) 25} O. 179; 24 I. A. 170; 1 O. W. N. 689; 7 Sar. P. O. J. 222; 18 Ind. Dec. (N. s.) 121 (P. O.).

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Rampini, J., in Har Pershad Lal v. Dalmardan

Singh (2) was accepted.

In Har Pershad Lal v. Dalmardan Singl. (2) Brett and Mitra, JJ., did not consider the fact that the prior mortgagee's right to enforce their mortgage against the second mortgagees was barred by limitation. Both were influenced by the facts that the prior mortgagee had no knowledge of the second mortgage whereas the second mortgagees had full knowledge of the prior mortgage and did not make the prior mortgagees parties to their suit. In Babu Lal v. Jalaita (4), where this case is referred to, Piggott, J., was influenced by a similar consideration, but after the amendment of section 85, Transfer of Property Act, [which was in force when Har Fershad Lal v. Dalmardan Singh (2) WES decided as in Order XXXIV, rule 1, First Sehedule, Civil Procedure Code, these fasts do not help the prior mortgagee or go against the second mortgages. Ganga Das Bhatter v. Jogendra Nath Mitra (3) follows Har Pershad Lal v. Dalmardan Singh (2) without comment.

It has been held that where a prior mortgages obtains a decree without making the
second mortgages a party to his suit the
decree or its results do not affect the second
mortgages: Pandurang Instant v. Sakharchand
Mali (7), Ghasiram v. Ihingwa (8), Gangades
v. Bhakaii (9), Het Ram v. Shadi Ram (10)
and Umes Chun er Sircar v. Zahur Fatema
(11).

Har Pershad Lal v. Dalmardan Singh (2) and the cases cited above in which it was followed all assume that the prior martgagee's failure to implead the second mortgagee is of no consequence so far as the former's right to possession against the latter is concerned; but the prior mortgagee's right to possession arises from the foreelosure decree which admittedly does not affect the second mortgagee.

(7) 31 B. 112 at p. 118; 8 Bom. L. R. 831.

(8) 4 N. L. R. 168.

(9) 58 Ind. Cas. 295; 16 N. L. R. 215.

(11) 18 C. 164 at p 179; 17 I. A. 201; 5 Sar. P. C.

J. 507; 9 Ind. Dec. (N. s.) 110 (P. C.).

The present suit is said to be based on a different sause of action, but in effects it is one to forcelose the second mortgages on his failure to redeem the prior mortgage, and an evasion of the law of limitation under which a regular suit for forcelosore is barred and the defendant has acquired an immunity from being compelled to redeem.

The cases cited above all profess to consider the question before them from an equitable point of view. I do not see how equity requires that where the prior mortgages has by his lashes allowed a suit for forcelosure to be barred against the record mortgages he should be helped to get the same relief against the second mortgages in a suit to enforce a right arising under a decree which does not

affect the second mortgagee.

The prior mortgages in a ease like the present occupies a dual character. He represents the rights of both mortgages and mortgagor-Ponduring Jasvant v. Sakharchand Mali (7) followed in Gangadas v. Bhika i (9). In the present suit he does not claim possession in the former character, nor, even if he did, would be be entitled to it merely as the holder of a prior mortgage by conditional sale. As representing the mortgagor his title to possession accrued on his obtaining the foreelosure deerer, but before that the morigagor's right to possession had been terminated by the decree for foreslosure in favour of the defendant and the possession taken by him thersunder. This decree was a perfectly good desree and open to no objection in law except on a ground to which I shall refer presently, and neither the mortgagor nor the plaintiff as his representative one get possession in the face of it.

I agree, therefore, with the view of Mittra,

A. J. C., in Raghunath v. Sheelal (1) and
hold that the prior mortgages cannot on the
strength of his title under his foreclosure,
decree maintain a suit against the second
mortgages for possession subject to the
latter's right to redeem.

There is, however, another point to be considered in this case, and that is lis pendens. The transfer in favour of the defendant was during the pendercy of the plaintiff's suit and the defendant took the property subject to the plaintiff's rights under his decres. On this point I agree with the opinion expressed by Brett, J., in Har Pershad Lal v. Dalmardan Singh (2) at pages 200 and 901 of the report.

^{(10) 45} Ind. Cas. 798; 40 A. 407 at p. 410; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 183; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72; 45 I. A. 180 (P. C.).

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In my opinion, the mortgaged property was directly and specifically in question in the prior mortgagee's suit which was being actively prosecuted when it was dealt with in the second mortgagee's suit. There is ample authority for holding that the dostrine of lis pendens applies to involuntary transfers: vide Har Pershad Lal v. Dulmardan Singh (2). Har Shankor Prosad Singh v. Shew Gobind Shaw (12), Gobind Chunder Roy v. Guru Ohurn Kurmokar (13), Radhamadhub Holdar v. Monokur Mukerji (14) and Moti Lil v. Karrabuldin (6).

On the ground, therefore, of the transfer to the defendant having been made during the active proceention of the plaintiff's suit, the latter is, in my opinion, entitled to a decree for possession subject to the defendants' right to redeem.

DHCBLEY, A. J. C .- (July 7, 1921) .- In this Reference the respective rights of two successive mortgagees over the same properly have to be determined. The plaintiff Jagesh. war is the representative in interest of the prior mortgagee, while the puisne mortgagee is represented by the defendant Moti.

2. The first mortgage, which was a registered one, was executed on 25th May 1882, and was for its enforcement put in Snit No. 766 of 1910, instituted on 5th August 1910, in the Court of the Senior Sub Judge, Nagpur. To that suit the subsequent mertgagee was not made a party. The suit was contested and, finally, a preliminary forcolocure decree was passed on 11th July 1913. Attempts were unsuccessfully made by the defendants in that snit to have that decree set aside and the proceedings dragged on till 31st January 1916. when it was made final.

The second mortgage was an unregistered one and it was executed on 12th March 1901. Suit No. 108 of 1910 was instituted on 25th August 19:0, in the Court of the Senior Munsif, Nagpur, for its enforcement and a preliminary forcelceure deeree was passed on 25th October 1910. It was made final on 18th July 1911 and within the comple of months after that the defendant took possession of the foreelesed property. To this

suit on the second mortgage, the prior mortgagee was not made a party.

4. The property was subsequently acquired by the Government for public purposes and the amount of compensation paid for it was received by the defendant. This was in 1915 before the final decree on the prior mortgage was passed. The plaintiff's suit which gives rise to this appeal was brought in December 1916 and it was for the recovery of that amount from the defendant. It is agreed between the parties that for the purpose of determining their rights, the plaintiff's elaim is to be considered as being ore for posses. sion, the compensation money being merely substituted for the property. From the dates given above, it will appear that the claim for the enforcement of the prior mortgage was, on the date of the present suit, barred by limitation.

5. The question referred to us for decision is, whether the plaintiff's suit for possession subject to the defendant's right of redemption was, on the above stated facts, maintainable. During the course of the argument the question as to the applicability of the doctrine of lis rendens was also discussed and it has thus to be seen whether the defendant is, on account of the principle of lis rendens, bound by the decree obtained on the first mortgage, because his own suit, on which he obtained the foreslosure of the property, was subse-

quently instituted.

Before proceeding further, I think it necessary to state that to the suit brought on the first mortgage, certain other persons who had taken subsequent mortgages were made parties. It will thus be apparent that the first merigagee was anxious to bring on record all persons interested in the property and that his omission to implead the present defendant could not have been intentional. It is, therefore, fair to assume that this omission was due to his being ignorant of the existence of the deferdant's mortgage, which was, as already stated, an upregistered one. There could not have been any motive on his part for his intentionally omitting to join the defendant as a party to his suit, when he had joined the other subsequent mort. gagees. The other circumstance worthy of mention is, that while it took three years for the prior mortgages to get his preliminary desree and another three years for its being made final, the deferdant could course both his preli-

^{(12) 26} C. 960; 4 C. W. N. 317; 13 Ind. Dec. (N. s.) 1218.

^{(13) 15} C. 94; 7 Ind. Dec. (N. s.) 648.

^{(14) 15} O, 756; 15 I. A. 97; 12 Ind. Jur. 297; 5 Sar. P. O. J. 211; 7 Ind. Dec. (N. s.) 1088 (P. O.).

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minary and final decrees and also possession within one year of his bringing the suit. There was in that suit no contest at all by the mortgagor, who had remained absent and had not defended it.

The questions which are to be answered in this Reference are not free from difficulty. It will, however, be useful to make a few general observations as regards the relationship between the mortgagor and the mortgagee. A mortgage transaction is primarily between two persons-the mortgagor and the mortgages-and these are the only persons who are parties to it. mortgagee may, in order to guard his own interests, be bound to make a diligent enquiry about the previous incum. brances over the property; but he is not expected to keep himself informed of the subsequent transfers by the mortgagor. He looks only to the mortgagor and to the mortgaged property for the estisfaction of the mortgage debt and it is on the mortgagor that he can make a demand for it. He is not expected to hunt up the Registration records to find out if any transfers subsequent to his mortgage have been effected, as he is not bound by any such transfer and as his own rights are wholly unaffested by them. If there is reason in this view, it would apply with very much greater force to subsequent transfers effected by unregistered documents which are not available to the general public for inspection and of which they can have no knowledge or information.

8. This brings me to the consideration of Order XXXIV, rule 1, Code of Civil Procedure, which has, with a slight change, been substituted for section 85 of the Transfer of Property Act, 1882. It lays down that to a suit on a mortgage, all interested persons are necessary parties and should be so joined. This is, however, merely a rule of procedure, enacted with the object of preventing multifariouscess of suits in respect of the same property and cannot, in my opinion, affect the plaintiff's righte. Its object is not to punish him for his failure to join as parties, persons of whose interest he is ignorant and whose title-deeds he has no means to inspect. It may, no doubt, be said that under this provision it is the duty of the mortgagee, when he seeks to enforce his mortgagee, to dissover persons entitled to the equity of redemption-See Norender

Nargin Singh v. Dwarka Lal (15). It may also be said that when the later mortgage is a duly registered dosument, the earlier morigages is presumed to have notice of it at the time of briniging his suit: See Het Ram v. Shadi Ram (10), and that the possession of the subsequent transferes should put him on enquiry. But to say that he is bound to implead all persons interested in the property, whether he has or has not notice of their interest is to ask him to do an impossible thing, It would be unjust to hold that his rights as a prior mortgagee would be injuriously affected, if he failed to implead in his suit a subsequent mortgagee who got his unregistered mortgage behind his back and of whose existence he could not even after due dilligence be made aware. If the question of notice were material in this case, it would have been for the defendant to plead specifically and to prove that the prior mortgages had at the time his snit was instituted notice of his interest in the mortgaged property. See Ram Nath v. Lachman (16) and Lala Suraj Prosad v. Golab Ohand (17).

9. Coming back to Order XXXIV, rule 1. it will be seen that the words: "Provided that the plaintiff has notice of such interest," which were to be found in sestion 85 have been omitted from the new rule. This omission does not, however, mean any change in the law and was not meant to affect the respective rights of the plaintiff and of the excluded parties. As observed by Dr. Gour in his Law of Transfer the above quoted proviso was quite unnecessary, if not misleading. It ereated an impression that the rights of a person whom the plaintiff was not bound to join as a party might be out off by a decree in a suit in which he was not represented. That was not the intention of section 85 and under it the ignorance of the plaintiff could not affect the right to redeem of a person interested in the equity of redemption. That right remained unaffested under the old section 85, as it now remains unaffected under the new rule 1, whether the plaintiff has or has

^{(15) 3} C. 397; 1 C. L. R. 369; 5 I. A. 18; 3 Suth. P. C. J. 480; 3 Sar. P. C. J. 771; 2 Ind. Jur. 117; 1 Ind. Dec. (N. s.) 839 (P. C.).

^{(16) 21} A. 193; A. W. N. (1899) 27; 9 Ind. Dec.

⁽N. s.) 832.

^{(17) 28} C. 517; 5 C. W. N. 640,

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not notice of the subsequent interest. The new rule does not, therefore, make any change in law nor does it affect the rights of the plaintiff or of the persons excluded from his suit.

10. Though the question of notice is not thus very material and though it does not affect the legal rights of the parties it assumes importance when one has to find out and interpret the law governing those rights. It is argued that the law should be interpreted as it is, without any consideration of equity or of its sonsequences. This is too broad a proposition, and interpreting law, equitable principles as its consequences cannot be entirely overlooked. We, for instance, see that though the wording of section 50 of the Registration Act is clear and unambiguous, it has always been intera special reference to the preted with equitable principle of notice and it has been held not to apply where of the competing deeds, the later is affected with notice of the earlier. In determining the respective rights of the parties, therefore, the fact that by a certain interpretation unjust results would follow and that a rightful person would suffer for no fault of his, on account of circumstances over which he had no control and for which he could not be held responsible, cannot be lost sight of. If by another interpretation this result would not follow, that interpretation must be adopted.

11. A person taking a transfer in respect of property which is already mortgaged, obtains only an equity of redemption as against the mortgagee, whose rights under the previous mortgage are left unaffected. All that the subsequent transferee elaim is to redeem the prior mortgagee. That right of redemption is left untouched, when he is not impleaded in the mortgage suit and has not been given a chance to redeem. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgages and the mortgagor. which they to have not been made parties: Umes Chunder Sircar v. Zahur Fatima (11). The subsequent trans. feree has got to be afforded an opportunity to redeem. He is not, however, entitled to anything more by reason of the fact that the plaintiff had omitted to implead him in his sait as defendant. This omission can

neither improve his position nor the reverse-Ram Prasad v. Bhikari Das (18). The failure to implead an interested person in a mortgage suit cannot equitably be treated as placing him in a better position than he would have osenpied, had he been made a party to the former suit, -See Gangadas v. Bhikiji (9). If in execution of a decree obtained in a suit on a mortgage, to which the puisne mortgagee was not made a party, the property is purchased by a third person, the puisne mortgages has as against the purchaser the same rights as he had against the mortgagor and the prior mortgagee, He may redeem him as pricr mortgages or thereafter foreelose him as mortgagor—Pandurang Jas.

vant v. Sakharchand Malji (7).

12. In these cases the question of limitation did not arise and they are not, therefore, on all fours with the case before us. The case of Far Pershad Lal v. Dalmardan Singh (2) is, however, very similar to the present one and in it the question of limitation was specifically raised. On the date of the second suit by the first mortgages for possession, the limitation for enforcing the first mortgage had expired and it was held by two out of the three learned Judges, that the first mortgages was entitled to a desree for possession on failure of the defendant to redeem. It would not be quite correct to say that the learned Judges had failed to consider the question of limitation, as the point was specifically raised and as the judgment of the learned dissentient Judge was based on it. This view was followed in a subsequent case of the same High Court-Ganga Das Bhattar v. Jogendra Nath Mitra (3), and it was held that, under similar circomstances, the decree obtained on the first mortgage doss not become intructuous against subsequent transferess, merely on account of their not being joined in the suit. In that ease, too, the enforcement of the first mortgage had become time barred on the day of the second suit for possession and still the plaintiff was held entitled to possession, subject to the right of redemption of the subsequent transferers. True, these cases were decided when section 25 of the Transfer of Property Act was in force, but as already observed; JOGESEWAR U. MOTI,

Order XXXIV, rule 1, Civil Procedure Code, did not make any shange in the respective rights of the parties. There is, however, a later case involving the same question, after the new Civil Procedure Code had been brought into operation. In Babu Lal v. Jalakia (4), the facts of which were very similar, it was held that the suit for possession was maintainable and that the subsequent mortgages was entitled to nothing more than an opportunity of paying off the prior mortgage. ease, too, the same question of limitation was raised. It will be aseful to quote from the judgment of the learned Judge (Piggott, J.,) portions relevant to the present eace, as the view expressed therein coineides with mine and as I am basing my judgment on it:

It seems clear to me, therefore, that the present suit is neither a suit for sale on the mortgage of Ostober 16th, 1893, nor a snit to foreelose that mortgage: it is not a suit on that mortgage at all. It is a suit brought after that mortgage had been extinguished upon a different cause of action, namely, the plaintiff's failure to cb. tain possession of the property purchased at the sale of July 30th, 1912 Babu Lal's purchase was first in point of time but he purchased at a sale held on a decree obtained by a paisne mortgagee in a suit in which the prior mortgagee was not impleaded. What was put up for sale and purchased by Babu Lal was the equity of redemption, sabject to the rights of the prior mortgagee. Babu Lal has a elear right to redeem the first mortgage and this right has not been affected by anything which took place in the course of in consequence of the plaintiff's suit on her mortgage to which the puiere mortgagee was no party......

"The plaintiff was bound...to implead the puisne mortgagee....The failure to do this has led to the present litigation; but the necessary parties are now before the Court and the duty of the Court is simply to work out the equities between them....I hold that Babu Lal is entitled to nothing more than ...an opportunity of paying off the prior

mortgage...

"In arriving at this conclusion I have disposed of the plea of limitation in the only form...it bas...been taken by the

appaliant himself. The present suit is not brought on the mortgage of Ostober 16th, 1898, but upon a cause of action long subsequent, and is well within limitation in respect of the said cause of action." (Pages 1154. 55*).

13. In assepting the correctness of this view I have not lost sight of the difficulty that faces me, and it is the ruling of our own High Court given by Mittra, A. J. C., in the case of Raghunath v. Sheolal (1). He follows the opinion of the dissentient Judge in preference to that of the other two Judges, deciding the case of Har Pershad Lal v. Dalmardan Singh (2) already cited. I have given my most earnest and eareful attention to the question but have, with the utmost respect to the learned Judge who decided the case of Raghunath v. Sheolai (1), to differ from him. If his view were assepted as correct, valuable rights of innocent persons like the present plaintiff would be injuriously affected for no fault of theirs. It caunot be said that by the asceptance of the other view, the rights of the subsequent transferees excluded from the first mortgage suit would be injuriously affected. They had only a right of redemption and of it they would not be deprived. With very great reluctance. therefore, I have to differ from the view laid down in the case of Raghunath and to follow that laid down by the majority in the case of Har Prashad.

To the question referred my answer is, therefore, in the affirmative and my opinion is that the plaintiff is, on the facts stated, entitled to possession, of course, subject to the defendant's right of redemption.

was not specifically put in the order of Reference, it was allowed to be argued, as it arose out of the facts of the case. It is, therefore, necessary to express an opinion on it. It was contended for the plaintiff appellant that the defendant's suit for foreclosure having been instituted subsequent to his own, the decree obtained by the defendant must, under the provisions of section 52 of the Transfer of Property Act, be considered to have been subject to the result of the previous suit. This contention finds support from the judgment of Brett, J., given in the case of HarPershad Lal v. Dalmardan Singh(2)

* Page of 14 A. L. J.—[Ed.]

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already sited. Though the wording of the section- the property in suit cannot be transferred or otherwise dealt with by any party to the suit or proceeding" would seem to indiest; that only voluntary transfers or dispositions of property were prohibited, the dcctrine of lis perdens has been held be applicable to involuntary sales effected through Civil Courts as well-See Byramii Jamset, i v. Chunilal Laichand (5), Moti Lal v. Karrabuldin (6) and Har Shankar Prasad Singh v. Shew Gorind Sham (12). But these and other eases on the subject refer to the Court sales held in execution of money desrees. The question is, whother a deeree for sale or for foreclosure obtained on a mortgage can be said to transfer or otherwise deal with the property covered by it. In my opinion the effect of such a decree is not to transfer or deal with property or any right in it from the date of that decree. The decree merely erforces the transfer already made under the mortgage and the title of the anotion-purchaser under the sale deeree or of the mortgagee under the forceleaure decree, relater, as observed by Mitira, J., in Har Tershad Lal's case (2), to the date of the original mortgage. The decree does not create any new right nor does it for the first time affect the property mentioned in it. Only the rights already oreated under the mortgage are declared in the decree and under the decree and by its mere force there is no new transfer or dealing with the property. It is contended that the right of sale or the right for possoebion are independent of .the mortgage and are brought into existence by the sale or foreelosure deeree. contention is not sound. The right to obtain a sale of the property or its foreelosure on the default in payment of the mortgage. debt is secured to the mortgages by the terms of the mortgage itself and is not a sreation of the decree. The only thing is that, for the enforcement of that right, the mortgagee has got to go to the Court. That the plaintiff's contention is not sound can be shown by an illustration. Suppose A takes a sale deed in respect of its property from its owner; subsequently B also takes a similar sale deed. B brings a suit for possession on the strength of his sale-deed; A's suit for possession on the strength of his sale deed is subsequently brought. A

is not made a party to B's suit, nor is B a party to the suit filed by A. Both obtain decrees for possession. Will B be permitted to plead successfully that as he brought his east first, the result of A's suit would be enbject to the decree in the first suit and that possession which A would take on the strength of the decree in his favour would be subject to the decree for possession chiaired by B? Certainly not. The order ic which the suits are instituted, or in which the decrees are obtained have nothing to do with the rights either of A or B which are based on and which relate to their respective cale deeds. In the precent case, the defendant's contention that as his foreologure decree was obtained first, there was nothing left to be foreelosed under the plaintiff's subsequent decree, would not be beard, as the plaintiff's right to foreelcsure was created by the mortgage and not by the decree. Similarly, the plaintiff cannot be permitted to plead lis pendens and be does not get any better right, because his suit was instituted earlier. If the dostrine of lis gendens were held applicable to such cases, the subsequent mortgages would be deprived even of his right of redemption. The respective rights of the plaintiff and of the defendant are based on their mortgage. deeds and remain unaffected by the order in which the suits are brought or decrees obtained.

My opinion, therefore, is that the dostrine of lis pendens does not apply to the facts of the present case.

HALLIPAX, KOTVAL, DHOBLEY, A. J. Cs.—
(July 7, 1921).—For the reasons set out in
our separate judgments our answer to the
question referred is, that the plaitiff is entitled
to a decree for possession subject to the defendant's right to redeem.

FINAL JUDGMENT.

Hallipax, A. J. C.—(July 9, 1921).—The answer of the Full Bench to the question referred to it is that the plaintiff in this case is entitled to a decree for possession subject to the defendant's right to redeem. The decree of the lower Appellate Court is set aside and that of the first Court is restored. All costs in this Court and in the

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lower Appellate Court will be paid by the second defendant Moti Patel who is respond. ent here.

J. P. & G. R. D.

Decree set aside.

CALCUTTA HIGH COURT. APPEAL FROM APPELLATE ORDER No. 17 or 1920. August 23, 1921.

Present :- Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

GOPAL KRISHNA SIL-DEFENDANT -APPELLANT

versus

ABDUL SAMAD CHAUDHURI AND OTHERS-PLAINTIFFS-RESPONDENTS.

Pleading-Plaintiff setting up prescriptive right, whether should be allowed to succeed on basis of customary right-Remand on issue not raised in pleadings-Civil Procedure Code (Act V of 1908), O. XLI, r. 25.

When a plaintiff comes into Court on a specific allegation of prescriptive right, and that case is completely met by the defendant and the Trial Court, which comes to the conclusion that the evidence of prescriptive user was in a large measure unreliable, he cannot in appeal set up a new case of customary right, nor would the Appellate Court be justified in entertaining that case, and in remitting it for re-hearing on an issue not raised in the pleadings or even suggested in the Trial Court. [p. 642, col, 1.]

Appeal against an order of the Additional District Judge, Chittagong, dated the 15th August 1919, reversing the decision of the Additional Subordinate Judge, Chittagong, dated the 10th June 1918.

Dr. Sarat Chandra Basak and Baba Chandia Sekhar Sen, for the Appellant.

Moulvi Nuruddin Ahmed and Babu Pares

Chandra Sen, for the Respondents.

JUDGMENT,-This appeal is directed against an order of remand made in a suit for the establishment of a prescriptive right to bury the dead in the disputed land, for a permanent injunction to restrain interference with such right and for incidental reliefs, The subject-matter of the litigation is a hillock which was included in the Reserve Forest of the Government up till 1907. In that year the defendant obtained a settlement from the Government and has since then been in possession. The plaintiffs, who are Moslem residents of the adjoining village of Talberia, allege that the Moslems of the locality have in the past buried the dead in the disputed tract, but were resisted by the defendant on the 26th October 1914. They assert that, from time immemorial and for more than a century, the hillock has been used as a burial ground, openly, continuously, without interruption and as of right, and that they have thereby asquired prescriptive right therein. They accordingly instituted this suit on the 1st November 1916 for the establishment and enforcement of the alleged prescriptive right. The defendant repudiated the claim as neither founded on fact nor On these pleadings, sustainable in law. twelve issues were raised. It is sufficient to refer to the eighth issue, which was framed in the following terms: "Is there any public or private easement?" The Subordinate Judge answered the question in the negative. He held that the evidence did not establish that the plaintiffs or the other villagers of Talberia had ever buried their dead in the hillock before 1911 and that the plaintiffs could not claim a right to use the land as a graveyard by prescription. In this view the Subordinate Judge dismissed the suit. Upon appeal it was argued before the District Judge that what the plaintiffs claimed was not a prescriptive right, but a customary right. The District Judge thereupon framed the following new issue and remanded the suit for re-trial: "Have the plaintiffs asquired a customary right to bury their dead in the suit land? If so, is this right valid to the extent that defendant must be restrained by a perpetual injunction from interfering with

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that right? And is that customary right to be held as existing over the whole of the suit land? If not, to which part of the suit land, if any, is that customary right to be held to exist?" The defendant has appealed against the order of remand.

No anthority has been poduced in support of the elaim put forward in the plaint, namely, that the plaintiffs bad acquired a prescriptive right to use the disputed land as a burial ground by reason of the interment of dead bodies therein for more than a century openly, continuously, without interruption and as of right. Such a prescriptive right was asserted in the case of Wooldridge v. Smith (1) but was negatived by a Fall Bench of the Missouri Supreme Court. Land for use as a burial ground may be asquired through purchase or dedication. But law does not recognise that an easement by prescription can be created by the mere fact that dead bodies are placed in graves on the land of another and permitted to remain there for the prescriptive term. The Indian Easemente Act contains the following definition of an easement : "An easement is a right which the owner or ossapier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in, or upon, or in respect of, certain other land not his own. The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner." By no stratch of language can the right to bury in a given tract of land be deemed a right imposed forthe beneficial enjoyment of land. In such a ease; there is no such thing as a dominant heritage to which the easement right can attach and the right to bury upon a tract of land in no sense falls within the general definition of the term "easement." It may be conseded that, where the owner of land has asquiessed in the burial of dead bodies on his property, apart from all questions of asquisi-

tion of title by adverse possession, a Court of justice may prevent the desceration of the graves. But this does not justify the inference that the placing of dead bodies in graves upon the land of another creates an easement by prescription. Such an easement is unknown to law and it is well settled that the Court will not create a new species of easement especially if the easement claimed constitutes a naisance: Hira Lil v. Lokenath (2). In view of these difficulties, the plaintiffs set up a sustomary right to bury the dead on the disputed trast; they may have been encouraged to put forward such a elaim at the appellate stage by reason of the decision in Mohidin v. Shivlingappa (3). That case is an authority for the proposition that, where a certain section of the Moslem community had been for many years in the habit of burying their dead near a Darga on the land of the plaintiff who sued for an injunction to restrain them in future, the right of burial e aimed by the defendants was not an ease. ment but a sustomary right which, being confined to a limited class of persons and a limited area of land, was sufficiently certain and reasonable to be recognised as a valid local enstom. We do not desire to express an opinion upon the view adopted in the ease just mentioned. The question, when it arises, may require eareful consideration, whether a eastomary right of user of a place as a burial ground or a cremation ground may be acquired especially as against the Orown. Before such a custom can be recognized, it will be necessary to investigate whether it possesses what has been considered as the essential attributes of a custom, namely, that it must be immemorial, it must be reasonable, it must have continued without interraption sinse its immemorial origin, and it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the parsons whom it is alleged to affect; Mahamaya Debi v. Huridas Haldar (4). Bat it is indispensable that when a enstomery right is elaimed, it should be specifically pleaded; all the essential requisites to its validity and binding effect

^{(1) (1912) 213} Missouri 190; 40 L. B. A. (x. s.)

^{(2) 29} Ind. Cas. 865; 19 C. W. N. 854. (3) 23 B. 666; 1 Bont. L. B. 170; 12 Ind. Doc. (N. s.)

^{(4) 27} Ind. Cas. 400; 42 C. 453; 13 C. W. N. 409; 20 C. L. J. 188.

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must be averred and the sustom so pleaded must when put in issue be proved as laid. When a plaintiff sets up a prescriptive right he cannot in fairness to the defendant be allowed to succeed on the basis of a sustomary right. The two are fundamentally distinct, for, as has been well said, sustom differs from prescription in the fact that prescription is the making of a right while custom is the making of a law. The District Judge in this case has framed a new issue, apparently under Order XLI, rule 25, but this should not have been done as the new issue framed did not arise upon the pleadings. In this connection, reference may be made to the decision of the Judicial Committee in Ram Chandra Bhanj Deo v. Secretary of State for India (5) where Lord Parker observed that, even if an Appellate Court be deemed competent to remit a case for re-hearing on an issue not raised in the pleadings nor even suggested in the Trial Court, this cught only to be done in exceptional cases, for good cause shown, and on payment of all costs thrown away. In the present case, the respondents showed no ground whatever for the indulgence they elaimed and obtained in the lower Appellate Court; they did not suggest that they had been in any way taken by surprise or had discovered fresh facts of which they were nnaware when the case was tried before the primary Court. They came into Court on a specific allegation of prescriptive right of a novel character. That case was completely met by the defendant and the Subordinate Judge same to the conclusion that the evidence of prescriptive user was in a large measure unreliable. When they went on appeal, they realised that the decision of the Trial Court was unimpeashable both on the facts and the law, and accordingly set up a new ease of enstomary right. If this case is entertained, the plaint must be amended and the defendant permitted written statement. to file a new new case would then have to be tried on fresh evidence. This is a procedure which sannot be seriously defended.

The result is, that this appeal is allowed, the order of the District Judge set

(5) 37 Ind. Cas. 223; 43 I. A. 172; 43 C. 1104; 24 C. L. J. 296; 20 M. L. T 235; 20 C. W. N. 1245; 1916; B. M. W. N. 175; 4 L. W. 251; 14 A. L. J. 1009; 18 Bom. L. R. 838; 31 M. L. J. 745 (P. C.).

aside and the decree of the Court of first instance restored with soats throughout.
W. C. A.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS Nos. 1, 2, 7, 13 AND 14 OF 1920.

May 2, 1921.

Present: - Mr. Daniele, J. C., and Mr. Dalal, A J. C.

Sheikh MUHAMMAD MUZAFFAR ALI
AND OTHERS—DEFENDANTS—APPELLANTS
tersus

HON'BLE SIR Mahara, a BHAGWATI
PRASAD SINGH AND OTHERS — PLAINTIFFS —
RESFONDENTS.

Contract Act (IX of 18.2), s 16—Undue influence:

—Urgent need of borrower—Civil Procedure Code (Act V of 1.08), ss 61, 74, O. XXI, rr 57, 84, O. XLI, r. 22, Sch. III, para. 1—Execution of decree—Decree transferred to collector—Debtor, power of, to alienate property—Permission of Collector—Power of Civil Court Attachment—Claims enforceable—Rateoble distribution—Order putting an end to attachment—Appeal—Cross-objections against co-respondent.

Urgent need of money on the part of a borrower is not in itself sufficient to place the lender in a position to dominate his will within the meaning of section 6 of the Contract Act [p 845, col 2]

Paragraph 1, Schedule II', (ivil Procedure Code, creates an absolute disability on the part of a debtor to deal with property while the powers conferred by the Schedule on the Collector are in force [p 648, col 1.]

Khushalchand Premraj Marwadi v. Nandram Suhebram Marwadi, 12 Ind Cas 572; 35 B. 516; 13

Bom. L. R. 977, distinguished from.

o special form of permission is required by paragraph 1, Schedule III, Civil Procedure Code, to enable a judgment debtor to execute a mortgage of his immoveable property. It is sufficient that the Collector knows that the mortgage is being executed and that he does in substance sanctionits execution by an order in writing. Nor is it necessary under that paragraph that every detail of the transaction should be sanctioned by the Collector or even that there

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should be a separate permission in respect of each deed. All that is required is that the judgment-debor should have his written permission to mortgage the property. The permission mentioned in the paragraph need not take the form of a certificate under Order XXI, rule 33, Civil Procedure Code, for this rule and paragraph 1: of Schedule III are two entirely independent provisions and there is no warrant for reading the former into the latter. [p. 617, col. 2; p. 613, cols. 1 & 2]

The provision contained in paragraph 11, Schedule III, Civil Procedure Code, makes it illegal for a vivil Court to issue process against the property during the period the powers conferred by the Schedule are exercisable by the Collector, and a process which was illegal when it was issued cannot become effective when the Collector ceases to be in charge of the execution proceedings. [p 654, col. 2]

The explanation to section 64, Civil Procedure Code, gives no priority to claims under section 74, Civil Procedure Code, apart from the attachment in connection with which they are made and under which they are enforceable, so that a claim to rateable distribution made in connection with an attachment ceases to be enforceable under it when the attachment is withdrawn. [p. 650, col. 1;]

Section 61, Civil Procedure Code, refers only to claims enforceable under the attachment effected prior to the alienation, and not to claims enforceable under the decree in execution of which the attachment was made. [p. 651, col. 1.]

Where there is an explicit order putting an end to the attachment, Order XXI, rule 5; Livil Procedure Code, has no application, nor is there anything in the rule which limits the power of the Court to pass such an order. [p. 65;, col 1.]

Order XLI, rule 22, Civil Procedure Code, should ordinarily be confined to cases of cross-objections urged against the appellant; rule 33 of the same Order, however, gives the Court a very wide discretion, and cases may occasionally arise where justice requires that cross-objections against a corespondent should be heard. But, where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, the rule does not revive his right simply because a codefendant has instituted an appeal against the plaintiff on entirely different grounds. The same principle applies in the case of a respondent objector who does not file any appeal himself whose interests are identical with that of the appellant and who might, had he chosen, have joined in the appeal. [p. 551, col 2; p 612, col 1.]

Munisumi Mudaly v Abbu Reddy, 27 Ind. Cas 323; 38 M 705; (1915) M. W. N. 45; 27 M. L. J. 74 J. F. B.) and Jagannath v. Hanuman Singh, 54 Ind. Cas. 832; 6 O. L. J. 544; 2 U. P. L. R. (J. C.) 47, considered.

Official Trustee of Bengal v. Charles Joseph Smith, 58 1nd. Cas :62; 5 P. L. J. 329; (1920) Pat. 161; 1 P. L. T. 434, followed.

Appeal from a desree of the Sabordinate Judge, Bahraich, dated the 22nd September 1919. Mr. Hardhian Ohindry, for the Appellants in Appeals No. 1 and for the Respondents in Appeals Nos. 13 and 14.

Messrs. M. Nasim, Shahid Husain and M. Wasim, for the Respondents in Appeals Nos. 1, 13 and 14 and for the Appellants in Appeal Nos. 2 and 7.

Messra. Bisheshwar Nath and Bishambhar Nath and Srivastava, for the Appellant in Appeal No. 2 and for the Respondent in Appeal No. 13.

Syed Zahur Ahmad, Mesers. A. Rauf, Mahesh Prasad and B. N. Khanna, for the Respondents in Appeals Nos. 2, 7 and 13.

Mr. E'ssan ur. Bahman, for the Respondent in Appeal No. 7.

Mesers. B. B. Lal and Shambhu Nath, for the Appellant in Appeal No. 13.

Pandit Tara hankar Sharma, for the Respondent in Appeal No. 13.

The Hon'ble Pandit Gokaran Nath Misra, for the Appellant in Appeal No. 14.

JUDGMENT .- Sheikh Muzaffar Ali and Sheikh Asghar Ali, Talukdars of the Gandara Estate, were beavily in debt. Various creditore, among whom Sahu Parshotam Das and Balmakund Kapur are important for the purpose of this ease, were seeking to sell up the estate in execution of decrees. Execution proceedings were transferred to the Collector. With the Collector's approval a loan of Rs. 9,26,000 was obtained from the Maharaja of Balrampur to pay off the ereditors on the security of a mortgage by conditional cale, dated 2sth October 1914. It was afterwards found that the amount due under the various decrees had not been properly calculated and that the amount advanced was insufficient. A further sum of Rs. 2,16,425-10-0 was advanced by the Maharaja on the same terms. This avdance was seenred by a mortgage of 10th August 1915 of the same property and in identical terms with the mortgage of 29th Ostober 1914. Sheikh Asghar Ali had died between the execution of the two mortgages and the second mortgage was executed by Sheikh Muzaffer Ali and Sheikh 1kbal Ali, son of Asghar Ali, who are the principal defendants in the pres sent litigation.

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Suit No. 10 of 1916 now in appeal before us was instituted by the Maharaja of Balrampur for foreelosure of the mortgaged property on the basis of the two mortgages mentioned above, and the questions which arise in the various appeals are, how far and in what manner the mortgage is enforceable

(a) against the mortgagors, and

(b) against other ereditors of the mortgagors.

Over Rs. 10,18,500 of the sum advanced by the Maharaja was paid into Court for distribution to creditors holding decrees against the estate. The balance, apart from the cost of the stamp, etc., was paid out of Court in satisfaction of mortgages and other claims. Nevertheless, a number of creditors atill remained unsatisfied. These creditors have been seeking to enforce their various decrees by attachment and sale of the Gandara Estate. Hence they have been impleaded as defendants Nos. 3 to 21 in the suit.

The learned Subordinate Judge found that the mortgage deeds are valid and enforceable according to their terms, but that the defendants Nos. 3 and 5 to 14 are entitled to priority over one or both of the deeds by reason of having attached the mortgaged property prior to their execution. He found that the other defendant ereditors, namely, the defendants Nos. 4 and 15 to 21, were not entitled to priority over the mortgaged debt but that by virtue of subsequent attach. ments they had a right of redemption under section 91 of the Transfer of Property Act. He accordingly made a decree permitting the defendants Nos. 1 and 2 (the mortgagors) and the defendants Nos. 4 and 15 to 21 to redeem the mertgages. If they failed to do so, the plaintiff was required, as a condition of foreclosure, to pay up within seven months the amounts due to the defendants Nos. 3 and Against the decree five appeals have been filed by the plaintiff, the principal defendants, and three of the ereditors respectively.

The appeal of Muzaffar Ali and Ikbal Ali

is Appeal No. 1 of 1920.

The plaintiff's appeal is Appeal No. 7 of 1920.

The appeal of the Bank of Upper India is Appeal No. 2 of 1920.

The appeal of Rae Bishamber Nath Tandan is Appeal No. 13 of 1920.

The appeal of the Allahabad Bank, Ltd., is Appeal No. 14 of 1920.

The mortgagors have pressed their appeal on five grounds. Two of these attack the validity of the mortgage, the third is concerned with the relief to be granted to the plaintiff, and, the fourth and fifth deal with points of procedure. The grounds are:—

(1) that the mortgages were obtained by undue influence and that their terms are

harsh and unconscionable;

(2) that the mortgages are invalid on the ground that the mortgagors did not obtain the written permission of the Collector as required by paragraph 11 of Schedule III of the Code of Civil Procedure;

(3) that a decree for sale should be sub-

stituted for a decree for foreclosure:

(1) that the Court below wrongly rejected an application for amendment of the written statement and framing of new issues;

(5) that the Court below erred in not granting an application for the examination of the appellants and of the plaintiff by

commission.

The second plea was also taken by Babu Bishumbhar Nath Tandan in Appeal No. 13. Both the second and third pleas have been adopted by all three of the appealing creditors, though the third plea is not to be found in any of their grounds of appeal. The first, fourth and fifth pleas are peculiar to the appellants.

The plea of undue influence is based on section 6 of the Contract Act. In order to establish it, it must be shown, first, that the plaintiff was in a position to dominate the will of the mortgagors and, secondly, that he used that position to obtain an unfair advantage. If the terms of the contract appear on the face of them to be unconsciousable or are shown to be so, the second point may be presumed under sub section (3).

The argument of the appellants was mainly devoted to showing that certain terms of the mortgages are prima facie unconscionable. On the question whether the mortgages was in a position to dominate the will of the mortgagors they rely mainly on the circumstance that the latter were heavily indebted and that their estates were threatened with sale in execution of decrees held by their oreditors. There had been no previous transactions between the parties to give the mortgages any hold

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over the mortgagors. In fact, the mortgage seems to have been entered into largely for their benefit to give them one last shapes, though it might be a slight one, of saving the estate from sale. The admitted fact that the transaction was entered into with the knowledge and approval of the Deputy Commissioner of the district raises a strong presumption against undue influence having been employed. He was fully sognizant of the negotiations which were taking place, as is shown by Exhibit 38 and numerous other papers on the resord, and the money was paid to the eraditors in his presence. There is also the further fact that the defendants were represented by a capable and experienced manager through whom the transaction was negotiated. Kunwar Kamta Pershad, P. W. No. 14, a Deputy Collector who had retired from Government service in the previous year, was appointed by the defendants as their manager in January 1914 and the whole of the negotiations were earried on by him in consultation with his principles, appears from his evidence and that of the plaintiff's manager, the terms of the loan were fully discussed between the parties, and there is absolutely no room for the suggestion that the plaintiff was in a position to dominate or did dominate the will of the borrowers in any way. It has been elearly laid down by the Privy Conneil in Sundar Roer v. Rai Sham Krishen (1), that urgent need of money on the part of the borrower is not in itself sufficient to place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act.

Even, therefore, if the terms were unconscionable, the requirements of section 16 are not fulfilled. It does not, however, appear that they were. Only two terms have been pressed before us as being such. The first is the agreement between the parties that the profits of the property should be taken to be Bs. 47,472-86 and that the value of the property should be calculated at 25 times this amount. It has not been shown either that the profits were wrongly stated or that the number of years pur-

chase agreed on was in any way unusual, It was perfectly open to the parties, for the purpose of avoiding future disputes, to as to the amount of the profits. There is nothing either unusual or improper in such a contract. The only evidense relied on by the appellants for the purpose of showing that the property has been undervalued consists in the fact that in a sale statement, dated 27th May 1915, which was submitted to Government in connection with the proposed sale of the property under Parshotam Das's decree the value of 52 villages out of the 62 now mortgaged was shown as Rs. 15.68,437. and that in a sale proclamation dated 24th June 1915 in connection with the same case the value of the same 52 villages was shown as Rs. 23,98,437. The totals are not given either in the statement or the proslamation but are arrived at by adding up the value assigned to each village. The values given in a sale proclamation are not always very assurate and the fact that two such diverse estimates were arrived at within a month of each other shows that very little weight ean be attached to these statements for the purpose of showing what the property was actually worth.

The appellants' main argument is direct. ed against the condition of forcelosure. The term of the mortgage was seven years, but it was agreed that if at any time the unpaid interest and principal was found to exceed the value of the property as calculated in the deed, the mortgages should be entitled to forselose at ones. This was, on the face of it, a very reasonable condition for the protection of the mortgages who could not be expected to allow the debt to go on increasing when its amount already exceeded the value of its seenrity. After the first deed had been exeented it was found, as we have seen, that the amount due to decree holders very much exceeded the original estimate and under the second deed a further loan of Rs. 2,16,425.10.0 was made on the same security and on the same terms. It is now said that a calculation of the amount of uppaid interest on the first deed shows that at the time of execution of the second deed the amount due already exceeded the value of the property as agreed on

^{(1) 84} C, 150; 4 A. L, J, 10 ; 5 C. L, J, 106; 9 Bom. L. B. 804; 11 C. W. N, 249; 17 M. L, J, 43; 2 M, L. T. 75; 84 I, A, 9, (P, C,),

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between the parties, and, therefore, the mortgagee might have taken advantage of this stipulation to forcelose at once. In reply to this the plaintiff asks, what was he to do under the eireumstances ? Unless he made a further advance the purpose of the original loan would be frustrated, as the unsatisfied ereditors would come down on the property. On the other hand, he did not want to throw his money away, especially so large a sum as Rs. 2,16,425 10 0, and for the protection of his own interests it was necessary to retain the power of foreelosure in his bands in same the mortgagors proved unable to pay interest on the enhanced loan. In fact the mortgagee waited for nearly six months after the execution of the second deed before putting this clause into force and only did so when the mort. gagore failed to pay anything towards the instalment of interest which fell due on 1st January 1916: Having regard to the eireumstances under which the deeds were executed we should not be justified in holding that this term was unconsciouable.

The fourth and 6fth pleas may be very briefly disposed of. The evidence of the defendants Nos. 1 and 2 was recorded from the 5th to the 22nd August 1917, and again from the 19th to the 25th March 1919, and on the latter date they definitely stated that their evidence was closed. The application for amendment on which they now wish to rely was only made on 6th May 1919 after the case had been pending for over two years, after the whole of the evidence had been closed, and only a few days before the date fixed for arguments. The acceptance of the application would have meant entering into fresh evidence after the case was practically over and the learned Sabbordinate Judge was entirely in the right in rejecting it. As a matter of fact, several of the points which the defendants desired to raise were included in the issues already framed and have been fully discussed in the judg. ment

The fifth plea is based on an application dated loth August 1917 saying that the defendants Nos. 1 and 2 wished to give syidence and were too ill to attend, they also wished to examine the plaintiff who was exempted from appearance in the Civil Courte, and they, therefore, asked for the issue of a commission for their cwn examination and

that of the plaintiff. They asked, at the same time, for the adjournment of the case, Now the plaintiff's evidence was closed on 22nd June 1917 (except that the crossexamination of one witness was still to be completed) and dates were then fixed for the hearing of the evidence summoned by the appellants. The appellants did not inelude either themselves or the Maharaja among the witnesses whom they desired to eall. They put in no affidavit in support of the allegation that they were ill, and their application if allowed would have resulted in the adjournment of the ease. In fact, they applied for adjournment along with their application. Under these stances, we are unable to hold that the Court was bound to grant their appliestion.

The plea based on paragraph 11 of Schedule III of the Code of Civil Procedure is discuss. ed by the learned Subordinate Judge under issue No. 16. He rejects it on two ground; first, that paragraph 11 was framed for the benefit of the judgment ereditor and that, therefore, the attachment revived as soon as the Collector seased to be in charge of the property, and, secondly, that in fact the written permission of the Collector was obtained. The plaintiff's Counsel has, wirely, we think, not relied on the first of these arguments. Where the Lagislature intended that a particular alienation should be invalid only as against the claims of the attaching creditor it has said so in plain language, as in the case of section 64 of the same Code. The language of Schedule III is widely different and, as was hell in Ganga Prasad v. Ganga Bakhsh Singh (2), creates an absolute disability on the part of the debtor to deal with the property while the powers conferred by the Schedule on the Collector are in force. The language used is similar to that of sestion 37 of the U. P. Court of Wards Act, 1912. A very wide construction was placed by the Privy Conneil on similar language in an earlier Court of Wards ersetment [Debi Bakhsh Singh v. Shadi Lal (3) . A similar phrase com-

(2 29 A. 415, A. W. N. (1907 . 112,

(3) 38 Ind Cas 681; 19 O. C. 55; 14 A. L. J. 477 24 C. L. J 5: 18 A. 271; 20 M. L. T. 53; 20 C. W. N. 770: 18 Bom L R 413; 1916) 1 M. W. N. 425; 3 L. W. 525; 31 M. L. J. 72; 4 O. L. J. 1; 43 I. A. 69 (P. C.).

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petent to contract' is used in sections 10 and 11 of the Contract Act, and it is now well-settled that transactions by persons who are incompetent to contract, such as minors, are wholly void. The Khushalchand Premra Marwadi v. Nandram Sahebram Marwadi (4), relied upon by the learned Subordinate Judge, does not really support his argument, as the passage on page 525* to which he presumably refers is dealing with a claim under sections 273 and 295 of the old Code and the cases referred to in support of the argument are cases under these sections, and not decisions passed with reference to section 325A of the old Code which corresponds to paragraph 11 of Schedule III. The argument based on the latter provision was dealt with on page 52. of the report and it was held that when the alienation in question was made the Collector was not exercising the powers referred to in the sestion.

The learned Subordinate Judge has, however, found that the written permission of the Collector was in fact obtained. The argument to the contrary is a purely technical argument. It has been admitted on all hands before us that the Collector was aware of the transaction and that it had his approval. The appellants argue that the terms of the mortgage are so hard that they are fully justified in relying even on a technical plea to get rid of them. We have now to examine the evidense on which the learned Subordinate Judge's finding is based. It is common ground that, as shown by Exhibit 211, execution proceedings against the 62 villages now in suit in connection with the decree of Babu Parshotam Das were transferred to the Collector on 7th November 1912. and that on 8th January 1913 the Collector issued notices under paragraph 3 of the Schedule. Except for a short interval between March and June 1915, when the file was returned to the Civil Court for the purpose of substitution of names on the death of Sheikh Asghar Ali, the powers conferred under Schedule III remained vested in the Collector until 21st August 1915, when the file was returned to the Civil Court (Exhibit 20). Applications were made from time to time to the Collector to stay sale-proseedings in order to enable the judgment debtors to raise a loan from the Balrampur Estate. One such application dated 5th June 19 4 (Exhibit 218) was signed by the judgment-debtors and their manager Kunwar Kamta Pershad. To this there was appended a certificate from the plaintiff's manager that the Maharaja was prepared to give a loan to the estate on condition that the entire estate would be mortgaged to him as security for satisfaction of the loan. On this application, and another application in similar terms presented on the following day, the Collector passed an order postponing the sale for three months On 8th October 1914, eleven days before the execution of the first of the two mortgages, the defendants' manager wrote a personal letter (Exhibit 36) to the Collector which begins :

"Your Honour knows that the Gandara Estate is going to take a loan from the Maharaja of Balrampur, by executing a mortgage to pay off the debts for which the former estate is going to be sold on the 20th October 1914."

He then states that owing to the absence of the plaintiff's legal adviser a week's time will be necessary to get the deed registered. This would mean that the deed could not be completed before the date fixed for sale. On this letter the Collector passed the following order dated 19th October 1914:—

"As there seems to be ground for believing that the loan will be negotiated, and the decree holders satisfied, I order the postponement of the sale of Gandara Estate to November 1st, 1914."

It seems to us that this order must be read in sounsetion with the application on which it was passed, and that in poetponing the sale in order that the loan may be negotiated and the decree holders satisfied, the Collector was clearly referring to the execution of the mortgage, which he knew only required the approval of the plaintiff's legal advisor and the formality of registrations for its completion, and which actually was executed and registered within the time allowed by him in his order. No special form of permission is required by the Schedole and it

^{(4) 12} Ind Cas. 572; 85 B. 5'6; 18 Rom L. R. 077. *Pages of 35 B.—[Ed.]

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is sufficient that the Collector knew that the mortgage was being executed and that he did in substance sanction its execution by an order in writing. After the execution of the mortgage the sum of Rs. 8,90,000 was sent by the plaintiff to the Collector for payment to the creditors and, as bas been already mentioned, was paid to them his presence. After this we have, in on 4th December 1914, a letter from the Collector to the plaintiff's manager (Exhibit 30) informing him that the amount sent was insufficient, as interest due since the preparation of the decrees had not been ealenlated and asking what he proposes to do in the matter as interest is mounting up every day, and unless the Maharaja took some further steps it might be necessary to fix a date for sale. this letter fresh negotiations were entered into between the parties. In the following month Asghar Ali, the father of the second defendant, died and his death delayed the negotiations. On 5th February the Deputy Commissioner wrote to the plaintiff's manager a letter (Exhibit 62) in which he said :

"I hope you will see the Gandara affairs are settled by the end of the month as

promised by your legal adviser."

Three days later, and evidently in reply to Exhibit 32, the plaintiff's manager wrote to the Deputy Commissioner a letter (Exhibit 63) informing him that he had asked Kunwar Kamta Parehad, the judg. ment debtors' manager, to come and arrange for the execution of a supple. mentary mortgage deed by the Gandara Talukdars and for payment of their dues to the two remaining eraditors. He hopes that the matter will be settled before the and of the month as desired. The last sentence evidently refers to the wish expressd in Exhibit 62. Ultimately, the second mortgage was executed, as already stated. It is not necessary under paragraph 11 that every detail of the transaction should be sanctioned by the Collector or even that there should be 8 separate permission in respect of each deed All that is required is that the judgmentdebtors shall have his written permission to mortgage the property and that they had this permission sufficiently appears on the face of the documents referred to above.

An ingenious argument was put forward by one of the respondents to the effect that the permission mentioned in paragraph 11 must take the form of a certificate under Order XXI, rule 83. It is said that the first paragraph of the Schedule allows the Collector the choice of three methods of procedure and three only. In this case he must be taken to have acted under clause (a), and under that clause the procedure of Order XXI, rule 83, is obligatory. The most that can be said for this argument is that when the Collector acts purely under clause (a) he must follow the procedure laid down in the rule in question. In this case the Collector did not proceed purely under elause (a). issued a notice to the other creditors under paragraph 3 of the Schedule. In any ease Order XXI, rule 83, and paragraph 11 of the Third Schedule are two entirely independent provisions and there is no warrant for reading the former into the latter.

The third and only remaining plea to be discussed in connection with appeal No. 1 is, that the Court should substitute a decree for sale for a decree for foreelosure. This plea is also urged by the appealing creditors. It is based on the provisions of clause (2) of Order XX IV, rule 4. Civil Procedure Code, which lays down that in a suit for foreelcsure, if the mortgage is not a mortgage by conditional sale, the Court may, at the instance of any party interested, pass a decree for sale in lieu of a decree for forcelosure on such terms as it thinks fit. Assuming that this course is open to the Court, the plea loses all its force in view of the failure of the appellants to show that the property has been undervalued. The security being even at the time of execution of the second deed, and still more when the suit was brought, insufficient to cover the lcap, it is not reasonable to suppose that the plaintiff would ever have agreed to enter into the transaction unless the right of foreelosure had been secured to bim, and there is no legitimate ground wby this Court should interfere to set saide to the plaintiff's prejudice the bargain made by the parties. It is by no means certain even that the Court has power to do so. The mortgage is described in the deed as

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one by conditional sale (bai bil worfa) and its main provisions are purely such as elearly to some within the definition such a mortgage in section 58 of the Transfer of Property Act. It contains, however, a sovenant against failure of the security to the effect that if the mortgagee is found at the suit of any slaimant to have no title to the whole or any part of the mortgaged property, or if any sumbrances on the property other than those spesified in the deed are discovered, the mortgages shall have the right to resover the mortgage-money at once either from the mortgagors personally or from the mortgaged property. The plaintiff's cause of action is based in part on this covenant. He says that the amount of ensumbrances exceeded that specified in the Schedule to the deed. So far as this covenant is concerned, the mortgage appears to be a combination of a simple mortgage with a mortgage by conditional sale and, therefore, to come within the definition of an anomalous mortgage as defined in sestion 98 of the Transfer of Property Act, Section 98, however, provides that in the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by their contract as evidenced in the deed, and it is a question of some difficulty whether Order XXXIV, rale 4, Oivil Procedure Code, was intended to overprovision. On the face of ride this it, there appears to be an inconsistency between the two provisions. They can be brought into harmony if slause (2) of Order XXXIV, rule 4, is deemed to apply only to English mortgages, and this was the view taken by the Judicial Commissioner in an unreported decision in First Civil Appeal No. 16 of 1914 Baquar Hussain v. Balak Ram (5)]. This is also the view taken by Dr. Gour in his Commentary. It is, however, unnecessary to decide the question as, even if we have a discretion in the matter, we do not consider that we ought to exercise it.

The appeals of the Bank of Upper India (Appeal No. 2) and of Babu Bishambhar Nath Tandan (Appeal No. 13) have this feature in sommon that neither of these ereditors applied for attachment of the suit properties prior to the execution of the

(6) 18-Ind. Cas. 84,

deeds in suit. They both applied for rateable distribution under section 73, Civil Procedure Code, in connection with the decree of Parshotem Das who admittedly had applied for attachment of the property on 17th September 1912. It was in connection with this decree that execution proceedings were originally transferred to the Collector under section 68 of the Code: It is common ground between the parties that Parehotam Das' degree was satisfied out of the consideration of the two mortgage deeds in favour of the plaintiff and that his attachment was withdrawn. Section 64 of the Code lays down that where property has been attached in execution of a decree, any private transfer of the property shall be void as against claims enforceable under the attachment, and the Explanation appended to the section provides that elaims enforceable under an attachment include elaims for the rateable distribution of the assets under section 73. The learned Subordinate Judge has held that the claim of the appellants under their decreas is not a claim enforceable under Parshotam Das' attachment, eines when the attachment itself came to an end, there could no longer be any claim enforceable under it. The appellants contest this view and contend that a claim to rateable distribution made in connection with an attachment continues to be enforceable under it even though the attachment is withdrawn. In other words, they put a claim under section 78 on precisely the same footing as an dependent attachment.

This plea was considered and rejected in an elaborate judgment by a Fall Bench of five Judges of the Madras High Court in the case of Annamalai Chettiar v. Palamalai Pillai (6) in which they followed the decision of their Lordships of the Privy Council in Mina Kumari Bibi v. Bijor Singh Dudhuria (7). The Explanation to section 64, which did not occur in the corresponding provision of the old Code, was added to remove a difference of opinion between the Bombay and Allahabad High

^{(6) 43} Ind. Cas. 539; 41 M. 265; 22 M. L. T. 461 38 M. L. J. 707; (1917) M. W. N. 882; 7 L. W. 298 (F. B.).

^{(7) 40} Ind. Cas. 242; 44 C. 662; 1 P. L. W. 425; 5 L. W. 711; 82 M. L. J. 425; 21 C. W. N. 185; 21 M. L. T. 844; 15 A. L. J. 882; 25 C. L. J. 508; 19 Bom. L. B. 424; (1917) M. W. N. 478; 44 I. A. 72 (P. C.).

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Courts as to the scope of the section. The Privy Council decision in Mina Kumari Bibi v. Bijoy Singh Dudhuria (7) was passed under the old Code, but it assumed the correctness of the Bombay decision and is, therefore, a relevant authority with reference to the existing Code. The appellants invite us to hold that the learned Judges of the Madras High Court misunderstood the meaning of the Code and the effect of the Privy Council decision. As their Lordships point, out though the word "attachment" occurs three times in the section (it now occurs four times) the reference is to one and only one attachment. The Explanation elears up a difficulty as to what kinds of elaims are to be regarded as being made under the attachment, but it is still the same attachment which is spoken of. The Explanation gives no priority to elaims under section 73 apart from the attachment in connection with which they were made and under which they are enforceable.

This disposes of the appeal of the Bank of

Upper India (Appeal No. 2 of 1920).

Babu Bishambhar Nath Tandan applied for rateable distribution under the attachment effected on the application Balmakund Kapur, defendant No. 8. appears from Exhibit V 4 which is an ap plication of Babu Bishambhar Nath Tandan of 10th April 1915 that he did apply for attachment of the Taluka in execution of his own decree. The order-sheet (Exhibit VI of 24th May 1915 in the same ease (Execution Case No. 79 of 1915), shows that he subsequently stated that he did not wish to attach the villages in his own ease but he applied for rateable distribution in case No. 78 of 1915 which, as appears from Exhibit 175, was the execution ease of Balmakund Kapur. This attachment was never withdrawn, and in fact defendant No. 8 has been given priority over the deeds in suit on the basis of it. Apart from the objection taken by the plaintiff to the validity of this attachment, the appellant would be entitled to priority in respect of it. The learned Subordinate Judge refers to Babu Bishambhar Nath Tandan's application for rateable distribution in connection with Balmakand Kapur's decree on original pages 381 to 383 of his jadgment, but all he says with reference to it is that no order was passed on the application for

of defendant No. 8 had been fixed for 23th June 1915 after attachment. It is not contested before us that Babu Bishambhar Nath Tandan had fulfilled the requirements of section 73 by applying for rateable distribution and that he is entitled to the same priority to which Balmakund Kapur himself is entitled.

The case of the Allahabad Bank, Ltd., appellant in Appeal No. 14 stands on a different footing from that of the other appellants, The Bank applied for attachment of the properties in suit on 15th November 1913, The only question in appeal is whether the Bank's claim is a claim enforceable under that attachment within the meaning of section 64, Civil Procedure Code. question turns on the effect of an order of 10th April 1915 which is Exhibit 220 on the record. At that time Asghar Ali, one of the judgment debtore, had died and the record of the execution proceedings had been returned to the Civil Court by the Collector in order that the names of his heirs might be substituted in his place. On this the Civil Court passed the following order:-

"Under the circumstances no further proceedings can be taken in this case under Order XXII, rule 12, Oivil Procedure Code. It is, therefore, ordered that the case having been struck off as unsatisfied be consigned to the record room, and the property under attachment be removed from the register (register se wa quear ho). The decree-holder can file a separate application under the rules for bringing up the names of the heirs in place of Asghar Ali, the deceased judgment debtor. Costs of the case to be upon

the judgment debtor."

The register referred to in this order is the register of attached property which the Nazirs of all Civil Courts are required to maintain under paragraph 20; of the Oadh Civil Digest. There appears to be no room for doubt that the effect of the order was to release the attached property and put an end to the attachment. The appellant Bank relies upon Order XXI, rule 57 of the Code, which says that where, after property has been attached, a Court dismisses the application for execution the attachment shall sease. He contends that where, as in the present case, the Court was unable to proceed with the execution

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owing to a circumstance over which he had no control, namely, the death of one of the judgment debtors, the order passed could not have the effect of putting an end to the attachment. This is not the meaning of the rule. Under the old Code difficulties had arisen where the Court's order simply directed that the execution proceedings be struck off or that the case be consigned to the record room and was silent on the question whether the attach. ment remained in force or not. The present rule was inserted in the new Code to put an end to these doubts. Where there is an explicit order patting an end to the attachment the rule has no applica. tion nor is there anything in the rule which limits the power of the Court to pass such an order. It may be that the learned Subordinate Judge when he passed the order did not foresee all the sonsequeness that would flow from it, but if the Bank felt aggrieved by the order had its remedy by way of appeal, impossible to hold that the order was any way ultra vires. The fact that the Bank put in a fresh application for execution on a date subsequent to the deeds in suit may give it a right of redemption under section 91 of the Transfer of Property Ast but sannot give the Bank priority over the deeds in suit. Section 64 refers only to elaims enforceable under the attachment effected prior to the alienation and not to slaims enforceable under the decree in execution of which the attachment was made. Reference has been made in argument to the fast that on the very day on which the execution application was dismissed and the attachment terminated, the Bank put in a fresh application before the Subordinate Judge of Lucknow asking for substitution of names; but the very application which is relied on as proving this (Exhibit 219) shows that this was done after the previous execution ease had been struck off, and in fact in this application the Bank made a fresh application for attachment of the property. The date of this application is missing in the copy on the record but the prohibitory order passed on it by the Jourt is dated 10th Novem. ber 1916. The Bank's case may be a hard one but the Court below is clearly right in holding that it is not entitled to

priority over the deeds in suit.

In Babu Bishambhar Nath Tandan's appeal another of the ereditors Balmakund Restogi, defendant No. 4, filed what purport to be cross-objections under Order XLI, rule 22. These objections are not in any sense directed against the appellant in that appeal; on the contrary, they are substantially the same as the pleas taken in the appeal itself. They are directed against the plaintiff. Balmakund Rastogi was not made a respondent in the plaint. iff's appeal because the plaintiff was quite satisfied with the decree passed against him by the Trial Court. The question is whether, under these eireumstances, the memo. randum of objections somes within the provisions of Order XLI, rule 22. It is true that that rule is wider than the sorresponding provision of the Code of 15-2, but the use of the word "eross-objections" does imply that the objections should be in opposition to the claim made in the appeal though they may affect other respondents as well. The objector relies on a Fall Bench desision of the Madras High Court in Munisami Mudaly v. Abbu Reddy (8) which has been followed by a single . unge of this Court in Second Civil Appeal No. 418 of 1918, printed on page 544 of Volume VI of the Oadh Law Journal Jagannoth v. Hanuman Singh (9)). The Madras judgment is a very short one and gives no reasons beyond the practice of the court and the convenience of having a fixed rule as distinct from the rule laid down by the Calcutta Hight Court in a case cited before them, that it is only in exceptional cases that the respondent may urge a cross-objection against another respondent. We think that the true rule is that laid down by the Patna High Court in Official Trustee of Bengal v. Charles Joseph smith (10), in which the matter has been exhaustively dealt with. It was there said that, where one of several defendants against whom a decree passed has allowed the period for appealing to elapse, there seems

^{(8) 27} Ind. Cas. 828; 88 M. 705; (1915) M. W. N. 45; 27 M. L J. 740 (F. B.).

^{(9) 54} Ind. Cas. 352; 6 O. L. J. 544; 2 U. P. L. R. (J. C. 27.

^{(10, 56} Ind. Cas. 262; 5 P. L. J. 828; (1920) Pat.

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no good ground for supposing that the rule intended to revive his right simply because a co-defendant had instituted an appeal against the plaintiff on entirely different grounds. The observation would apply with equal force where the interest of the objector is identical with that of the appellant and he might, had he chosen, have joined in the appeal. The rule laid down by the Court in the judgment is, that—

"The rule should ordinarily be confined to cases of cross-objections urged against the appellant, but rule 33 of the same Order gives the Court a very wide discretion, and cases may coessionally arise where justice requires that cross objections against a co-respondent should be heard."

The provisions of the rule have been interpreted in the same sense by the Calcutta High Court and the interpretation commends itself to us as being in accordance with the intention of the rule. On the merits, the position of this defendant is similar to that of the Bank of Upper India and his objections, if they could be heard, would fail on the same ground.

The plaintiff's appeal, Appeal No. 7 of 1920, is directed against those creditors who have been given priority by the learned Subordinate Judge. He attacks the validity of their attachments under the same provision of law under which they attack the validity of his mortgage, namely, the first clause of paragraph 11 of Schedule III, Civil Procedure Code. The clause in question runs as follows:—

"So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs I to 10, the judgment-debtor or his representative-in-interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money."

Execution was transferred to the Collector tor on 7th November 1912. The Collector finally seased to exercise the powers conferred by the Schedule and returned the case to the Civil Court on 21st August

The whole of the executions relied 1915. on by the ereditors who have been sus. sessful before the Subordinate Judge fall within this period. The defendants Nos. 5 to 7 claim that the period from 19th March. 1915 to 24th June 1915 should be exelud. ed, and that their attachments fall within this period. On the former date the were sent bask to the execution cases Oivil Court for substitution of names in consequence of the death of Asghar Ali (tide Exhibits E 8 and F 15). On the latter date the file was received back from the Civil Court and proceedings in the Deputy Commissioner's Court were resumed (Exhibit 190). The defendants Nos. 5 to 7 applied for, and obtained an order of attachment on 21st May 1915. This was after the first but before the second deed. It may be noted here that the learned Subordinate Judge has proceeded on the principle of requiring the plaintiff to pay off all creditors who had obtained valid attachments before the execution of the latter of the two mortgage deeds and the plaintiff has taken no exception to this.

The plaintiff contends that the period from 19th March to 24th June 1915 He suggests ought not to be excluded. that, at most, the powers of the Collector were merely suspended during this period. The Collector, however, returned the papers to the Civil Court on the ground that no further proceedings could be taken until substitution was effected and it appears clear that while the Subordinate Judge remained seised of the proceedings the Collector could not have exercised or performed any of the powers or duties conferred on him by the Schedule. It might perhaps have been otherwise if, at the time of Aeghar Ali's death, the Collector had already granted a lease of the property because in such case the lease would have continued to run not withstanding the death. In the present case nothing of this kind had occurred and it must be held that the Civil Court and not the Collector was seised of the proseedings during the interval in question. Suppose, for example, that no application for substitution of names had been made in the Oivil Court; in that case the Collector's powers under the Schedule would have finally seased on the date on which he

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re-transmitted the proceedings to the Civil Court.

The Subordinate Judge's reasons for not accepting the plaintiff's contention are -

First, that it was not made till a late stage

of the case, and

Secondly, that in his opinion the attachment is only invalid as against the ereditor at whose instance execution proceedings have been transferred to the Collector (vide o.

pages 377 and 378 of the judgment).

With reference to the first criticism, the objection is one which is apparent on the face of the proceedings and cannot, in our opinion, be ignored. The ereditors had to prove and rely on the dates of their attachments in order to obtain priority and if those dates show that attachment was made at a time when it could not legally be made the plaintiff was quite entitled to draw attention to the fact and to rely on it in answer to the plea of priority. It is urged that the plea should have been taken in the pleadings, but the attachments were pleaded for the first time in the written statements of the defendants. In answer to these written statements the plaintiff either pleaded ignor ance of or did not admit the attachments which were said to be prior to his mortgages. In this state of the pleadings he could hardly have taken a technical objection to the validity of an attachment of which he professed to have no knowledge. In any case, the fifteenth issue framed by the Trial Court necessarily involves a finding as to the validity of the attachments.

On the merits no satisfactory answer to the objection is forthcoming. The view taken by the learned Sabordinate Judge is not supported by the language of the Schedule which is markedly different from that of section 64. As in the case of the provision against alienation by the judgment-debtor the language used is very similar to that need in the Oadh Land Revenue Act of 1:76 with reference to persone under the superintendence of the Court of Wards. Section 174 of that Act ran:

"No such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence" The Privy Council held in Debi Bakheh Singh v. Shadi Lal (3), that this provision was meant to protect property

against the execution of a deerse made in respect of any contract entered into during a certain period of time, and they rejected the contention that a decree obtained upon such a contract could be enforce i after the property was released. Similarly, the provision before us makes it illegal for the Civil Court to issue process against the property during a certain period of time, namely, the period during which the powers conferred by the Schedule are exercisable by the Collector; and a process which was illegal when it was issued cannot become effective when the Collector ceases to be in charge of the execution proceedings. The Schedule makes ample provision for the protection of the ereditors. Under paragraph 3 the Collector is empowered to publish a notice salling on all persons holding money decrees against the judgment-debtor or having claims against the property to put forward their elaims and such a notice was actually issued in this case. He is empowered to draw up a statement of the amount to be recovered by any creditors who have come forward with claims, and to arrange for liquidation of the amount found due to them. Clause (3) of paragraph II contains a further provision excluding from the operation of the law of limitation the period during which the deeres holders have been deprived of their ordinary remedy against the property by the provisions of the Schedule.

The case of Khushalchand Premraj Marwadi v. Nandram Sahebram Marwadi (4), in which most of the points now argued before us were considered, has been extensively quoted on both sides. Rightly considered, that case is entirely in favour of the plaintiff as the following analysis will show :--

The plaintiff got three decrees against the judgment debtor in 1900, 1901 and 1904.

He attached the property under each of the three. Execution proceedings under the first decree were transferred to the Collestor and remained with him till 21st May or 8th June 1904, On 21st May the plaintiff intimated that his claim was satisfied and the Mamlatdar who was in immediate charge of the property endorsed the execution application "as disposed of, to be returned to Civil Court." On 8th June the Collector despatched it to the Court,

Between 21st May and 8th June, i. c., on Sist May the judgment debtor sold the MUHAMMAD MUZAPPAR ALI U, BHAGWATI PRASAD SINGH.

property to the defendant in consideration of money advanced to pay off the plaintiff's first decree. The question in dispute in the High Court was the validity of this sale. The pleas urged against it were:—

(1) That it was bad under section 325 A (=Schedule III, paragraph 11) on the ground that the property was under the management

of the Collector.

This was rejected on the ground that the Collector's powers had some to an end on 21st May.

(2) That the payment out of Court had not been sertified.

This does not concern us and was rejected.

(3) That the sale was illegal under section 276 (=section 64) because it was made while the property was still under attachment.

To this the Court replied that as the decree was satisfied there could be no claim now enforceable under the attachment.

(4) That the sale was bad under section 325 A (=Schedule III, paragraph II) because the execution proceedings under the second decree of 1901 were also transferred to the Collector.

This was rejected on the ground that the attachment under the second decree was itself invalid having been made while the Collector was in charge of execution and, therefore, contrary to the provision which is now contained in the last two lines of paragraph 11 (1), Schedule 111.

(5) That the second execution application was a claim enforceable under section 276, read with section 295, i.e., section 64, read with section 73, and, therefore, the sale was

invalid against it,

From the language of the judgment it would seem that the claim under the second decree was relied on as being a claim for rateable distribution under the first. The Court held that any such claim was dependent on the continuance of the original attachment. As soon as the original decree was satisfied there was no claim left enforceable under that attachment.

On the ground that only 52 villages out of 62 originally attached were actually proclaimed for sale under Parshotam Das' decree it has been suggested that execution proceedings regarding the remainder may not remain under the charge of the Collector.

This plea, if correct, would only validate the attachments in respect of those villages as to which proceedings were removed from the Collector's control. In fast it has not been shown that any villages were excepted. There is no dispute that the whole execution proseedings were originally made over to the Collector and Exhibit 211 shows that the parties admitted the property to be ancestral. From a subsequent order of the Collector passed on 8th January 1913 (Exhibit 213) it appears that it was suggested in the course of the proceedings that two villages were self acquired but there is nothing to show that they were eventually held to be self. acquired, still less that any part of the execution proceedings was ever taken out of the hands of the Collector until he returned the papers to the Civil Court. This ples, therefore, has no force.

The dates of the various attachments are all given in that portion of the Subordinate Jadge's judgment which deals with the fifteenth issue and their correctness has not been impugned. Those of defendants Nos. 5 to 7 (21st May 1915), of defendant No. 8 Balmakund Kapur (24th May 1915) and of defendant No. 13 (15th May 1915) fall within the period during which the papers had been returned to the Civil Court and are, therefore, not affected by the plaintiff's objection. The validity of Balmakund Kapur's attachment order involves also the validity of the claim to priority made by Baba Bishambhar Nath Tandan who applied for rateable distribution in connection with that attachment. The remaining orders of attachment were all issued while the Collector was exercising the powers conferred by Schedule III. The attachment by defendant No. 3 was made in April 1914, that of defendant No. 9 in December 1914, that of defendant No. 10 in June 1914, that of defendants Nos. 11 and 12 in June 1913 and that of defendant No. 14 in May 1913. The above are the only creditors to whom priority has been allowed by the decree of the Court below. As against defendant No. 14 a special plea has been taken by the plaintiff to the effect that though the Court made an order of attachment in his favour the application on which this order was based only asked for rateable distribution in connection with Parshotam Das' deeree. It is unnecessary to decide this as the attachment was, in any

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case, invalid, but if it were necessary to decide the objection we should hold that there was no force in it. It is quite possible that an oral application supplementary to the written application for rateable distribution may have been made and there is a presumption that the proceedings of the Court were regular until the contrary is shown.

The final result of the above findings is as follows. Appeals Nos. 1, 2 and 14 of 1920 filed respectively by the judgment-debtors, the Bank of Upper India and the Allahabad Bank, fail altogether and are dismissed with costs in favour of the plaintiff respondent. Appeal No. 13 of 1920 filed by Babu Bishambhar Nath Tandan is allowed with costs against the plaintiff respondent in both Courts and his name will be included among those creditors to whom the plaintiff is required to pay the amount due under their decrees against defendants Nos. 1 and 2 before foreelosure under the deeree of the Court below. The payment must be made before 31st August 1921, otherwise the property will be sold in execution of the decrees of the defendants Nos. 5 to 7, 8, 13 and 21 (Babu Bishambhar Nath Tandan). The amount, if paid by the plaintiff to these defendants, shall form part of his mortgage money and shall earry interest at six per cent. per annum form date of payment as already directed by the Subordinate Judge. Appeal No. 7 of 1920 filed by the plaintiff is allowed in part and the names of the defendants Nos. 3, 9, 10, 11, 12 and 14 will be removed from slause (2) of the lower Court's deeree and inserted in clause (1), that is to say, that the plaintiff will not be required to pay the amount due to these ereditors under their deerees as a condition to obtaining forealosure but they will be allowed a right of redemption. The date on or before which these defendants will be permitted to pay the amount due to the defendants will be 31st July. The plaintiff will get his costs of this appeal against those defendants against whom he has been successful to the extent to which he has succeeded. These respondents who have successfully contested the appeal will be entitled to their easts against the appellant. The plaintiff will also get his sosts in the Court below against those defendants against whom his appeal has susseeded in assordance with the state.

ment of costs shown in the decree of the Court below. As between the plaintiff and the remaining defendants the lower Court's order as to costs will stand good.

Z. K.

Appeals Nos. 1, 2, 14 dismissed.
Appeal No. 7 partly allowed.
Appeal No. 13 allowed.

ALLAHABAD HIGH COURT. CIVIL REVISION No. 132 OF 1921. March 1, 1922.

Present: - Mr. Justice Ryves.

JIWAN MAL AND OTBERS - APPLICANTS

versus

JAGESHAR KASONDHAN-OPPOSITE

Instalment bond—Entire amount payable on default —Limitation, operation of.

In a suit upon a money-bond which provides for repayment by instalments and which contains a condition
that on failure to pay any one instalment the
creditor would be entitled to recover the whole
amount at once, the point to consider is, whether
the creditor had an option to waive his right to
bring a suit at once on the happening of the
default, and whether, as a matter of fact, he did
exercise this right of waiver, in each case the
question is one of fact. [p. 656, col. 1.]

In the absence of anything to show such option and exercise of waiver limitation begins to run from the time when the first default in the payment of instalments is made. [p. 65%, cols. 1 & 2.]

Babu Ram v. Jodha Singh, 18 Ind. Cas. 690; 11 A. L. J. 89 and Amolak Chand v. Baij Nath, 20 Ind. Cas. 983; 35 A. 455; 11 A. L. J. 664, followed. JIWAN MAL C. JAGESHAR RASONDHAN.

Civil revision against an order of the Judge of the Coart of Small Causes at Gorakhpur, dated the 29th June 1921.

Mr. S. P. Sinha, for the Applicants. Mr. G. L. Agarwala, for the Opposite Party.

JUDGMENT .- This application in civil revision raises a somewhat difficult point. The defendant executed a registered bond on the 8th of July 1911 for Rs. 250. It was recited in the bond that on making up accounts this sum was due to the predecessorin-title of the plaintiffs by the defendant and that he was unable to pay the money at once, it was agreed between the parties that he would pay it by twelve six monthly instalments. So long as the instalments were paid no interest was chargeable. But it was covenanted that if the instalments were not paid the failure of one instalment would entitle Ram Deo Marwari to resover the whole amount due at once together with interest Rs. 12 per cent. per annum. The suit was filed in the Court of Small Causes on the 26th of May 1921. The bond was a registered one and, therefore, was governed by the rule of six years' limitation. plaintiff claimed that his cause of action arose on the 7th of May 1917, the day on which the last instalment was due. The defendant admitted execution and coneideration, but pleaded that the suit was by limitation. The Court below barred has found that not a single instalment had been paid and held that the suit was timebarred. This is the question which is raised before me. A number of rulings have been eited but I do not think there is really any conflict between the various decisions of this Court. In all of them it has been held that the point to consider in each case is, whether the plaintiff had an option to waive his right to bring a suit at once on the happening of the default and whether, as a matter of fact, he did exercise this right of waiver; so it comes, after all, to a question of fact in each case. It is pointed out that a test of waiver or not may be found (P) prayer in each suit-did the plaintiff claim the whole amount, if so, was there no waiver, or only the amount due on unpaid instalments not time-barred? In this case it is argued that the plaintiff elearly did waive his right to bring his suit on the failure of the first default. This argument is based on the paragraph in the plaint in which the plaintiff states that as the defendant is a poor man he is suing only for the principal amount and not for the interest agreed on. Under the terms of the bond interest would only be payable if default had been made. If the plaintiff waived his rights, no question of interest would arise. Apart from this state. ment in the plaint and the fact that the suit was not brought till a long time afterwards, there is no evidence pointing to any waiver. The etatement in the plaint that the plaintiff does not ask for interest far from being evidence of waiver may be explained by the opening words of the paragraph that the reason for doing so is because the defendant is a poor man and, therefore, presumably would not be in a position to pay. On the one side, we have the cases such as Babu Bam v. Jodha Singh (1) and Amolah Chand v. Baij Nath (2) and on the other side Mohan Lal v. Tika Ram (3) and A udhia v. Kunjal (4). It seems to me that this case falls within the first class and in that view the decision of the Court below was right. I reject the application with costs.

X. H.

Application rejected.

(1) 18 Ind. Cas. 690; 11 A. L. J. 89.

^{(2) 20} Ind. Cas. 933; 35 A. 455; 11 A. L. J. 66 L. (3) 47 Ind. Cas 9 6; 16 A. L. J. 929; 41 A. 104

^{(4) 30} A. 123; 5 A. L. J. 72; A W. N. (1908) 36.

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SIND JUDICIAL COMMISSIONER'S COURT.

ORIMINAL REPORT No. 99 of 1919
September 18, 1919.

Present:—Mr. Kemp, A. J. C., and
Mr. Raymond, A. J. O.

EMPEROR—PROSECUTOR

MENGHRAJ DEVIDAS - ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 141, 237, 403, 438, 537—Nuisance—Order under si 141—Accused challaned under s 291, Penal Code—Case withdrawn—Withdrawal, effect of—Accused subsequently proceeded against under ss. 189, 230, Penal Code—Proceedings, validity of—"Competent to try" in s. 493 (4), meaning of—"Competent jurisdiction" in s. 537, meaning of—S. 537, scope of—Revision—Report by Sessions Judge—High Court, power of.

A District Magistrate issued an order to the public under section 144 of the Criminal Procedure Code for prevention of a public nuisance in a certain locality within his jurisdiction. The order had not the desired effect, as the nuisance was repeated, with the result that the Police challaned the accused and others before the City Magistrate, for an offence under section 291 of the Penal Code. The case was not proceeded with, but after three or four adjournments, the Public Prosecutor, under instructions from the District Magistrate, withdrew it under section 494 of the Criminal Procedure Code, and, armed with a fresh sanction from him, filed a fresh complaint on the same facts before another Magistrate under sections 183 and 290 of the Penal Code:

Held, that as the withdrawal of the charge under section 291 of the Penal Code amounted to an acquittal under section 494 (b) of the Criminal Procedure Code, that acquittal operated as a bar under section 403 (1) of the Criminal Procedure Code to subsequent proceedings under sections 188 and 290 of the Penal Code, as in the trial under section 291 of the latter Code, the accused could have been convicted under section 188 thereof, though not under section 291, and that, therefore, he could not be tried again on the same facts for any other offence of which he might have been convicted under section 237 of the Criminal Procedure Code though not charged with it.

The expression "competent to try" in clause (4) of section 403 of the Criminal Procedure Code refers to the character and status of the Tribunal when it refers to the competency to try the offence.

[p. 660, col. 1.]

The term "competent jurisdiction" in section 537 of the Criminal Procedure Code refers to the character and the status of the Court which has

decided the case. [p. 6t0, col. 2.]

The restriction imposed by section 537 of the Oriminal Procedure Code, not to reverse or alter a finding or order or sentence on the ground of any absence of sanction unless it has occasioned a failure of justice, clearly indicates that a Court may be of competent jurisdiction to try a case in the

absence of sanction; and, therefore, a sanction is not a condition of the competency of the Tribunal, but only a condition precedent for the institution of proceedings before a Tribunal. [p. 660, col. 2.]

Section 537 only cures the want of sanction in those cases which are covered by section 195 of the Criminal Procedure Code: the absence of sanction required by any other provision of the law cannot be

remedied. [p. 661, col. 2.]

Although in a report to the High Court under section 438, Criminal Procedure Code, a Sessions Judge does not recommend that the proceedings against the accused be quashed, yet, as a consequence of the report, the facts of the case are brought to the knowledge of the High Court, that Court has jurisdiction under section 439 to stop further proceedings, if it is satisfied that they are barred. [p. 652, col. 1.]

Report under section 433, Oriminal Pro-

Mr. T. G. Elphinston, Public Prosecutor for Sind, for the Crown.

Mr. F. J. de Verteuil, for the Acoused.

JUDGMENT,-On the 11th January 1919 the Sub Divisional Magistrate, Shikarpur, issued an order to the public forbidding persons from congregating in sertain streets in Shikarpur for the purpose of buying and selling Russian Notes and thereby causing an obstruction. The accused was alleged to have disobeyed this order and was in consequence challaned before the City Magistrate on 23rd January 1919 under section 291 Indian Penal Code: As it was obvious that in order to succeed on a charge under section 251 it was necessary to prove a specific order to the person charged, the Public Prosecutor after three or four hearings applied for and obtained permission under section 494. Criminal Procedure Code to withdraw the case.

By virtue of section 494, Criminal Pro-

acquittal.

Subsequently, fresh proceedings under sections 188 and 290, Indian Penal Code, were instituted against the assumed before the Court of the A' Bench of Magistrates who ordered process to issue.

Apparently, the reason why these preceedings were not instituted before the City Magistrate was that he was engaged in the trial
of another case and the District Magistrate
directed the trial to be before the Bench

Magistrates.

The accused then applied to the District Magistrate for transfer of the cas which was refused. He then made a

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application to the learned Sessions Judge, Sukkur, praying that the order of the 'A' Bench of Magistrates directing process to issue and the summary trial of the case be quashed. He alleged various grounds in his application, vie., that one of the Magistrates on the Bench was his rival in business and two of them were dealers in Russain Notes, that one of the Bench would be called as a witness, that the mukhtyarkar was a Hyderabadi Amil like the Inspector of Police in charge of the proceedings, and that the applicant had made charges of bribery and corruption against the Inspector which required an investigation which could not be held in a case tried summarily. He also contended that he had been acquitted under section 231, Indian Penal Code, and could not, therefore, be tried again under sections 188 and 290, Indian Penal Code. The learned Sessions Judge has submitted the proseedings to this Court with a resommendation that the case should be transferred to a stipendiary Magistrate to try in a regular manner. He does this appar. ently under section 438, Criminal Procedure Code.

The Public Prosecutor for Sind informs us that the District Magistrate strongly opposes the transfer.

I consider it regrettable that there should be this divergence of opinion between the learned Sessions Judge and the District Magistrate whose duty it is, in the best interests of the district, to work in harmony. Nevertheless, the Sessions Judge is empowered under section 4.8. Criminal Procedure Code, to report the case to us as he has done.

There appears to be no substance in the grounds set forth for a transfer. The Inspector of Police has been re-placed by another and there is now another mukhtyarkar attached to the 'A' Bench of Magistrates. The Magistrate whom the accused proposes to call as witness need not sit on the Bench, which can form a quorum without him. The case is a simple one and can be tried summarily and any allegations against the Inspector of Police can be made the subject of a separate investigation or charge against him. Moreover, only one of the Magistrates is a dealer in Russain Notes.

The more important question remains, whe-

Penal Code, operates as a bar under section 403, Criminal Procedure Code, to subsequent proceedings under sections 188 and 290, Indian Penal Code. We can take notice of this objection of our own motion. The prosecution say that section 188, Indian Penal Code, requires sanction and that the City Magistrate could not have tried a charge under that section as no sane. tion had been obtained. In my opinion, this is a fallacy. If sanction had been obunder section 188 tained, the charge could have been tried Oity by the Magistrate. It does not rest with the prosesution to say whether a Court shall have jarisdiction or not. I do not agree with the observations of the learned Judges in Jivram Dankarji v. Emperor (1) to the effect that a Court, which is otherwise competent to try the case, is not a Court of competent jurisdiction merely because sanction has not been obtained. Section 537, Criminal Procedure Code, laye down specifically that no finding passed by a Court of competent shall be reversed or altered jurisdiction on the ground of any want of, or irregularity in, any sanction required by section 195, Criminal Procedure Code. It is clear from the wording of the section that the jurisdiction of the Court is not dependent on the sanction. It is clear that the City Magistrate's Court is a Court of sompetent jurisdiction to try an offence under section 188, Indian Penal Code, although, no doubt, the City Magistrate would not take sognizance of the offence until sanction had been obtained. Nevertheless, the City Magis. trate's Court was a Court "competent to try," with the sanction, the offence under section 188, within the meaning of section 403, Oriminal Procedure Code.

This is quite independent of the question whether sanction can be obtained at any time during the trial. On that point I express no opinion.

Now what were the facts here? The prosecution charged the accused under section 291, Indian Penal Code, alleging that he had been enjoined by the order of the Sab Divisional Magistrate, Shikarpur, on the 11th January 1919, against committing A

^{(1) 31} Ind. Cas, 301; 40 B. 97; 17 Bont. L. R. 881; 16 Or. L. J. 761,

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nuisance and that he had repeated the nuisance. Clearly, the charge could not stand because a conviction under section 291 requires proof of a specific addressed to the person charged. As a matter of fast, on the fasts alleged by the prosecution, the charges should have been under sections 188 and 290, Indian Penal Code. The charge under section 188 can be sustained on a general order. The ease, therefore, clearly falls under section 237 (1) of Criminal Procedure Code, as the facts were certain but the wrong charge was based on them. At the trial before City Magistrate the accused might have been convicted on the facts on charges under sections 188 and 290, Indian Penal Code. He sannot now, by virtue of section 403 (1), be subsequently tried on those charges.

It is to be noted that in Jieram Dankarji v. Emperor (1) the user of the forged document which was the subject-matter of the subsequent charge occurred after the accused had already been charged for abetment of forgery.

Moreover, in that case it was held that the offences fell under section 235 (1), Oriminal Procedure Code and, therefore, section 403 (3) of that Code applied.

I am, therefore, of opinion that the proceedings before the 'A' Bench of Magistrates should be quashed.

RAYMOND, A. J. C .- This is a report by the Sessions Judge, Sukkur, under section 438, Criminal Procedure Code, for the transfer of a case under sections 188 and 290, Indian Penal Code, pending before the 'A' Bench of Magistrates to a stipendiary Magistrate in the Sukkur District on certain grounds mentioned in the report. The concluding part of the Sessions Judge's report is as follows: "I submit the ease to the Court of the Judicial Commissioner with the finding that though proceedings should not be quashed on the ground of 'autrefois acquit,' a case has been made out for hearing this case in a regular manner, and in view of the grave charges against Senior Police Officers and others it would be desirable that the case should be tried by a sti-. pendiary Magistrate". On ascertaining the facts of the case, it appears that there were good grounds for the consideration of the question whether the present complaint against the accused under sections 188 and 290, Indian Penal Code, was not barred under section 403, Oriminal Procedure Code, by a withdrawal of the previous proceedings against him under section 291, Indian Penal Code, and the Public Prosecutor and the Counsel for the accused were salled upon to argue this point. The facts of the case which have been elicited from Counsel on either side may be stated as follows: The District Magistrate, Sukkur, passed an order under section 144, Criminal Procedure Code, for the prevention of a public nuisance committed by dealers in Russian Notes in a certain locality within his jurisdiction. Apparently, the order had not the desired effect, as the nuisance was repeated, with the result that the Police challaned the accused and others before the City Magietrate, Sukkur, for an offense under section 291, Indian Penal Code, The ease was not proceeded with, but after three or four adjournments the Public Prosecutor of Sukkur, under instructions from District Magistrate, withdraw it under sestion 494, Criminal Procedure Code, and, armed with a sanction from him, filed a fresh complaint on the same facts before the "A" Bench of Magistrates under sections 183 and 290, Indian Penal Code. After this complaint was filed, the accused applied to the Sessions Judge that the order of the Bench directing process to issue, and that the case be tried summarily, be quashed and that a recommendation to that effect be made to this Court. In this application the assused stated that, as he had been acquitted of an offence under section 291, Indian Penal Code, he could not be tried again on the same facts in respect of offences under sections 290 and 188, Indian Penal Code. We are informed that, sontemporaneously with the application to the Sessions Judge. an application was made by the accused to the District Magistrate for a transfer of this case, but that the latter application was withdrawn probably on the ground of its being unnecessary, owing to the present report.

Now, though the Sessions Judgo has not asked us to quash the proceedings against the accused, yet, as the consequence of his report, the facts of the case are brought to our knowledge, we have jurisdiction

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under section 439, Criminal Frosedure Code, to stop further proceedings if we are satisfied that they are barred. The first proceeding against the accused under section 291, Indian Penal Code, was based on an infringement of the order passed by the District Magistrate under section 144, Oriminal Procedure Code. The withdrawal of these proceedings by the Public Prosecutor under section 494, Criminal Procedure Code, amounted to an aequittel of the accused under clause (b) of the section, as the offence under section 291 being a summonsease, no charge against the accused was necessary.

The Public Prosecutor has argued that the Magistrate before whom the proceedings under section 291, Indian Penal Code, were pending and who acquitted the accused was not competent to try the accused for the offence under section 188, within the meaning of clause (4) to section 403, Oriminal Procedure Code, as no sanction for the prosecution of the accused had been obtained, and his second argument is, that the facts involved in the consideration of the question whether the accused is guilty of an offence under section 291 are different to those under section 188, inasmuch as under the former section it is essential to a successful prosecution, to show that the accused had been personally enjoined not to continue or repeat the nuisance, whereas under the latter, a proclamation to the public or a portion of the public is sufficient. According to his argument, therefore, the offense under section 291 was distinct from that under section 188, and, consequently, the acquittal under the former was no bar to the trial of the accused under the latter, under clause (2) to section 403.

With regard to the first argument that the City Magistrate was not competent to try the accused for an offence under section 188 in the absence of the canction, it is important to consider what the words "competent to try" really connote. In Ganapathi Bhatta v. Emperor (2) it was held that the clause (4) to section 403 refers to the character and status of the Tribunal when it refers to the competency to try the

offence. In my opinion, this correctly deseribes the meaning to be attached to the words "competent to try" and Illustrations (f) and (g) to the section do also bear out this interpretation. In the same Madras case it was held that sanction under section 195 was only a condition presedent for institution of proceedings before a Tribunal, so that it is not a condition of the competency of the Tribunal. In connection with this point it would be useful to refer to section 537, Criminal Procedure Jode. This section provides that, subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of a competent jurisdiction shall be reversed or altered on assount of the want of or any irregularity in any sanction required by section 195, Criminal Procedure Oode. The words "competent jurisdiction" do, in my opinion, refer to the charaster and status of the Court which has decided the The restriction imposed by section 6888. 537, not to reverse or alter a finding or order or sentence on the ground of any absence of sanction unless it has occasioned a failure of justice, slearly indicates that a Court may be of competent jurisdiction to try a ease in the absence of any sanction. And, therefore, a sanction is not a condition of the competency of the Tribunal, but only a condition precedent for the institution of proceedings before a Tribunal. The case Ganapathi Bhatta v. Emperor (2) was on the facts similar to the present case. Sanction was obtained by the complainant to prosesute the accused for an offence under section 211, Indian Penal Code, he was convicted but the conviction was quashed by the High Court in revision on the ground that no offence was committed under cection 211, Indian Penal Oode, but under section 182, for which no Complainant sanction had been granted. thereupon obtained sanction to prosecute the assused under section 182. held that the prosecution was barred by section 403, clause (1) and that section 403, clause (4), was not applicable to the case, The Public Prosecutor relied upon Jivram Dankarji v. Emperor (1). In one important point this case is distinguishable, as at the time when the accused was on his trial

^{(2) 19} Ind. Cas. 310; 36 M. 303; 24 M. L. J. 463; 13 M. L. T. 360; 14 Cr. L. J. 214.

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under sections 467 and 109, Indian Penal Code, there were no materials before the Court with respect to the offence under section 471, Indian Penal Code, for which he was subsequently placed on his trial and hence his previous acquittal was held to be no bar to the second trial. In this case, it was the opinion of the Court that the Court which acquitted the assused on a charge of a abetment of forgery, was not competent to try the offence under section 471 as at the time of the earlier trial no sanction for the prosecution under section 472, had been given under section 195, Oriminal Procedure Code, and as the grant of such a sanction was a condition precedent to the Court's jurisdiction to try the offence under section 471, without the sanction the Court was incompetent to undertake the prosecution. With regard to the argument based on the section 537. Oriminal Procedure Code, all that was said was that it would be relevant only if the prosecution under section 471 had resulted in: a conviction. No doubt, it would be relevant only under those eircumstaness, but why has provision been made by section 537 for earing the want of sanction if an accused is tried by a Court of compelent jurisdiction? If the want of a sanction has not led to any failure of justies, the conviction of a person by a Conrt of competent jurisdiction is to be upheld. Had it been an absolute bar, I fail to see how it sould be condoned by sestion 537, Oriminal Procedure Code. It is also signifigant to remember that section 537, Oriminal Procedure Code, only cures the want of sanction in those cases which are covered by section 195, Criminal Procedure Code.

Mr. Elphinston also relied upon Em. peror v. Jiwan (3), that a Court is not a Court of competent jurisdiction unless a sametion has been obtained in those cases where sanetion is required. It is a decision of a Single Judge and I find on the perusal of the judgment that no reference is made to section 537, Oriminal Procedure Code clause (b), I must respectfully state that I am not prepared to follow this judgment with regard to its interpretation of the words "competent to try" as used in sestion 403, Oriminal Procedure Code. In the same

(8) 27 Ind. Cas, 209; 87 4. 107; 18 4 L. J. 4; 16 OY. L. J. 144.

volume, at page 110 [Gur Baksh Singh v. Kashi Ram (4)] there is a case where a Sessions Court had set aside a conviction under section 182, Indian Penal Code, on the sole ground that the offence, if any, which the appellants had committed was one under section 211, Indian Penal Code, and that no sanction for prosecution under that section had been obtained. A Division Bareh in setting aside the order remarked as follows :- "We are both of opinion that the Sessions Judge was not justified in ignoring the provisions of section 537, slause (b), Oriminal Prosedure Code. There had been a conviction by a Court of competent jurisdiction, and if there was any question as to sanstion, the provisions of section 537 could have met the case." The words "Court of compatent jurisdiction" have undoubtedly been used in the same meaning as in Ganapathi Bhatta v. Emperor (2), as connoting the character and status of the trying Court, and, therefore, notwithstanding the absence of sanction, the Court was a Court competent to try" within the meaning of sestion 403, slause (4), Oriminal Procedure Code. I may also refer to King-Emperor v. Krishna Ayyar (5), where section 403, clause (4), is discussed and the words "compatent to try" explained. The prosecution also relied on Tikaram Sakharam v. Emperor (6), in support! of their contention, but I do not think this case applicable. At the first trial the accused could not be convieted under section 498, Indian Penal Code, as there was no complaint by the husband. There is no similar provision in eaction 537, Oriminal Procedure Code, with regard to section 199, Oriminal Procedure Code, as there is in regard to section 195, Oriminal Procedure Code. It must be remembered that it is the want of sanction required by section 195 alone which is curable by section 537 and that the absence of the sanction required by any other provision of law can not be remedied, nor by any other express enastment for initiation of proceedings. I am, therefore, of opinion that the City Magistrate in the present case was a Court "competent to" try" the offences under sections 188 and 290,

^{(4) 27} Ind. Cas. 223; 87 A. 110; 18 A. L. J. 53; 16 Or. L. J. 159.

^{(5) 24} M. 641; 2 Weir 458.

^{(6) 80} Ind. Cas. 641; 17 Bom. L. B. 678; 16 Cr. U. J. 657.

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Indian Penal Code, with which the accused was subsequently charged.

With regard to the second argument advanced on behalf of the Crown, it is essential to remember that when the acensed was challaned under section 291, Indian Penal Code, it was in respect of the infringe. ment of the order promulgated by the Distriet Magistrate under section 144, Criminal Procedure Code. The prosecution under section 291 was clearly unsupportable in view of the admitted fact that the accused had not been enjoined by any specific order to discon. tinue or not to repeat the nuisance. The main point, however, in issue before the trying Court would have been, whether there was any infringement of the order under section 144: and if this was held proved, the account could have been convicted under section 188 though not under section 291. Therefore. in terms of section 403, clause (1), the accused cannot be tried again on the same facts for any other offence of which he might have been convicted under section 237, Criminal Procedure Code, though not charged with it. The evidence that would have been led before the Magistrate to prove the offence under section 188 would have been the same. and section 403, clause (1), clearly contemplates a case of this description.

I would, therefore, quash the proceedings against the accused pending before the 'A' Bench of Magistrates under sections 188 and 290, Indian Penal Code. In view of this order it is annecessary to discuss the merits of the transfer application. As it has been argued before us, I shall content myself with saying that I am far from being convinced of the necessity of any transfer of the case. The divergence of opinion between the District Magistrate and the Sessions Judge is a matter of regret, but I am not disposed to think it was necessary for the Sessions Judge to report under section 433, Criminal Proeedure Code to the High Coart that the ease should be transferred, the more so when he did not resommend the queashing of proseedings. If the accused was convinced, as is said, that his application for transfer would meet with no success before the District Magistrate, he could have easily applied to the High Court supporting his application by an affidavit. By the present circumlo utory method of applying for a

transfer, he has certainly dispensed himself from the necessity of filing any affidavit.

W. C. A.

Proceedings quashed.

CALCUTTA HIGH COURT.

FULL BENCH REFERENCE No. 1 of 1920 IN ORIMINAL REVISION No. 767 of 1920. December 20, 1920.

Present:—Sir Lancelot Sanderson, Kr.,
Chief Justice, Justice Sir John Woodroffe,
Kr., Justice Sir Asutosh Mookerjee, Kr.,
Mr. Justice Teunon and Mr. Justice
Richardson.

KHETRA MOHAN DAS-PETITIONER

versus

EMPEROR-OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1899), ss. 195, 537—Sanction to prosecute not in force at date of trial—Conviction, legality of—Failure of justice, absence of.

Where a person is sentenced upon conviction for an offence mentioned in section 195 of the Criminal Procedure Code, the sentence is not liable to be reversed or altered on appeal, or revision, on the ground that the sanction required by that section was not in force at the time when the prosecution was instituted, unless it is established that this has in fact occasioned a failure of justice within the meaning of section 537 of the Criminal Procedure Code. [p. 664, col. 2.]

FACTS appear from the following Order of Reference made by Sanderson, C. J., and Mockerice, J:—

"The facts material for the elucidation of the question of law raised before us are not in controversy and may be briefly stated.

"On the 8th April 1919 the Mansif of Habiganj granted sanction under section 195 of the Criminal Procedure Code to Abbas Ali, the complainant, to prosecute the petitioner, Khetra Mohun Das, for offences under sections 181 and 193 of the Indian Penal Code. The prosecution was not instituted till the 2nd January 1920, that

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is, after the expiry of the period of eix months mentioned in section 195 (6) of the Oriminal Procedure Code. As no order had been obtained from this Court to extend the time, the sanction must be deemed to have lapsed before that date. No objection, however, was taken on behalf of the accused who pleaded guilty, was convicted under section 181 of the Indian Penal Code, and was sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 20, in default to undergo rigorous imprisonment another month. An appeal was preferred to the Sessions Judge of Sylhet, who dismissed the appeal on the ground that the sentence awarded was neither illegal nor excessive. On the application of the accused, the present Rule was granted on the ground that the Court below had no jurisdiction to take cognizance of the complaint, as the sanction was not in force on the date of complaint. In support of the Rule, reliance has been placed upon the case of Raj Chunder Masumdar v. Gour Chunder Mozumdar (1), where it was held that the provisions of section 537 of the Oriminal Procedure Code were not intended to override the provisions of section 195. In the case of Abdur Rahman, In the matter of (2) a doubt was expressed as to the correctness of this view, and the contrary opinion was actually adopted in Sunder Dasadh v. Sital Mahto (3). decision in Raj Chunder Mozumdar v. Gour Chunder Mosumdar (1) has been dissented from in Madras ! Ismail Rowther v. Shunmugavelu Nadan (4) and Perumalla Nayudu v. Emperor (5); and also in Allahabad [Mangar Ram v. Behari (6), King Emperor v. Pancham (7)]. We assordingly refer the following question for desision by a Full Bench :-

(1) 22 C. 176; 11 Ind. Dec. (N. S.) 119.

(3) 28 C. 217 at p. 220; 5 C. W. N. 291.

(4) 29 M. 149, 8 Cr. L. J. 419.

(7) A. W. N. (1901) 151,

"Where a person has been 'sentenced upon a conviction for an offence mentioned in section 195 of the Oriminal Procedure Code, is the sentence liable to be reversed or altered on appeal or revision on the ground that the sanction required by section 195 was not in force at the time when the prosecution was instituted, unless it is established that this has in fact occasioned a failure of justice within the meaning of section 537 of the Oriminal Procedure Code?"

Babu Panchanan Ghose, for the Peti-

JUDGMENT.

SANDERSON, C. J .- In this reference the material facts, which it is necessary for me to state for the purpose of my judgment, are set out at the beginning of the referense, and they are follows. On the 8th April 1919 the Munsif of Habigunj granted sanction under section 195 of the Criminal Procedure Code to Abbas Ali, the complainant, to prossents the petitioner, Khetra Mohan Das, for offeness under sections 181 and 193 of the Indian Penal Code. The prosecution was not instituted till the 2nd January 1920, that is, after the expiry of the period of six months mentioned in section 195 (6) of the Criminal Procedure Code. As no order had been obtained from this Court to extend the time, the sanction must be deemed to have lapsed before that date. No objection, however, was taken on behalf of the assused who pleaded guilty. and who was convicted under section 181 of the Indian Penal Code, and was sentene. ed to undergo rigorous imprisonment for three months and to pay a fine of Rs. 20. in default to undergo rigorous imprisonment for another month. An appeal was preferred to the Sessions Judge of Sylhet, who dismissed the appeal on the ground that the sentence awarded was neither illegal nor excessive. On the application of the accused, the present Rule was granted on the ground that the Court below had no jurisdiction to take cognizance of the complaint, as the saustion was not in force on the date of complaint,

The Rule was granted on the authority of the case, Rai Ohunder Mosundar v. Gour Ohunder Mosumdar (1), In that case the

^{(2) 27} C. 839; 4 C. W. N. 656; 14 Ind. Dec. (N. s.) 549 (F. B.).

^{(6) 31} M. 80; 17 M. L. J. 533; 2 M. L. T. 493; 6 Cr. L. J. 882.

^{(6) 18} A. 358; A. W. N. (1896) 113; 8 Ind. Dec.

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sanction which had been granted under section 195 of the Code of Criminal Procedure was no longer in force, as the limit of six months provided by that section had expired before the commement of the proceention. The judgment of the learned Chief Justice and Mr. Justice Beverly, dealing with section 537 of the Code, was as follows: "Mr. Leith has drawn our attention to the provisions of see. tion 537 of the Code but that section is ex. pressly made subject to the provisions contained,' and we cannot, therefore, suppose that it was intended to override the provisions of section 195." The learned Vakil, who has argued this case on behalf of the accused, has asked us to interpret that judgment as applicable to the particular facts of the case which the learned Judges were considering, and his argument has proceeded upon the basis that, although section 537 (b) would apply to a case where no sanction had ever been granted, it would not apply to a case where sanction had been granted, but the sanction had lapsed before the proceedings were commeneed. In my opinion the words of the judgment, which I have quoted, are wide enough to cover both cases, the case where no sanction has been granted and the case where sanction has been granted, and has lapsed before the proceedings began, and the question is whether we are prepared to follow that decision. It was pointed out in the reference that that desision has been questioned in a considerable number of cases both in the Madras High Court and the Allahabad High Court, and a contrary opinion was adopted in one ease in this Court, Sunder Dasadh v. Sital Mahto (3) where Mr. Justice Prinsep in delivering judgment said as follows: "No doubt sanstion to the prosecution should have been given before the Magistrate took cognizance of that offence, but unless the want of such sanction has, in fact, occasioned a failure of justice (section 537, Code of Criminal Procedure), the conviction is not bad only on that account." In one of the cases which was decided by the Madras High Court, Perumalla Nayudu v. Emperor (5), the learned Judges in delivering judgment said this: "The words subject to the provisions hereinbefore contained,' which occur at the beginning of section 537, sannot be construed in such a way as to

nullify the express provision of the latter part of the section, which in clause (b) enacts that no sentence passed by a Court of competent jurisdiction shall be reversed on appeal for want of any sanction required by section 195." To this should be added unless such want has in fact occasioned a failure of justice." In my judgment, without expressing any opinion as to whether the words "subject to the provisions hereinbefore contained" refer to the provisions contained in any previous part of the Code or whether they refer only to the provisions contained in Chapter XLV, they cannot be construed in such a manner as to nullify the express provisions of section 537 (b). Consequently, in my judgment, section 537 (b) applies just as much to a ease in which sanction has been granted under section 195 and the sanction has lapsed owing to the period of six months having expired before the commencement of the proceedings, as it does to a case in which no canction has been granted at all. In my judgment, in this case there was, on the date of the institution of the proceedings. a want of sanction. Consequently, I answer the question which has been referred to this Bench in this way; where a person has been sentenged upon a conviction for an offence mentioned in section 195 of the Oriminal Procedure Code, the sentence is not liable to be reversed or altered on appeal, or revision, on the ground that the sanction required by section 195 was not in force at the time when the prosecution was instituted, unless it is established that this has in fact oseasioned a failure of justice within the meaning of section 537 of the Oriminal Procedure Code. My learned brother, Mr. Justice Woodroffe, drew my attention to the fact that my learned brother, Mr. Justice Mookerjee, and I did not expressly find that there was no failure of justice in this case. In that view it is desirable to point out that the assumed person, when he was charged with the offence, pleaded guilty: and, in the explanation which the learned Magistrate has submitted in answer to the Rule, he said this: "The accused cannot say that he has been unfairly affected in his defence on the merits, since he pleaded guilty in unmistakable terms and prayed for merey." Consequently, in my judgment, there has keen no failure of justice.

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WOODROFFE, J.—My answer to the question referred to us is in the negative, and I hold slee that there has been no failure of justice.

MOOKERJEE, J .- I agree with the learned

Chief Justice.

TRUNON, J .- I also agree with the learned

Chief Justice.

RICHARDSON, J.-I also argee with the learned Chief Justice.

W. C. A.

Order accordingly.

LOWER BURMA OHIEF COURT.

ORIMINAL REVISION No. 179B or 1921.

July 12, 1921.

Present:—Mr. Justice Manna Kin.

Present: -Mr. Justies Maung Kin, NAN MA MYA-Accused

versus

EMPEROR - OPPOSITE PARTY.

Burma Ezcise Act (7 of 1917), ss. 12 (o', 30 (d)
Yeast balls, possession of -Offence.

Yeast balls are not excisable articles, but as they are materials for the manufacture of an excisable article, namely, liquor, the possession of them is prohibited by section 12 (c) of the Burma Excise Act, and is made punishable under section 30 (d) of that Act,

Reference made under section 438, Criminal Procedure Code, by the District Magistrate, Thatpn, recommending the sentence of Township Magistrate, Pa-an, be set aside.

JUDGMENT.—The question is, whether the possession of yeast balls is punishable

under the present Excise Act.

In Queen Empress v. Ngu Lu Gale (1), it was held that yeast balls were not intoxicating drugs as defined in clause (h) of section 3 of the old Excise Act and that they were not spirit or fermented liquor either.

Yeast balls are balls of flour scaked in the sap or juices of different plants, such as toddy-tree roots, kaing-grass roots, and: eccount roots, and a little sugar added and when they are mixed with rice water

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or jaggery, after three days or so there results a ferment as yeast, which is used only for the manufacture of liquor and nothing else.

Section 12 (c) of the present Excise Act says that no person shall use, keep or have in his possession any materials, or apparatus whatsoever for the purpose of manufacturing any excisable article.

Yeast balls are materials for the purpose of manufacturing liquor and liquor is an excisable article. Possession of them is, therefore, prohibited by section 12 (c).

The District Magistrate in his order of reference says he considers that yeart balls do not come within the definition of excisable article and that, in view of the case above cited, the conviction was wrong. Subsequently he wrote to say that his opinion was wrong and that he had over-looked section 12 (c) of the Excise Act.

The law as regards yeast balls may be stated thus:—Yeast balls are not excisable articles but as they are materials for the manufacture of an excisable article, namely, liquor, the possession of them is prohibited by section 12 (c) and made punishable under section 30 (d) of the Act.

The sonviction in this case was under section 30 (a). It should have been under section 30 (d).

The case above cited is obsolete. Return the papers.

W. C. A.

Order accordingly.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

ORIMINAL APPRAL No. 50 or 1922. April 3, 1922.

JAIPAL KUNBI-Acoused-Appellant

Penal Code (Act XLV of 1860), ss. 96, 99, 100, 800, 802, 804, 826—Lathi blow in a melee—Natural and probable consequences—Fracture of skull—Common

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intention—Guilt of all taking part—Actual consequences also probable and natural—Person retiring from the assault after first blow—Intention—Guilt—Right of private defence—Defence of master—Assault by Mahar tenant on Rajput Zemindar—Assault by followers of Zemindars whether under grave and sudden provocation.

Having regard to the great frequency with which a lathi, used in a melee, lights on the head even though not specially aimed at it, and the still higher percentage of cases in which a blow on the head with a lathi results in the death of the victim from a fractured skull, it would be contradictory to say that a person taking part in an assault with lathis does intend to break the victim's arm or leg but does not intend to break his skull, an injury which is undoubtedly sufficient in the ordinary course of nature to cause death. [p. 669, col. 1.]

Every same person of the age of discretion is presumed to intend the natural and probable con-

sequences of his own acts. [p. 669, col. 2.]

In deciding what are the natural and probable consequences of an act, it must be presumed that every actual consequence is a natural and probable consequence unless and until the contrary is affirmatively shown. [p. 669, col. 2]

If a man strikes another with a light stick and then retires from the assault before the general assault begins and the lathis of others begin their work he can be said to have taken no part in the common

intention of others, [p 669, col. 2]

Under section 100 and section 96 of the Indian Penal Code an accused cannot be considered to have committed any offence, even in intentionally killing a person, while acting in his right of private defence if he has kept within the limits prescribed by section 99 of the Code, i. e., if the assault could not be prevented by anything short of killing. [p. 670, col. 1.]

If some persons were acting in the exercise of their right to defend their master against what was certainly a murderous assault, and, with such care and attention as was humanly possible at the moment and in the circumstances, believing that they could not protect their master from that assault otherwise than by striking the deceased with lathis, even at the imminent risk of hitting him and cracking his skull, their acts amply satisfy the conditions required to bring them within the terms of the second Exception to the definition of murder in section 300 of the Indian Penal Code. [p 670, col. 1.]

An assault by a Mahar tenant on a Rajput Zemindar, even if it had not been likely to result in anything worse than grievous hurt, would undoubtedly give very grave provocation to the Zemindar's followers, quite sufficient to deprive ordinary men of their self-control and if they suddenly and immediately assault the tenant it must be held that they acted while they were still under the full influence of the passion engendered by the provocation. [p. 670, cols. 1 & 2.]

Appeal against the finding and sentence of the Sessions Judge, Bhandara, in Sessions Trial of 1921, decided on the 20th December 1921.

Mr. M. B. Niyogi, for the Appellant. Mr. S. R. Pandit, for the Crown.

JUDGMENT .- The appellant, Jaipal Kunbi, along with three others, of whom two are called Chhatris and the other as a Rajput, though all three seem to be of the same easte, has been convicted by the Sessions Judge of Bhandara of voluntarily eausing grievous burt with a dangerous weapon, and each of the four has been sentenced to rigorous imprisonment for five years. The employer of all four of them, Dilan Singh Chhatri, a Malguear or Mokani of some substance, was tried along with them and acquitted. Jaipal Kunbi alone has appealed. It must be remembered, in the first place, that the appellant was the Zemindar's Diwanji or manager in the village in which the assault took place, and not one of his Rajput body guard of elub. men or "lathials". Also, he was not armed with a "lathi", as they were ; if he had a stick at all it was nothing more than what is

ordinarily known as a walking-stick.

(2) Mangia, whose deposition as recorded by the Committing Magistrate was read in evidence in the Sessions Court as he died in the interval between the enquiry and the trial, gave no description of the sticks be saw used by the accused. He mentioned the lathi earried by Nandan Singh when he first saw him in the village and the lathi earried by deceased Mithia and, in saying where the various blows hit after giving other details of the assault, he said that Nandan Singh's lakri struck Mithia on the hand. Beyond this he is not recorded as having mentioned sticks at all, though the blows of which he speaks must have been struck with sticks. Kodia (P. W. No. 1) says each of the three Rajputs had a lathi of a man's height, but "Jaipal carried his stick of Dhaman wood 21 enbits in length". He also speaks of it later as a danda. Lakshia (P. W. No. 2) makes no difference between the four sticks, speaking of all of them as sticks or lathis. He was apparently not questioned about the matter, though for some reason he was asked to give a fairly exact. description of the length and thickness of the stick with which Mithia threatened the Zemindar, Bhikia (P. W. No. 3) says he was "at a distance of five or six bandhis", which would probably be something over a

hundred yarde; though his own estimate is

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sixty only, and "saw that Mithia was being beaten with lathis by the four accused, Nandan Singh, Bhagwan Singh, Jaipal and Dashrath Singh." It is clear then that Jaipal had only an ordinary walking stick, very little if at all over three feet in

length.

3. The evidence of the actual incidents of the assault is to be found in the depositions of the same four witnesses. With the greatest difficulty, I have desiphered the following passage from the resord of Mangia's deposition: "Mokashi stood aside ... The four accused who were there assaulted and the first blow was dealt by Dashrath Singh, then the new Sipabi (accused No. 3) dealt a blow, then Bhagwan Singh, then the Kunbi Diwanji (accused No. 5) dealt a blow. The blows hit on the shoulder-blade on the ribs and on the arms. The new Sipahi's lakadi hit on the hand of Mithia. Mithia fell down and the four accused went on dealing blows to him. Bhagwan Singh and the Kunbi Diwanji each dealt one blow. Dashrath Singh and new Sipahi dealt two blows each". I do not guarantee the accuracy of this transcript but I believe it to be what the learned Magistrate meant to write.

(4). Kodia (P. W. No. 1), after saying that Dilan Singh called upon Dashrath Singh and Bhagwan Singh to lay Mithia out (suto sale ko), continued as follows: "On this Dashrath Singh hit Mithya with a lathi which fell on the fingers of the left band of my father as he raised his hand, Bhagwan cingh then ran and dealt a blow with a lathi on the left shoulder-blade of my father. Jaipal assused after this ran and dealt a blow with his dands on the head of my father. My father on receiving this blow stretch out his eyes. Then began to Nandan Singh, accused, who was keeping me under restraint same up and dealt a blow on the upper part of the arm near the elbow of my father's left arm. On reseiving this stroke my father whirled round and fell down on the ground. My father fell flat on his back. After he fell down all the four assused who had lathis dealt one or two blows each at my father." The words: "My father on receiving this blow began to stretch out his eyes" are probably a translation of an expression meaning that his eye balls protruded or, to use a sommon English phrase, his eyes

started out of his head. It is to be noted that this witness speaks of four blows struck before Mithia fell down, and one or two by each of the four assailants after

he fell.

(5) Lakshia (P. W. No.2) gives the following description of the insident : "The four persons Dashrath Singh, Nandan Singh, Bhagwan Singh and Jaipal, commenced beating Mithia with lathis which they had in their hands. As soon as Dashrath Singh received the blow he raised his lathi and gave a blow with it which fell on Mithia's back. Mithia got down the embankment after his lathi fell on Dashrath Singh. Nandan Singh then raised his tathi and gave a blow which fell on the hand of Mithia below the elbow. He again raised his lathi and dealt another blow which fell on Mithia's head on the left side. Bhagwan Singh than ran and gave a blow which fell on Mithia's left hand fingers. Jaipal then raised his lathi and gave a blow with it on Mithia's waist. Mithia did not fall down yet. Nandan Singh after this dealt a third blow on Mithia's rib which caused him to fall down. After Mithia fell down Nandan Singh gave two successive blows with his lathi." Bhikia (P. W. No. 3), as has already been observed. was at least sixty yards away, and he says: "I saw from the place where I stood that Mithia was being beaten with lathis by the four assused Nandan Singh. Bhagwan Singh, Jaipal and Dashrath Singh. I cannot narrate the details as to the number of blows given by each of the four assused above-named and as to the places on Mithia's body on which each strcke fell. Bat I observed that Mithia fell down, Dashrath Singh, acoused, gave two successive blows of his lathi. After Mithia fell down, no one except Dashrath Singh hit him."

(6) Now, it appears from the depositions of the Sab-Assistant Sargeon who examined Mithia on his admission to hospital on the same day, and of the Civil Surgeon who made a post mortem examination of his body when he died three days later. that he was not struck more than three times on the back of the left hand, on the left forearm and on the left side of the head. There may, of course, have been other blows which left no mark but they

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must, for that reason, have been very light and could not have been struck with a heavy lathi of the kind earried by the three Rajput accused, and also there cannot have been more than one or two of them in an attack of the kind described by the witnesses. If there was any blow of this kind it must have been dealt with the walking stick sarried by the appellant, Jaipal, as nobody else in all the company had a stick of any sort. The Civil Surgeon does not appear to have been asked if the extensive fracturing of the skull could have been due to more than one blow, though here, again, I have to speak with caution as an answer to such a question may appear in some of the more illegible parts of the record of his deposition. The nature of the fractures, however, are such as could be caused by a sinlge blow, though it would have to be a very heavy one, But the description given by both medical witnesses of the single contusion on the left side of the head makes it practically certain that one blow only was struck.

(7) It is, in the next place, perfectly elear that Mithia was not struck after be fell. In describing the attack up to that point Mangia and Kodia both say he received one blow from each of the four accused who were convicted, though they differ entirely as to the order in which the accused struck and the parts of Mithia's body on which their blows fell. Lakshia makes it six blows, and differs further from both Mangia and Kodia in the order in which they were struck and the parts they hit. Bhikia also makes it at least four blows but does not give details. The four witnesses are then agreed that he was struck at least four times before he fell, and by each of the four accused, one witness only assigning two extra blows to Nandan Singh. This accounts completely for the three contueions found on his body and a possible fourth lighter blow which made no mark. Some at least, if not all, of the blows struck after Mithia fell would be certain to be severe enough to leave a bruise; but there is no sign of anything of the sort. It is also a priori improbable that, in a andden attack made without any conscious desire to cause even grievous hurt, the assailants would not be frightened into

desisting when their vietim fell senseless, That they did so here is further clear from the contradictory and vague character of the evidence in regard to the blows struck after Mithia fell. Mangia, Kodia and Lakshia tell us which of the accused struck each blow they saw before he fell and the order in which they did so, and Kodia and Lakshia tell us exactly on what part Mithia's body each of these blows alighted. But in describing what happened after he fell Mangia says, in a general sort of way, that Dashrath Singh and Nandan Singh gave him two blows each and Bhagwan Singh and Jaipal gave him one each, Kodia says, in a still more general manner, that all four gave him one or two each, Lakshia says that Nandan Singh alone hit him and he did so twice, and Bhikis, who gives no details of the blows struck while he was standing, says that as he lay nobody hit him but Dashrath Singh and he did so twise.

(8) The only possible finding on this evidence is, that after he fell nobody hit Mithia at all, and before he fell he was struck three times with a lathi and possibly also received one or more blows with a lighter weapon. Now, I do not think the fact that the four eye witnesses foolishly attempt to describe each blow, and naturally contradict each other, even suggests that there is any untruth in the statement of all of them that each of the four accused did take part in the attack on Mithia and did hit him with his stick at least once. Not one of them has any motive for dragging in the name of any member of the party whom he did not see actually using his stick on Mithia. If there had been an attempt to do this, the second Diwanji Nandlal would have been implieated as well, and the omission of his name is a very strong indication, indeed, that these witnesses are telling the truth when they say Jaipal also struck Mitbia. It would, indeed, be the natural thing for him to do in the circumstances. I find, therefore, that one of the three blows of which the marks were observed when was taken to the hospital was struck by each of the three Rajput assused, Bhagwan Singh, Nandan Singh and Dathrath bingh with his lathi, and that Jaipal Kunbi also struck him with his

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walking stick in the course of the same assault, but not hard enough to leave a mark

on his body.

(9) As to the offenes constituted by the acts found proved, the learned Judge's decision seems to be as follows. It is not proved which of the accused struck the fatal blow on the head. Therefore, each of them must be treated as if he had not struck that blow but had merely taken part in the assault. For each of them we have then to find what was the intention common to him and the others, including that other who did strike the fatal blow. It sannot be said that any of them who did not hit Mithia on the head had any intention of killing him or any knowledge that one of the others would hit him on the head and kill him. But having regard to the nature of the weapons they used, reasonably infer that ean. all intended that grievous hurt should be saused to him. They are all, therefore, guilty of voluntarily sausing grievous burt with a dangerous weapon and punishable under section 326 of the Indian Penal Code.

(10) The learned Judge has mentioned the cases of Emperor v. Bhola Singh (1) and Chandan Singh v. Emperor (2). If there are any applicable principles there laid down which are not in consonance with the two very simple and, so it seems to me, incontrovertible principles enunciated by Ismay, J. C., in Jhagru Gond v. Emperor (3), the learned Judge was bound to disregard them, as I am. And, having regard to the great frequency with which a lathi, used in a melse, lights on the head even though not specially aimed at it, and the still higher percentage of eases in which a blow on the head with a lathi results in the death of the victim from a fractured skull, it seems to me contradistory to say that a person taking part in an assault with lathis does intend to break the vietim's arm or leg but does not intend to break his skull, an injury which is undoubtedly sufficient in the ordinary sourse of nature to sauce death.

(11) But these matters do not now require discussion. The two principles laid down in Jhagru Gond's case (3) are these.

 Every same person of the age of discretion is presumed to intend the natural and probable consequences of his own

aots.

2. In deciding what are the natural and probable consequences of an act, we must presume that every actual consequence is a natural and probable consequence unless and until the contrary is affirmatively shown.

An actual consequence of the joint assault on Mithia was that a blow from a lathi fell on his head and broke his skull so that he died. That was, therefore, a natural and probable consequence of that joint attack, for the contrary has not been even suggested. Indeed, it seems to me that the frequency of this result by itself proves it to be the natural and probable consequence of belabouring a man with a latti anywhere above the waist so that there is imminent danger of a blow lighting on his head. We must presume, therefore, that every man who took part in that assault intended to sause the death of Mithia. The offense each of them committed was then primarily murder. Jaipal has not been shown to have struck Mithia with his lighter stick and then retired from the assault before the general assault began and the lathis of the others were flying round his head and shoulders, which is the only cireumstance I can imagine that would prove him to have had no part in the common intention of those others.

(12) But one of the most important points in the whole case has been left entirely out of consideration throughout, even in the argument of the appeal. That is the matter of the accused having acted in the exercise of the right of private defence, When Mithia aimed a blow at Dilan Singh which the latter avoided, his followers must have felt certain that he would hit him again with it unless they prevented him which he undoubtedly would have done. Now, if we presume that the accused knew that a blow with one of their own lathis would in all probability sause grievous hurt, we must presume that they knew that Mithia's lathi would have the same effect, Indeed, by applying the principles stated

^{(1) 29} A. 282; A. W. N. (1907) 51; 4 A. L. J. 207; 5 Cr. L. J. 130.

^{(2) 43} Ind. Cas. 438; 40 A. 103; 16 A. L. J. 11; 19 Cr. L. J. 150,

^{(8).1} N. L. B. 184, 2 Cr. L.J. 746.

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in Jhagru Gond's case (3) it has already been shown that the death of the vistim is a natural and probable result of anything like a careless hammering with a lathi, and there is no indication that Mithia was taking any particular care to avoid Dilan Singh's head. If Mithia's blow or any other blow that he was allowed to deliver had fallen on Dilan Singh's head and killed him as Mithia himself was killed, Mithia would certainly have been guilty of murder. The assault of Mithia on Dilan Singh was, therefore, such an assault as might reasonably, and in fact probably, did, cause an apprehension in himself and his followers that the death of Dilan Singh would be the consequence of it if it were not prevented.

(13) In these circumstances, under section 100 and section 96 of the Indian Penal Code the accused would have committed no offence in intentionally killing Mithia, if they had kept within the limits prescribed by section 99 of that Code, that is to say, if the assault could not be prevented by anything short of killing Mithia. It is, however, clear that the assault could have been prevented by a blow or two which would have caused no more than simple hart, if not indeed by threatening the man with lathic without actually striking him. In killing him the accused undoubtedly used much more force than was necessary for the purpose of defending the person of their master. But they were acting in the exercise of their right to defend their master against what was certainly a murderous assault, and, with such eare and attention as was humanly possible at the moment and in the circumstances, they did believe that they could not protest their master from that assault otherwise than by striking Mithia with their lathis, even at the imminent risk of hitting him on the head and eracking Their acts then amply satisfy the conditions required to bring them within the terms of the second Exception to the definition of murder in section 300 of the Indian Penal Code.

(14) There is also another matter which undoubtedly takes the intentional killing of Mithia out of section 302 of the Indian Penal Oode and makes the offence one punishable The assault by the under section 304. Mahar tenants on the Rajput Zemindar, not been likely if it bas aven

result in anything worse than grieveus burt. undoubtedly would 6A18 grave provosation to the Zamindar's followers, quite sufficient to deprive ordinary men of their self-control. It was very sudden and the accused acted immediately, while still under the full influence of the passion

engendered by that provocation. (15) It appears, therefore, that the appellant, Jaipal, is guilty of the offence of sulpable homicide not amounting to murder which is punishable under the first part of section 304 of the Indian Penl Code. But the maximum senteness allowed bу sestion 304 section 326 are exactly the same. is, therefore, no practical advantage in altering the conviction of Jaipal. He is also undoubtedly the least guilty of the party and it would searcely be fair to convict him of eulpable homicide while the others remain convicted of what is in some respects a less The sentence, however, Berious offense. requires examination. It is clear that Jaipal's offence is scarcely to be compared at all to that of the three other assailants in regard to its gravity. Indeed, if it had appeared that the blow he struck with his walking-stick was the first of all, he would have been entitled to an acquittal under section 96 of the Indian Penal Code as he sould not then have been said to have taken any part in the more serious assault with lathis, and a blow with a walking-stick not severe enough to cause a bruise is certainly not by itself in excess of what is sufficient to prevent an attack of the kind Mithia was making on Dilan Singh. But Jaipal appears to have joined in after the other accused had begun to use their lathis and is, for that reason only, guilty of the offence they committed. I consider that a short term of rigorous imprisonment is ample punishment for him, and he has already been in jail for more than three months, in addition to having spent nearly two months in the look-up. In the case of Jaipal the finding is maintained and the sentence is reduced to one of rigorous imprisonment for the period during which he has already been in jail.

(16) It appears to me necessary to mention the case of the first accused, Dilan Singh. He is ordinarily called Zemindar or Mokasi, a title implying a bigher status than that of an ordinary malgusar, and he is a Rajput. Walking in one of his own SABUP SONAR U. BAM SUNDAR THAKURAIN.

villages, followed by three armed elub men of his body-guard, he was accosted and reviled by an agad mahar filthily tenant, who aimed a blow at him with a lathi, which would certainly have been followed by others if the assailant had not been prevented. It seems to me to show complete ignorance of the ordinary course of human conduct and of human affairs to be able to believe, as the learned Judge says he does, that in these circumstances Dilan Singh merely avoided the blow and fled from the spot without saying anything to his followers beyond possibly salling their attention to the matter, not as one they should prevent or avenge but merely as one of interest. It is of course conelusively proved that when the Mahar tenant attacked the Rajput Zemindar, the latter immediately called upon his followers to beat him, that is to say, that he ineited them to cause simple burt at least. That, however, is no offence ascording to section 96 of the Indian Penal Code, by reason of his having acted in the exercise of the right stated in section 97 of the same Code. He was within the limits laid down in section 99 because it cannot even be suggested that he ordered his followers to use more force than was necessary for the purpose of defending him, whether the actual words he used were that they were to beat Mithia or to "lay him out " or to "settle him" or to "straighten him out" or to "see to him." The acquittal of Dilan Singh is, therefore, correct, but for a reason which was not in the mind of the learned Judge who acquitted him.

G. B. D.

Order accordingly.

ALLAHABAD HIGH COURT.

ORIMINAL REFERENCE No. 171 or 1922.

April 12, 1922.

Present:—Mr. Justice Lindsay.

SARUP SONAR—Complainant

RAM SUNDAR THAKURAIN AND OTHERS

-Acoused.

Criminal Procedure Code (Act V of 1899), c. 250

(1)-Discharge-Offence triable by Court of Session-Magistrate, whether can award compensation.

Where after an inquiry in respect of an offence triable by a Court of Session, the accused is discharged the Magistrate is not empowered to award compensation to the accused.

Criminal reference made by the Sassions Judge, Gorakbpur, dated the 24th March 1922.

REFERRING ORDER. - This is an application to me to order further enquiry into the case of sertain assused who have been discharged by the learned Joint Magistrate of Gorakh. pur. The learned Magistrate has made a careful enquiry and I see no reason wby I should direct the matter be taken up again. There is, however, one point which I must deal with. The learned Magistrate has ordered, under section 250. that the complainant should pay compensation to the accused on account of having brought a frivolous and vexations charge. Now, under clause (1) of section 250, the procedure of the section applies only to offences triable by a Magistrate. In the present case, however, it appears from the Magistrate's order that the offence was triable as a dasoity by the Court of Session. I accordingly hereby call upon the Magistrate concerned to explain why the order awarding compensation should not be reported to the Hon'ble the High Court with a view to its being set aside illegal, inasmuch as the offence to which it related was not triable by a Magistrate. I shall be obliged if the Magistrate will be good enough to let me have his explanation within ten days, if possible.

JUDGMENT.—I have read the referring order of the learned Sessions Judge. The order of the Sub Divisional Magistrate is slearly an illegal one and must, therefore, he set aside as recommended by the learned Sessions Judge. I order assordingly.

W. C. A.

Order accordingly.

EMPEROR C. MEHRALI BACHAL.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIMINAL REFERENCE No. 126 of 1919. January 8, 1920.

Present: -Mr. Faweett, J. C., and Mr. Kineaid, A. J. O. EMPEROR-PROSECUTOR

MEHRALI BACHAL - ACCUSED.

Criminal Procedure Code (Act V of 1878), ss. 225, 233, 537-Charge, separate, for each offence-Omission to frame separate charge-Irregularity, whether material.

Although section 233 of the Criminal Procedure Code requires that for every distinct offence of which any person is accused there shall be a separate charge, yet under sections 225 and 537, where this is not done, the irregularity is immaterial, unless the accused was misled by the error, and it has occasioned a failure of justice.

Reference made under section 307, Criminal Procedure Code, by Mr. Kemp, A. J. C., of Sind.

Mr. T. G. Elphinston, Public Prosecutor, for the Orown.

JUDGMENT.-This is a reference by Kemp, A. J. C., under section 307, Criminal Procedure Code.

The assused Mahrab was charged with having committed house-breaking by night and theft and culpable homicide not amountmurder under sections ing to 380 and 304 (ii), Indian Penal Code, and was found guilty by the Jury.

The Additional Judicial Commissioner has accepted the verdiet under section 301 (ii), but disagreed with the remainder of it. This disagreement is based not on any difference of opinion as to the culpability of the accused, but upon a technical point relating to the charge. The charge says that the accused committed house breaking and theft at the shop of Khemo and Dharamdas, whereas the evidence shows that there were two separate shops of Khemo and Dharamdas in respect of each of which the offences charged were committed. This fact, he says, was unfortunately not present to his mind when he charged the Jury, and he is of opinion that there should have been a separate charge in respect of the house-breaking and theft from each shop and that the conviction on the charges under sections 457 and 380 (as framed) cannot stand,

We, think, however, that this objection is not sound. No doubt, section 233, Oriminal Procedure Code, requires that for every distinct offence of which any person is assueed there shall be a separate charge. sections 225 and 537 of Bat under the Code an irregularity of this kind is immaterial, unless the accused was in fact misled by the error and it has occasioned a failure of justice. We agree with the veiw taken in Musai Singh v. Emperor (1) and by the majority of the Court in Ram Subhag Singh v. Emperor (2) that the error is one falling under these sections and does not necessarily vitiate the trial. In this case, it is elear that the assused has been in no way prejudiced, for the prosecution evidence showed the real facts and no objection was raised by him at the trial.

We accordingly think that the learned Judge should have accepted the verdist of the Jury and convicted the accused under sections 457 and 380, Indian Penal Code. Acting under the powers conferred on us by section 307 of the Criminal Procedure Code, we now convict the assused, Mahrab son of Bashal, of the offences sharged under sections 304 (ii), 457 and 380, Indian Penal Oode. We sentence him to suffer rigorous imprisonment for eight years for the offence under section 304, and for two years for the offences under sections 457 and 380, Indian Penal Code, the sentences to be secutive. This makes the total imprisonment the same as inflieted on his companions in the erime.

W. C. A.

Accused consicted and sentenced.

^{(1) 22} Ind. Cas. 1008; 41 C. 66; 18 C. W. N. 183; 15 Cr. L. J. 224.

^{(2) 30} Ind Cas. 465; 19 C. W. N. 972; 16 Cr. L. J.

GOKARAN SINGH U. MANGLI.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECKES APPEAL No. 1 or 1921.

February 17, 1921. Present :- Pandit Kanhaiya Lal, J. C. GOKARAN SINGH-PLAINTIEF -

APPELLANT

versus

MANGLI AND OTHERS-DIFINDINTS -RESPONDENTS.

Construction of judgment -- Foreclosure decree, final -Extension of time-Setting aside of decree - Benefit of doubt.

On an appeal from a decree final for foreclosure, the Appellate Court granted the judgment-debtors two weeks' time within which to pay the balance of the decretal money and directed that if the payment was made the mortgagors would be put in possession of the property mortgaged, but that if they failed to make the payment, their rights in the mortgaged property would be extinguished:

Held, that inasmuch as the judgment contained no provision that in case of failure to pay, the decree final for foreclosure would stand, the decree must be treated as granting an extension of time and setting aside the final decree and that, therefore, the judgment-debtors were entitled to pay the decretal money at any time before an order absolute was passed. [p. 674, col 1.]

Where the language of a judgment is doubtful, he benefit of the doubt ought to go to the judgment-

debtor. [p. 674, col 1.]

Appeal against an order of the Third Additional District Judge, Lucknow at Sitapur, dated the 20th November 1920, confirming a deeree of the Munsif, Biswan, dated the 1st September 1920.

The Hon'ble Syed Wasir Hasan and Mr. Wasi Hasan, for the Appellant.

Mr. A. P. San, for the Respondents.

JUDGMENT .- The plaintiff-appellant obtained a preliminary decree for foreclosure against the defendants respondents. The time originally granted by that decree for the payment of the desretal money having expired, an application was made by the judgment debtors for the extension of that time and was granted. The judgment. debtors did not, however, pay the full decretal money within the extended time. deeres holder applied in sonsequenes for a final decree for foreslosure. While this application was pending, the judgment. debiors were asked to deposit the balance of the described money. They deposited some

amount but that amount too was found to be A decree final for foreslosure insufficient. was eventually passed on the 20th February 1920. On an appeal from that decree the lower Appellate Court set it aside in the

following terms:-

"I, therefore, think that the judgmentdebtors should be allowed an opportunity to make good the deficiency in their payment. To make matters quite clear, I may lay it down that the total amount payable is Rs. 469 2.0 with interest at 1 per cent. per mensem from the 25th January 1919 to the date on which the deeree holder was put in possession of the property, as he appears to have been on some date since the order of 20th February 1920. The judgment-debtors are allowed two weeks' time for that purpose. If they make the necessary payment they will be put in possession of the property. If they fail to do so, their rights in it will be extinguished. The appeal susseeds to this extent." The date of this decision is the The judgment-debtors 3rd July 1920. should have paid the money on or before the 17th July 1920, but instead of doing so they tendered it on the 21st July 1920. The Court of first instance assepted the tender and directed that the money deposited should be paid to the decree holder and the property in question delivered bask to the judgment. debtors. That order has been upheld by the lower Appellate Court and forms the sabjest of the present appeal.

The judgment of the 3rd July 1920 is undoubtedly ambiguous. In case it meant that the decree final for foreslosure passed by the Court of first instance was to be set aside if the remainder of the decretal money was paid within 14 days, and be maintained, if it was not so paid, the judgment-debtors would undoubtedly be presluded from depositing that money beyond the extended period. The judgment does not expressly say so. All that it says is, that the judgmentdebtors will be allowed two weeks for paying the balance of the decretal money, that if they make the said payment, they will be put back in possession of the mortgaged property. but if they fail to do so, their rights in it will be extinguished. It does not say that in ease of failure the decree final for foreelesure shall stand. That judgment must, therefore, be treated as one granting an extension of time and setting aside the final BIPRADAS PAL CHOWDHULT D. KAMINI KUMAR LAHIRI.

The direction that in case of nonpayment the rights of the mortgagors in the disputed property shall be extinguished amounts to nothing more than the direction usually contained in preliminary decrees of that kind. In any event, where the language is doubtful, the benefit of the doubt ought to go to the judgment-debtors, who, as laid down in Vidyasagar v. Ratipal (1), are entitled to pay the decretal money at any time before an order absolute is passed. If the desree passed on appeal was conditional, a fresh deeree for foreelosure was necessary. If it was necessary, the judgment debtors had a right to stop the passing of such a decree by depositing the decretal money. A conditional decree for forcelosure is not a decree of the kind contemplated by Order XXXIV, rule 3, of the Code of Civil Procedure; and the failure of the judgment-debtors to comply with the condition did not itself operate as a restoration of the decree final for foreelosure previously passed.

The appeal is, therefore, dismissed with

costs.

W. C. A. & N. H.

Appeal dismissed.
(1) 25 Ind. Cas. 752; 17 O. C. 347; 1 O. L. J. 433.

PRIVY COUNCIL.

June 14, 1921.

Fresent:—Lord Shaw, Lord Phillimore and Mr. Ameer Ali.

BIPRADAS PAL CHOWDHURY (SINCE DECEASED) NOW REPRESENTED BY MANMATHA PAL CHOWDHURY

AND OTHERS-APPELLANTS

tersus

KAMINI KUMAR LAHIRI AND OTHERS -- RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 167-Patni taluk-Rent-sale-Incumbrances, purchaser seeking to annul-Burden of proof-Presumption.

Where the purchaser of a patni taluk at a sale in execution of a decree for rent, is resisted in his attempt to obtain possession by certain tenants who claim to hold their lands as revenue-free or as lakhiraj, and he seeks to avail himself of the prosions of section 167 of the Bengal Tenancy Act, and to annul these interests as incumbrances, it lies

upon him to show an origin subsequent to the creation of the taluk, and, in the absence of any indication that these holdings had an origin either by creation or by the sufferance of the patnidar since the creation of the taluk, the proper presumption is that they date back to a period antecedent to the creation of the taluk. [p. 676 col. 2.]

Consolidated appeals, one from a judgment and eighty-eight decrees (dated February 12, 1914) of the High Court, reported as 26 Ind. Cas. 436, reversing decrees (dated June 2 and 19, 1911) of the District Judge, Nadia, on appeal from the Munsif of Krishnagar; the other from a judgment and sixty-three decrees (dated May 29, 1917) of the High Court affirming the decrees (dated August 30, 1915) of the Additional Subordinate Judge, Nadia, on appeal from the Munsif, Ranaghat.

Mr. De Gruyther, K. O., and Mr. B. Dube,

for the Appellants.

JUDGMENT.

LORD PRILLIMORE. - The plaintiff in the below, now represented by the Courts present appellants, was the purchaser at a public auction of the patni taluk Taraf Santipur, the property having been put up to sale in execution of a decree for rent. When he came to take possession he found that in thirty-eight villages, tenante, with some small exception, set up a claim to hold their lands as revenue free or as lakhiraj. He accordingly served notices under section 167 of the Bengal Tenancy Act of 1885 upon 103 occupiers, treating the interests which they claimed as insumbrances upon his purchase, which he had power under the various sections of the Act to avoid or annul. As they persisted in their claims, he instituted in the Court of the Munsif, 103 suits which were heard together.

During the somewhat protracted litigation which followed, fifteen of these suits were disposed of, and do not now come before their Lordships. The remaining eighty-eight are the subject of the first appeal, and there is a further batch of appeals represented in the second consolidated appeal also before their Lordships. The principles governing all these cases are the same, and the decision in one would cover the rect.

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The case made by the plaintiff is, that the patni taluk in question was created in 1807, that it was put up for sale on Ostober 2, 1899, and was bought by him free of incumbrances; that the lands in question were not registered as lakhiraj and were in fact mal lands, and that any right of the occupier to hold revenue free must be derived under some grant made by the talukdar, and that this would be an incumbrance upon the taluk which the plaintiff would be entitled to avoid or annul.

The defences in general form were that no Zemindar, patnidar or darpatnilar had been in possession of the land within twelve years, and the claims, therefore, were barred by limitation; that the lands never were mal lands; that they had in fact been registered as lakhiraj; and certain other objections not material to be discussed in the present judgment.

When the case came for trial before the Munsif he decided in favour of the defendants and dismissed the various suits, and on appeal the District Judge confirmed his decision. The matter was then taken to the High Court of Judicatura at Fort William in Bengal, which Court remanded the case to the District Judge for re-hearing the parties upon the evidence, and then addressing himself to the determination of the questions of law, intimating that the whole case would be open before him, and that every question of fact and law that arose for consideration upon the issues must be decided.

On this second hearing the District Judge, who was not the same as the first District Judge, went very sarefully into the evidence, and took the view that the burden of proving that the lands were mal lands lay upon the plaintiff, but that he had discharged it except in eight suits, in which he held that the defendants had proved that their lands were likhiraj. The ground on which he rested his view that the onus was in the first instance upon the plaintiff was that these suits were not suits "for the resumption of lathirai lands but for the evistion of the persons holding them, on the ground that they are trespassers, and, therefore, had no right or title to hold them,"

The materials put before him were partly dosumentary and partly oral. The plaintiff relied upon the Pargana register kept under Regulation VIII of 1800, the Kanungo register prepared and kept under Regulations of 1816 and 1819, the register kept the Land Registration Act of 1876 and sories of the Thak Maps and Thak Statements. In none of these were the in question shown to be lakhira; lands although there were instances in which other lands were mentioned as being lakhiraj. This was all the evidence which he gave. He did not show that any rent had ever been received in respect of the lands in suit. The way in which the learned District Judge accounted for this is as follows: "It must be remembered that the plaintiff is a new comer having purchased the paint at an auction cale only resently, and when it is borne in mind that some of the outgoing patnidars are at the back of the contending defendants, there is nothing extraordinary in the fact that plaintiff could not produce any Collection papers to show that any rents have ever been realized from the defendants for the lands in suit. I, therefore, hold that the plaintiff by producing series of registers and Thakbast Maps and Thak statements, and showing that the lands in suit do not find any entry in any of these documents as lakhiraj succeeded in discharging the onus upon him, sufficiently to shift it on the defendants to prove that the lands they hold are lakhiraj lands."

The documentary evidence which the defendants relied upon was the Qainquennial register, the Terji statements and the Taidad registers. The learned District Judge thought that no useful assistance could be obtained from the two former; but with regard to the Taidad register, he gave it force wherever the lands could be identified. He thought that there was sufficient identification in eight—cases and he decided these in favour of the defendants. All the rest he decided in favour of the plaintiff.

The eighty-eight defendants who had been unsuccessful appealed to the High Court. The High Court first dealt with the application of Article 121 of Schedule I of the Indian Limitation Act, 1877, which

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provides that suits to avoid incumbrances in a pathi taluk sold for arrears of rent must be commenced within twelve years from the date when the sale becomes and ecnelusive, and, therefore, by final inference permits suits to be brought within that time. But the learned Judges observed that the adverse possession contemplated in these cases is possession which commenced after the creation of the patni tenure. They say truly that the principle is, that the purchaser of the patni taluk at such a sale as the present takes the taluk in the state in which it was initially created; and after assuming the correctness of some decisions to which they refer, they add : "The purchaser takes the property not free merely of all incumbrances that may have accorded upon the tenure by the act of the defaulting proprietor, his representatives or assignees but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the inaction of the defaulting propieter." But they add: "This doctrine is plainly limited in its application to eases where the adverse possession commenced after the ereation In a case in which the of the paini. proprietor of the estate is out of possession, he sannot, merely by the device of the ereation of a subordinate taluk, arrest the effect of the adverse possession which has already commenced to run against him, and such possession would be effective not only as against the enbordinate tenureholder, but also as against the superior proprietor. Consequently, if a plaintiff relies upon Artiele 121 of Schedule II of the Indian Limitation Act, he has to establish that the incumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the paini." They then point out that: "The District Judge has not found that in the cases before us the adverse possession of the defendants and their predecessors commenced after the ereation of the patni. On the other hand, there is ample evidence that the adverse possession of the defendants and their predecessors sommeneed before the creation of the paini. There are traces on the record to show that there had been assertions of hostile title before the paint itself was created."

The High Court accordingly reversed the decision of the District Judge and dismissed all the suits.

The estate of the superior Zemindar was created in 1799, and, even assuming that there were no lakhira; lands at the time of the creation of that estate, there would be room for the growth of interests by adverse possession between 1759 and 1807; and, as the High Court observer, on the assumption that the possible interests acquired by the defendants by adverse possession constitute incumbrances which can be annulled, the defect of the plaintiff is that he has not established that the adverse possession of the defendants and their predecessors commenced after 1807.

It is here that the strong body of oral evidence, to which the learned District Judge apparently paid little attention, comes in. There is a mass of evidence to show that the defendants and their predecessors had occupied the lands in question revenue free for periods greatly exceeding twelve years, and there was no evidence of any suggestion in cross-examination to which their Lordships' attention could be drawn to show that this compation had begun at any particular period. Apparently, it went back as far as anything could be traced.

In the absence of any indication that there holdings as revenue free tenures had an origin either by ereation or by the sufferance of a rathidar since 1867, their Lordships think that the High Court was right in saying that the proper presump. tion was that they ran back to a period antecedent to the ereation of the taluk, or to put it in another way, that it lay upon the plaintiff to show an origin subrequent to the creation of the paini taluk if he were seeking to avail himself of section 167 of the Act, and to annul these interests as incumbrances. the judgment of the learned District Judge had given no weight to the evidene of possession. Whether this possession is to be attributed to the fact that the predecessors of the defendants were in by title lawfully created before the grant of the taluk in 1807, or to be attributed, as Counsel for the appellants insisted must be the case (if they were to prevail), to interests lawfully ereated before 1790, or is to be attributed to adverse possession

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acquired before 1807, makes no diffrence in

the legal result.

The principle upon which their Lord. ships should proceed has been wellexpressed in the ease of Hurryhur Mookho. padhya v. Madub Chunder (1): "Again their Lordships think that no just exception can be taken to the ruling of the High Court toushing the burden of proof which such eases the plaintiff has to support, this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facis ease. His case is, that his mal land has, since 1750, been converted into lakhiraj. He is surely bound to give some evidence that his land was once mal. The High Court, in the judgment already considered. has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the mal assets of the estate at the Desencial Settlement. His prima facie case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 17:0. It may be objected that the result of this ruling may be that plaintiffs will cometimes fail, where under the former and loceer practice they would have susseeded in assessing or resuming the land. But this can only bappen by reason of the inability of the plaintiff to give prima facie proof of the fact which is the foundation of his title; a circumstance not likely to ceeur unless the defendants, or those from whom they claim have been long in possession of the tenure impeashed, Nor is it, in their Lordships' opinion, to be regretted if, in such easer, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption snits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and by relieving defendants from the burden which every year made it more difficult to support."

It is right to add one observation. The case proceeded in the Courts below upon the footing that an interest not directly created by the talukdar, but allowed to grow up by his sufferance and negligenes is an insumbrance within the definition given to that word in section 161 of the Act. There is apparently a surrent of desisions in India to this effect, and their Lordships have, for the purpose of their jadgment, assumed, as the Judges in the High Court assumed for their judgment, that this is correct, must not be taken that their Lordships have expressed a final opinion upon the point, it being unnecessary that they should do 80.

One further point remains. In order to be in a position to use the powers of section 167, the purchaser must act "within one year from the date of the sale or the date on which he first has notice of the incumbrance, whichever is the later." The plaintiff here did not act within one year from the date of the sale; but it is suggested that he did act within one year of his having notice. No point to the contrary was made in the Courts below the High Court, and no issue was taken. In these eireumstances, the High Court thought itself entitled to act upon the probabilities and to hold that the plaintiff must have had notice more than a year before he acted, and to decide against him on this ground also. Their Lordships cannot agree with this source of action, and if the point were now of importance they would have asseded to the application of the appellants, and remitted the sase in order that an issue as to this point might have been stated and found. But as, for the reasons already given, they think the plaintiff has failed on the main point, it becomes immaterial to have this issue decided.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. There being no appearance for the respondents, there will be no question as to costs.

Solicitors for the Appellants:-Messrs. Watkins & Bunter.

W. C. A.

Appeal dismissed.

^{(1) 14} M. I. A. 152 at p. 172; 20 W. R. 459; 8 B. L. R. 566; 2 Suth, P. C. J. 484; 2 Sar. P. C. J. 718; 20 E. R. 743.

RAM LAL U. THAKUR DIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 298 CF 1920.

March 8, 1921.

Present: - Mr. Lyle, A. J. O. RAM LAL-PLAINTIFF-

APPELLANT

CET \$149

THAKUR DIN AND OTHERS - DEFENDANTS - RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 47— Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Adverse order—Suit for rossession by person succeeding by survivorship—Limitation.

A member of a joint Hindu family made an application under section 145 of the Criminal Procedure Code, which was dismissed and the possession of the opposite party over the property in dispute was confirmed. The applicant died. More than three years after the order under section 145, his younger brother brought the present suit for possession of the property:

Held, (1) that there was nothing to show that the application made by the plaintiff's brother under section 145 of the Criminal Procedure Code, was made by him as head and manager of the joint family. In 675 col 2

family; [p. 678, col. 2.]

(2) that even if that were so the order under section 145 was the order of a Criminal Court directed to the plaintiff's brother personally; [p. 679, col. 1.]

(3) that the plaintiff succeeded to his brother's interest in the property by survivorship and not as

his heir; [p 679, col. 1.]

(4) that, therefore, the plaintiff was not bound by the order and Article 47 of Schedule I to the Limitation Act was not applicable to the suit. [p. 679, col. 1.]

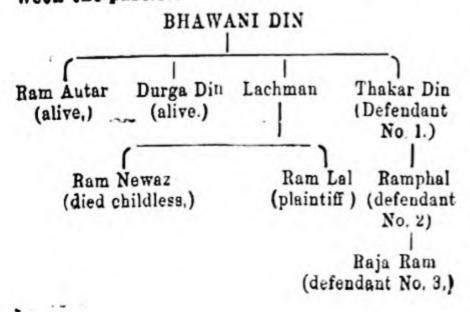
Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 29th July 1920, reversing a decree of the Munsif, Sultanpur, dated the 9th March 1920.

Mr. Niamat Ullah, holding the brief of Mr.

A. P. Sen, for the Appellant.

Dr. J. N. Misra, holding the brief of the Hon'ble Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—The following gerealogical table will show the relationship between the parties:—



The plaintiff brought this suit against the defendants for possession of 12 bighas 19 biswas of land and for damages, or, in the alternative, for joint possession with the defendants of the land in suit. The plaintiff alleged that all the four sons of Bhawani Din obtained a decree for underproprietary rights in respect of 32 bighas 1 biswa 12 biswansis; that in 1888 the plaintiff's father Lashman denied the title of Thakur Din, defendant No. 1, and dispossessed him of his share in the property; that thereafter the defendant No. 1 filed a suit for profits in respect of his one. fourth share but the suit was dismissed; that in 1890 defendant No. 1 brought a suit for partition of his one fourth share but that suit also was dismissed; that in 1906 the defendant No. 1 again brought a suit for profits in respect of his one-fourth share but that suit also was dismissed: that whatever rights the defendant No. 1 had in the under-proprietary holding had been extinguished; that the plaintiff had purebased the rights of his uneles Ram Autar and Darga Din and that, therefore, he was the sole owner of the entire property, but in 1914 the defendants foreibly took possession of 12 bighas 17 biswas and denied the plaintiff's title; that thereupon Ram Newaz, the elder brother of the plaintiff, filed an application under section 145 of the Code of Criminal Procedure in the Court of a Deputy Magistrate but the Deputy Magistrate beld that the defendants were in possession and maintained their possession and directed Ram Newsz to seek his remedy in the Civil Court. On these allegations the plaintiff sued for possossicn of the 12 bights 19 bismes and, in the alternative, if it were held that the defendants' title to a one fourth share in this land had not been extinguished, he prayed for joint possession of a the share in the land in suit.

The defendants depied that the plaintiff had acquired title by adverse possession. They pleaded that they had never lost possession over their share and that the plaintiff's claim was barred by time.

The Court of first instance held that the plaintiff had failed to establish his title by adverse possession and that the suit was not barred by time and it gave the plaintiff a decree for joint possession of a sthe

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shere in the land in suit and for Rs. 25

as damages.

The lower Appellate Court has dismissed the plaintiff's elaim on the ground that it is barred by limitation under Article 47 of the Limitation Act. The lower Appellate Court has held that, as the order of the Magistrate in the proseedings under section 145 of the Code of Criminal Procedure was passed on the 9th of September 1914, the plaintiff was bound, under Article 47 of the Limitation Act, to bring his suit within three years of the date of that order, and has relied on the ruling in Jogendra Kishore Roy Chowdhry v. Brojendra Kishore Roy Chowdhry (1). The question for decision is, whether Article 47 of the Limitation Act is applicable in the circumstances of the

present case.

The plaintiff was no party to the proceed. ings under sestion 145; but it is argued on behalf of the respondents that be was bound by the order passed in those proceedings and that, in any case, he is claiming under Ram Newsz who was bound by that order. Admittedly, Ram Newaz and Ram Lal were members of a joint Hindu family and Ram Newaz was the elder brother, but it seems to me that it is impossible to hold that Ram Lal was bound by the order. There is nothing to show that Ram Newsz made his application as the head and manager of the joint family. But even if he did so the order was the order of a Oriminal Court directed to him personally. Ram Lal was no party to the proceedings and had he, ignoring the order, foreibly ousted the defendants from their possession he would not have been liable to conviction for an offense under section 188 of the Indian Penal Code. Nor can it be held that Ram Lal is claiming under Ram Newsz. Ram Lal and Ram Newaz were members of a joint Hindu family and Ram Lal succeeded to whatever interest Ram Newaz held in the land by right of survivorship and did not acquire his title through Ram Newsz [Sundar Lal v. Ohhitar Mal (2)]. The ruling in Jogendra Kishore Roy Choudhry V. Brojendra Kishore Roy Ohowdhry (1) on which the lower Appellate Court relies is clearly inapplicable. In that case defendant No. 1 was

(2) 29 A, 1; 8 A. L. J. 644; A. W. N. (1906) 242,

the adopted son of defendant No. 2 and derived his title to the property through defendant No. 2. For these reasons, I must hold that the plaintiff appellant's suit was not barred by limitation.

I, therefore, allow the appeal, and as the appeal has been desided on a preliminary point I remand it to the lower Appellate Court with directions to readmit the appeal and to dispose of it according to law. Costs of this appeal will abide the result.

Z. K. & M. H.

Arpsal allowed.

ALLAHABAD HIGH COURT. EXECUTION SECOND APPEAL No. 1681 or 1921.

March 10, 1922. Present :- Mr. Justice Ryves and Mr. Justice Stuart.

MAZHAR HUSAIN—DECREE-HOLDER -APPELLANT

Versus

Musammat AMTUL BIB! AND ANOTHER-JUDGMENT- DEBTORS-RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16 -"Transfer by assignment in writing or by operation of law," meaning of - Mortgage, whether included.

The words "transfer by assignment in writing or by operation of law" in Order XXI, rule 16 of the Civil Procedure Code mean a transfer of all the transferor's interests in the decree. Unless the interests of the transferor in the decree are exhausted, there is not a transfer as the rule contemplates. The words do not include the transfer of rights in a decree by means of a mortgage.

Execution second appeal against a decree of the Second Additional District Judge. Gorakhpur, dated the 30th August 1921.

Mr. N. Upadhya, for the Appellant. Mr. Sankar Saran, for the Respondents.

JUDGMENT .- The facts of the case out of which this appeal arises are stated clearly and sussinetly in the order of the Second Additional District Judge. The appellant has obtained a decree under Order XXXIV. rule 5, by which he is at liberty to bring to sale the decretal right of Musammat Umtan Nissa in a money decree for dower due to her against a third party, in satisfaction of the amount due on a mortgage executed by the

^{(1) 28} O. 781; 12 Ind. Dec. (N. s.) 486 (F. B.).

RAM AUTAR D. RAM ASRE.

lady in favour of the appellant. Under this mertgage the lady transferred to him her rights as a decree bolder. He has not yet executed his decree, and the decretal right of the lady has not so far been sold to any one. He maintains that he is entitled to execute the deeree for dower against the third party without taking further steps in the matter. The point for desision is, whether the deeree for dower has been transferred to him by an assignment in writing or by operation of law. We are of opinion that, so far, it has not been transferred to anybody by assignment in writing or by operation of law within the meaning of the words in Order XXI, rule 16. There is considerable distinction between the transfer of rights as a decreeholder by mortgage and a transfer by assignment in writing or by operation of law of the deeree itself. In these circumstances, we can only read the words "transfer by assignment in writing or by operation of law" in Order XXI, rule 16, to mean a transfer of all the transferor's interests in the decree. Unless the interests of the transferor in the decree are exhausted there is not, in our opinion, such a transfer as Order XXI, rule 16 contemplates.

For the above reasons, we dismiss this appeal with costs including in this Court-fees on the higher scale.

N. H.

Appeal cismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 15 or 1921. March 10, 1921.

Fresent: - Pandit Kanbaiya Lal, J. C. RAM AUTAR - PLAINTIFF -- APPLICANT

RAM ASRE-DEFENDENT-OPPOSITE PARTY.

tersus

Contract, performance of -Bond - Mode of re-payment, not enforceable - Covenant to re-pay, whether can be

enforced.

A executed a bond in favour of B to secure a loan of money the bond provided that it would be re-paid by a certain date that the creditor would be given possession of certain tenancy land in lieu of interest, and that in case of default, the creditor would be entitled to continue in possession. The bond was unregistered and the tenancy was not transferable.

A. brought a suit on the bond and asked for a simple money-decree against B.:

Held, that the bond being unregistered there was no valid mortgage, but merely an agreement to deliver possession, and that although the arrange.

ment made to re-pay the debt failed partly from want of registration and partly on account of non-transferability of the land, the covenant to re-pay the money borrowed could still be enforced. [p. 681, col. 1.]

If a contract prescribing a particular mode of re payment of a debt fails, the primary obligation can still be enforced, provided the ransaction is not one in which the consideration is forbidden by law or is opposed to public policy [p. 681, col. 1.]

Krishnan v. Sankara Varma, 9 M. 441; 3 Ind. Dec.

(N s. 702, referred to.

Kuraishi Begam v. Mumtaz Mirza, 3 Ind. Cas. 8717 12 O. C. 275 and Shiam Sundar v. Dilganjan Singh, 39 Ind. Cas. 540; 20 O. C. 155; 4 O. L. J. 380, distinguished.

Application against a decree of the Subordinate Judge, Bahraich, sitting as a Small Cause Court Judge, dated the 16th July 19.0.

Mr. S. N. Sinha, for the Applicant.

Mr. Hardhian Chandra, for the Opposite Party.

JUDGMENT.—The applicant, Autar, filed a suit against the defendant, Ram Asre, for the recovery of money due on a hond said to have been executed by the latter in favour of the former on the 1st July 1912. The bond provided that the money borrowed shall be repaid on or before Baisakh Sudi Puranmashi 1327 Fasli, that is, the 3rd May 1920; that the ereditor would be given possession over 13 bighas of tenancy land in lieu of a portion of the interest, and that if the balance of the interest and the principal sum were not paid by the time fixed, the ereditor would be entitled to continue in possession. The amount borrowed was Rs. 136. The bond was not registered. The plaintiff wanted a simple money decree against the defendant but the Court below refused to grant the same on the ground that the tenancy over which possession was given was not transferable and that the mortgage was consequently void.

It appears, however, to have overlocked the fact that there was here no valid mortgage at all, because the bond was not registered and could not affect immoveable property. There was, at best, only an agreement to deliver possession of a certain tenancy land in lieu of a portion of interest due on the bond, but that agreement was not enforceable. In fact, the landlord ejected the tenant some time after this transaction and such possession as the plaintiff had over the tenancy or the rental

thereof ceased in consequence.

SAITID MUSAWARD O. PARSHOTAN SARAN.

The plaintiff is, however, entitled to enforce the transaction irrespective of the mortgage, because no mortgage in law exists. In Krishnan v. Sankara Varma (1) where the trustees of a sertain temple in consideration of an advance of money which they required to pay off debte insurred for the benefit of the temple, granted to the plaintiff a lease of the right to manage the temple lands and the plaintiff promised that he would re pay himself out of profits to be derived from the lands and that neither the defendants nor their family property should be made liable for the debt, it was held that the agreement to deliver possession which was found to be illegal was collateral to the primary contract to re-pay the loan and that the latter was, therefore, enforceable. The former is nothing more than a contract prescribing a particular mode in which the re-payment shall be made. If the contract prescribing that particular mode of re-payment faile, the primary obligation can still be enforced provided the transaction is not one in which the consideration was forbidden by law or opposed to public policy.

Here the arrangement made to re pay the debt fails partly from want of registration and partly on assount of non transferability of the tenancy and subsequent ejestment of the tenant therefrom. The envenant to re pay the money borrowed can still be enforced, because, denuded of the agreement prescribing the method in which the interest was to be paid, the agreement to re pay was there and could be enforced against the person who made it. The deei-Kuraishi Begam v. sions in Mirea (2) and Shiam Sundar v. Dilgan in Singh (3) do not apply, because the remedy which was contemplated in those cases for the satisfaction of the mortgage debts question was foreslosure of the mortgaged property and no other.

The application is, therefore, allowed and the suit remanded to the Court below with a direction to reinstate it under its original number and to dispose of it after the determination of the remaining points involved, in the manner provided by law. The costs here and hitherto will abide the result.

K. B.

Revision accepted

ALLAHABAD HIGH COURT. Second Civil Appeal No. 1048 of 1920. March 24, 1922.

Present: -Mr. Justice Refique and
Mr. Justice Piggott.
SAIYID MUHAMMAD - DEPENDANT -

APPELLANT

Der sus

Lala PARSHOTAM SARAN—PLAINTIPP
—RESPONDENT

Mortgage—Property situated within two Registration Offices - Property where deed registered not belonging to mortgagor — Fraud — Estoppel — Mortgage, validity of.

A, mortgaged two sets of properties situated within the jurisdiction of two Registration Districts. The deed was registered in the Registration Office within whose jurisdiction one of the properties was situated, but in a suit on the mortgage the mortgagor pleaded that the property within the jurisdiction of the Registration Office where the deed was registered was not his property but was want property although it stood in his name. It was not proved that at the time of the registration the mortgagee knew that the property was want:

Held, (1) that the mortgagor could not take advantage of his own fraud by pleading that the mortgage-deed was not registered at the proper

place; [p. 642, col, 2]

12) that as the land in question was hypothecated and entered in the mortgage-deed, the deed could be presented to the Registrar having jurisdiction over the property and could be properly registered and that, therefore, there was a valid registration and the mortgage could be enforced. [p. 682, col. 2.]

Second appeal against a decree of the District Judge, Moradabad, dated the 27th April 1920.

Mr. Nihal Chand and Dr. S. M. Sulaiman, for the Appellant.

Dr. S. N. Sen, Messrs. S. Rasa Ali and Durga Prasad, for the Respondent.

^{(1) 9} M. 441; 8 Ind. Dec. (N. s.) 702.

^{(2) 8} Ind Cas 87; 12 O. C. 275.

^{(8) 89} Ind. Cas. 540, 20 O. C. 155; 4 O. L. J. 350.

FIRM OF AYABAM TOLARAM U. FIRM OF RAI BITRAM BODRAJ.

JUDGMENT .- This appeal arises out of a suit brought by the plaintiff-respondent for the enforcement of a mortgage given to his father Durga Prasad on the 18th August 1913 by the defendant-appellant Muhammad. It appears that the latter gave the mortgage of two of his properties in lieu of Rs. 1,000. The two properties were (1) land at Mauza Gandupal, and (2) some land forming part of the compound of a bungalow in the Civil Lines at Moradabad. The mortwas registered at Moradabad. gage-deed Durga Prasad died prior to the institution of the suit. The plaintiff, as the legal representative of the original mortgagee. instituted the suit out of which this appeal has arisen in the Court of the Subordinate Judge of Moradabad on the 1st of August 1919 for the resovery of the mortgagemoney by sale of the two properties hypothe. eated in the deed. The claim was resisted on various pleas, but we are concerned with one of them only in this appeal. The said plea was that the land which formed a part of the compound of the bungalow situated in the Civil Lines at Moradabad did not belong to the mortgagor and hence the registartion at Moradabad was invalid inaumuch as it was a fraud on the law of registration and the registration being invalid the deed of the 18th August 1913 could not be enforced as The plea was based a mortgage deed. on the allegation that the land in question with some other property had been dedicated some charities by the mortgagor's grandfather under a deed of 1887. At the time of the execution of the mortgage-deed of the 18th August 1913, the mortgagor was not the owner and proprietor of the said land and he could not create a valid mort. gage in respect of it. Both the Courte below found that the deed of wagf of 1887 relied upon by the mortgagor was in itself invalid and never acted upon. The elaim of the mortgagee, i. e, the plaintiff-respondent was, therefore, decreed. The mortgagor has some up in second appeal before us and contends that the deed of waqf of 1887 was a valid and a binding deed and had been acted upon. and that the registration of the deed of mortgage of the 18th August 1913 Moradabad was a fraud on the law of registration. We think this appeal can be disposed of without our having to express an opinion upon the validity of the deed of

waqf of 1887. The name of the mortgagor stood in the Manieipal registers in respect οf the that land forms 1 part the compound of a bungalow in the Civil Lines at Moradabad at the time that the mortgage in suit was given. The mortgagor represented to the mortgagee that he (the mortgagor) was the owner and proprietor of the said land. It is not proved that the mortgages knew at the time of taking the mortgage that the land in question was part of the waqf property. The mortgagor cannot, therefore, take advantage of his own fraud by pleading that the mortgage dead was not registered at the proper place. As the land in question was hypothecated and entered in the mortgage deed, the deed could be presented before the Registrar at Moradabad and could be properly registered. It was so registered. In our opinion there was a valid registration and the deed of mortgage is enforsible as such. The appeal fails and is dismissed with costs inslading in this Court fess on the higher ssale.

W. C. A. & N. H.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

Civil Suit No. 1105 of 1920. September 16, 1921.

Present:—Mr. Raymond, A. J. C.
FIRM OF AYARAM TOLAHAM—
PLAIST. FF3

versus

JOINT FAMILY FIRM OF Rai HITRAM BODRAJ-DEFENDANTS.

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 1, 3, 11, applicability of -Extension of Act, meaning of -Agriculturists residing in other Provinces, whether governed by Act. FIRM OF AYABAM TOLARAM U. FIRM OF BAL HITRAJ BODRAJ.

The Dekkhan Agriculturists' Relief Act is not applicable to an agriculturist who earns his livelihood wholly and principally by agriculture at a place in the runjab, or at any place to which the Act has no application. [p. 683, col. 1.]

What is meant by the extension of an Act to a district is, the extension of a substantial portion of the Act and not merely the extension of a particular section or one or more sections. [p 683,

col. 2.]

Mr. Tolasing Khushalsing, for the Plaint-

Mr. Srikrishendas Lullu, for Defendants Nos. 1 and 2.

Mr. Kalumal Pahlumal, for Defendant No. 3.

JUDGMENT.—Defendants in this suit are described as the joint family firm of Rai Bodraj earrying on businesses at Shikarpur, in Tahsil Bajanpur, Zilla Dera Ghazi Khan, Punjab. The enit is on a commission agency account and plaintiffs allege that there is over a lakh of rupees due to them at the foot of this account. Defendant No. 1 Bodraj contends that the commission agency account was only between the plaintiffs and himself and that as he is an agriculturist this Court has no jurisdiction to try the suit.

The first two issues raised in this suit

are :-

(1) Is defendant No. 1 an agriculturist?

(2) If so, has the Court jurisdiction to try the suit?

By consent these have been tried as preliminary issues on the assumption that defendant No. 1 is an agriculturist.

The point for determination would be, whether the Dekkhan Agriculturists' Relief Act, XVII of 1879, is applicable to an agriculturist who earns his livelihood wholly and principally by agriculture at Dera Ghazi

Khan, Punjab.

The Dekkhan Agrienturists' Relief Act is entitled an Act for the relief of indebted agriculturists in certain parts of the Dekkhan, clause (3) of section I declares that this section and sections 11, 56, 60 and 62 extend to the whole of British India. The rest of this Act extends only to the districts of Poona, Sholapur and Ahmednagar, but may, from time to time, be extended wholly or in part by the Local Government with the previous sanction of the Governor General in Council to any other district or districts in the Presidency of Bombay. Mr. Lulla argues that, as section 11 has been made applicable

to the whole of British India and the suit filed against defendant No. 1 falls within the description mentioned in section 3, clause (1), it is open to him to claim the privileges of this Act.

The term, agriculturist, is defined in clause (1) of section 2, as meaning a person who by himself or his servants earns his livelihood wholly or principally by agriculture earried on within the limits of a district or part of a district to which this Act may for the time being be extended, or who originally engages personally in agrieulture labour within these limits. The agriculture is, therefore, to be sarried on within the limits of a district to which this Ast may apply. The whole of this Ast is extended to the four districts specified in section I, some provisions of the Act apply to the districts and some apply to the whole of British India. The words "this Act may for the time being extend," can bardly be construed as including any portion of the Ast, for, on the basis of this interpretation, the Act may be made applicable to Calcutta or Madras. The extension of a few sections cannot be regarded as an extension of the Act. As was said in the case of Chanbasayya v. Chennapgavda (1): "What is meant by the extension of an Act to a district is, the extension of a substantial portion of the Act and not merely the particular extension of a section or more sections." And in the case of Purchotam Lalbhai v. Bhavanji Partab (2) it was held that, "the effect of the extension of sestion il by the first section of it, to all India is, simply to impose upon any person in any part of India who brings a suit, of a nature mentioned in the third section, against an agriculturist or agriculturists residing within the Districts of Poons, Satars, Sholapur and Ahmednagar, the necessity of instituting such suit, and having it tried, in a Court within the local limits of whose jurisdiction he or they reside. The Court must necessarily be in some one of the said four districts. The word 'agriculturiet', as defined in section 2. elause (2), refers to an agriculturist residing within any one of the said four districts

^{(1) 54} Ind. Cas. 693; 44 B. 217; 22 Bom. L. R.

^{(2) 4} B 300; 2 Ind. Dec. (N. 8) 747.

GAJADHAR PRASAD U. MANBARHAN.

only, and not to one residing in any other district." The enumeration of the four districts in the ease is in accordance with the definition of the term 'agriculturist' as it then stood, and the Act has extended in whole or in part to other districts or places in the Presidency of Bombay. The judgment in this case was given on a reference from the Judge of the Small Cause Court at Ahmedabad, who placed on section 11 the same interpretation as Mr. Lulla seeks to do now. Mr. Lulla relied on the judgment in the case of Tulsidas Dhunies v. Virbussopa (3) in support of his argument. He apparently has misread the following passage in this judgment: "It follows that 'agriculturist' in section 11 means one according to the definition in section 2, although the latter section is not declared to extend to the whole of British India. Section 11 extends to the whole of British India as to suits brought against agriculturists of the description given in section 2." All that this passage means is, what has been stated in the judgment at page 360 that there is an obligation upon any person in any part of India who brings a suit of the nature mentioned in the third section against an agriculturist, to bring it within the four places mentioned in the Act.

There can be no doubt that the Dekkhan Agriculturists' Relief Act is essentially a local measure and it could not have been contemplated by the Legislature to make it one of general application by the extension of sections 1 and 2 to the whole of

British India.

My finding, therefore, on the preliminary issue will be, assuming defendant No. 1 to be an egriculturist, as he is a resident of the Ponjab, to which the Dekkhan Agriculturists' Relief Act has no application, this Court has jurisdiction to try the suit.

N. H.

Issue decided in the affirmative.

(3) 4 B. 624; 2 Ind. Dec. (N. s.) 922.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 314 or 1920, February 18, 1921. Present:—Mr. Daniele, A. J. O.

GAJADHAR PRASAD-PLAINTIPY
-APPELLANT

versus

MANRAKHAN AND OTHERS-DEFENDANTS
-RESPONDENTS.

Pre-emption-Vendor out of possession-Legal proceedings necessary-Sale, nature of-Question of fact.

It is not correct to say that no sale can be the subject of pre-emption where legal proceedings are necessary to obtain possession of the property. [p. 686, col, 1.]

Where a sale-deed definitely purports to sell, not a share in a law suit, but a share in a property to which he definitely and clearly states his title, the sale is subject to pre-emption, even though it is effected for the purpose of raising funds to recover the property by litigation. [p. 684, col. 1.]

Abdul Wahid Khan v. Shaluka Bibi, 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 349; Rafique & Jackson's P. C. No. 134; 10 Ind. Dec. (N s.) 961 (P. C.) and Mirza Mohammad Abbas Ali Khan Bahadur v. A. Quieros,

9 O. C. 86, distinguished,

The question whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of the case. [p 686, col. 1.]

Appeal from a decree of the additional Subordinate Judge, Unao, dated 22nd July 1920, upholding that of the Muneif, Safipur (Unao), dated 4th August 1919.

Syed Zahur Ahnad, for the Appellant.

Dr. J. N. Misra, bolding the brief of the Hou'ole Pandit Gokaran Nath Misra, for Respondent No. 1.

JUCGMENT.—This is a second appeal in a suit for pre emption which has been dismissed by the Courts below, professing to follow the relings in Abdul Wahid Khan v. Shaluka Ribi (1), Mirea Mohammad Abbas Ali-Khan Bohadur v. A. Quieros (2), Khurshaid Ali v. Rashid Husain (3), on the ground that what was sold was not property but a mere share in a law suit. The learned Subordinate Judge also refers to a fourth case Rai Bahadur v. Jagrup Pande (4) but as it was held in that case there had been no sale this case is irrelevant.

^{(1) 21} C. 496; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique & Jackson's P. C. No. 134; 10 Ind. Dec. (N. s.) 961 (P. C.).

^{(2) 9} O. C. 86.

^{(3. 9} O. C. 831. (4) 42 Ind. Cas. 37; 20 O. C. 249; 4 O. L. J. 540.

GIJADHAR PRASAD C. MANBARHAN.

The facts are as follows :- Musammot Dal Kuar while in possession as a Hindu widow of the property of her deceased husband, Baldeo Singb, executed a mortgage by sonditional sale in favour of one Jagannath. Jagannath brought a suit for forcelosure, obtained a final decree on 13th January 1910 and was put in possession of the prop-Musammat Dal Kuar died in March erty. 1916. Thereafter, Mangal Singh and certain other persons brought a suit against Jagannath on the ground that they were the nearest reversioners of Baldeo Singh and that the mortgage had been obtained by Jagannath without legal necessity. their pedigree they showed Thanna Singh and his brother, Badri Singh, (since deceas. ed) as being nearer in degree to Baldeo Singh than themselves but alleged that they were illegitimate. Among the defences plead. ed by Jagannath one was that Thanra Singh and his brother were not illegitimate ard that, on the plaintiffe' own case, they ard not the plaintiffs were the nearest reversioners. While this suit was pending Thanka Sirgh, on 18th January 1918, sold a two appas eight pies share in Manza Bardhai to Manrakhan for a sum of Rs. 350. The sale deed sets out that he is the owner of the property as heir of Baldeo Singh but that Mangal Singh and others had get mutation and brought a claim in the Civil Courts for the property and that Thanks Singh had not the means to fight the case. He, therefore, sold the property to his vendee Manrakhan. After the execution of this sale-deed, Manrakhan brought a suit against Jagannath for possession of the property. This suit and that previously instituted by Mangal Singh were tried together and by a judgment, dated 7th December 1918, the learned Subordinate Judge decreed the elaim of Manrakhan and dismissed the eross-suit. Shortly afterwards, on 18th January 1919, the present appellant, Gajadhar Prasad, filed a suit for pre-emption in respect of the sale deed of 19th January 1918 in favour of Manrakhan. Two other preemptors also filed suits but with these we are not now concerned.

The grounds on which the learned Subordinate Judge has arrived at the finding on which he has dismissed the suit are:

(1) that Thanna Singh was not in possession of the property;

(2) that the suscess of Thanna Singh's elaim, should be bring one, was doubtful;

(3) that the sale price was very much less than the real value of the property which is now valued at Rs. 2,000

In this connection it may be remarked that, however good Thanna Singh's title might be, no one would be likely to give anything like the full value for the purchase of property when he knew that a long and expensive law suit would be necessary before he could obtain possession of it.

The question for decision is, whether the considerations relied on by the learned Subordinate Judge are sufficient to bring the case within the principle of the rulings on which he has relied. In my opinion, the principle of those cases must be confined within very narrow limits. The facts of Abdul Wahid Khan v. Shaluka Bibi (1), were of an altogether exceptional nature. The defendant who was setting up the elaim to pre-emption was at the same time denying the title of the vendor, and alleging that he himself was the true owner of the property. The sale which he sought to pre-empt was executed for the purpose of raising funds to recover the property from the defendant himself, the very person who set up his right of pre-emption in defence. The costs to be incurred in the legal proceedings formed a part of the price agreed upon. Under these eirsum. stances, their Lordships held that the law of pre-emption laid down in the Oudh Laws Act was not applicable and added; "In truth, the transaction was a sale of a share in a law suit. The position taken up by the defendant was altogether inconsistent with claiming a right of preemption," In Mirea Mohammad Abbas Ali Khan Bahadur v. A. Quieros (2), Mr. Scott, who delivered the leading judgment, said that the facts were not very different from those of the Privy Council ease. In this ease not only had the vendor a very doubtful right under the Will, but the major portion of the sale consideration was made to depend on whether it was decided that he had any right to the property. Mr. Chamier, in concurring, said that this was not the kind of transaction to which RIJAH OF RAMESD U. EAMITH RAVOTHAN.

Chapter II of the Oudh Laws Act was ever intended to apply and that it would be impossible for a Court to ascertain the market value of what was being sold.

In my opinion, these rulings were never intended to lay down that no right of preemption arises in any case in which the vendor was out of possession and litigation would be necessary to recover possession of the property. The fact that the vendor had in truth a good title to the property is evident from the result of the litigation which afterwards took place. I have myself held in the case of Balwant Singh v. Lallu Ram (5), that the question whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of the case, and that it is certainly not correct to say that no sale can be the subject of pre-emption where legal proeeedings are necessary to obtain possession of the property. On the facts, that was a stronger case in favour of the pre emptor than the present, but the principles there laid down, to which I still adhere, are entirely applicable to the case before me. The sale-deed definitely purports to sell not a share in a law suit but a two-annas eight-pies share in Zemindari property to which the vendor definitely and clearly There is no reason on states his title. principle why a champertous purchase of this nature should be exempted from the liability to pre emption to which other purchases are subject. In my opinion, the suit has been wrongly dismissed on this preliminary ground and, setting aside the decrees of the Courts below. I remand the case through the lower Appellale Court to the Court of first instance for decision on the merits. The appellant will be entitled to his costs in this Court and in the Court below. As Bharat Singh had ceased before his death to have any interest in the suit it will not be necessary to make his heirs parties in the Court below. In fact, there appears to be now no necessity for determining the fourth issue originally framed by the learned Munsif.

2. K. & N. H.

Apreal allowed: Oase remitted for re-trial.

Nos. 235 1 to 2338, 2370 to 2373, 2375 to 23:4, 2386 and 2387 of 1920.

September 9, 1921.

Present:—Mr. Justice Spencer and Mr. Justice Kumarswami Sastri.

RAJAH of RAMNAD—Petitioner

versus

MADRAS HIGH COURT.

CIVIL MISCELLANGOUS PETITIONS

KAMITH RAVUTHAN AND OTHERS-

Civil Procedure Code (Act V of 1903), s. 110"Claim or question to or respecting property of like amount," meaning of—Possible suits involving same points but not perding, applicability to—Letters Patent (Mad), cl. 39—Substantial question of law though value trifling—Leave to appeal.

The expression "claims or questions to or respecting property of like amount or value" in section 110 of the Civil Procedure Code refers only to questions arising between the parties to the suit and not to questions affecting the title of one of the parties to the suit in suits that may hereafter be brought but are not now pending [p. 687, col. 1.]

Hanuman Prasad v. Bhagwati Prasad, 24 A. 236; A. W. N. (1902) 43 and Moofti Mohummud Ubdoollah v. Baboo Mootichund, 1 M. I. A. 363; 3 W. R. P. C. 31; 1 Suth, P. C. J. 56; 1 Sar. P. C. J. 129; 18 E. R. 148, followed.

Ananda Chandra Bose v. Broughton, 9 B. L. R. 423, not followed.

A decision on the meaning of section 12 of the Madras Estates Land Act is a question which involves a substantial question of law within the meaning of section 110 of the Civil Procedure Codc. [p. 687, col. 1]

It is within the jurisdiction of the High Court, under clause 39 of the Letters Patent, to grant leave to appeal to His Majesty in Council in suits of small value where the right in dispute, though not exactly measurable in money, is of great private importance. [p 687, col. 1.]

Joykishen Mookerjee v. Collector of East Burdwan, 10 M. I. A. 16; 1 W. R. P. C. 26; 1 Suth P. C. J. 542; 2 Sar. P. C. J. E4; 19 E. R. 879; Anant Ram v. Sheoraj Singh, 18 Ind. Cas. 305 and Harjibhai v. Jamshedji, 21 Ind. Cas. 783; 15 Bom. L. R. 1021, followed.

Petitions, under sections 109 and 110 of Order XLV, rules 2 and 3, Civil Procedure Code, 1908, and clause 39 of the Letters Patent, praying the High Court to grant a certificate to enable petitioner to appeal to the King in Council against the judgment of the High Court in Civil Revision Petitions Nos. 164 to 178, 180 to 183, 185 to 194, 196 and 1252 of 1918 and reported as 60 Ind. Cas. 90.

Mr. O. V. Anantha Krishna Aiyar, for the Petitioner.

Mr. S. Soundaraja Aiyangar, for the Re-

MAHRAJ PRAG DIN D. BHAGWATI SAHAI.

ORDER.—These are petitions for leave to appeal to His Majesty in Council from an order passed under section 25 of Act IX of 1887 in exercise of the High Court's powers of revision over the judgment given by the District Mansif of Manamadura in certain Small Cause suits.

Those suits were brought by the Rajah of Ramnad in a Small Cause Court to recover damages for the cutting of trees in the defendants' holdings. The damages claimed amounted to no more than a few rupees in each case. It is now alleged in an affidavit sworn to by a subordinate of the Rajah that the effect of our order will be to deprive the plaintiff of tirva to the extent of Rs. 30,000 when the whole Zamindari is considered. There is no counter affidavit and this statement, therefore, is not challenged. It is, therefore, urged that the order involves, directly or indirectly, a claim or question of upwards of Rs. 10,000 in value.

The reference in the Civil Procedure Code is evidently to questions arising between the parties to the suit and not to questions affecting the title of one of the parties to the suit in suits that may hereafter be brought but are not now pending. Vide Hanuman Prasad v. Bhaguati Prasad (1) which follows a decision of the Privy Council in Moofti Mohummud Ubdoollah v. Baboo Mootichund (2) and must, therefore, be preferred to the decision of a Single Judge in Anarda Chandra

Bose v. Broughton (3).

As the value of the subject matter involved is less than Rs. 10,000 no appeal can lie from our final order unless we certify under clause 39 of the Letters Patent that the case is a fit one for appeal to the Privy Conneil.

We think it must be conceded that our decision, being one on the meaning of section 12 of the Madras Estates Land Act, involved a substantial question of law and that it is likely to have very serious and far-reaching consequences in the Ramnad Zemindari, seeing that other Courts in that District will follow it in dealing with disputes as to the rent payable for trees and as to the right of rangets to take the timber of growing trees. Looked at from this point of view, the right

(1) 24 A. 238; A. W. N. (1902) 45.

(8) 9iB. L. R. 423,

in dispute is not exactly measurable in money, but is of great private importance and, in such cases, leave to appeal has been granted in Joykishen Mookeree v. Collector of East Burdson (4) and by the Allahabad and Bombay High Courts respectively in Anant Ram v. Sheorai Singh (5) and Harribhai v. Jamshedni (6).

We, therefore, certify under clause 39 that these cases are fit cases for appeal. The appeals may be consolidated for purposes of security.

M. C. P.

J. P. & W. C. A.

Leate granted.

(4) 10 M. I. A. 16; 1 W. R. P. C. 26; 1 Suth. P. C. J. 542; 2 Sar. P. C. J. 54; 19 E. R. 879,

(5) 18 Ind. Cas. 305.

(6) 21 Ind. Cas. 783; 15 Bom. L. R. 1021,

OUDH JUDIOIAL COMMISSIONER'S COURT.

FIRST CIVIL APPRALS NOS. 48 AND 60 OF 1919.

February 22, 1921.

Present: -Mr. Daniels, A. J. C.

and Mr. Lyle, A. J. C.
MAHRAJ PRAG DIN-PLAINTIFF-

APPELLANT

BHAGWATI SAHAI AND OTHERS -- DEPENDANTS -- RESPONDENTS.

BHAGWATI SAHAI AND OTHERS
—DEFENDANTS—APPELLANTS

versus

MAHRAJ PRAG DIN-PLAINTIPF-

Hindu Law-Joint family-Mortgage by some members-Personal decree-Legal necessity-Interest -Limitation-Contract Act (IX of 1872), s. 16-Undue influence-Necessity-High rate of interest.

Where a mortgagee from some members of a Hindu joint family seeks only a simple money-decree in respect of the mortgage-debt, no question of legal necessity arises. In the absence of fraud, undue influence, or other circumstances which would invalidate the contract, the members who executed the mortgage are personally liable and the other members are liable to the extent of the assets of the executants who are dead which have come into their hands. [p. 639, col. 1.]

^{(2) 1} M. I. A. 863; 8 W. R. P. C. 34; 1 Suth, P. C. J. 56; 1 Sar. P. C. J. 129; 18 E R. 148.

MAHRAJ PRAG DIN C. BHAGWATI SAHAI,

Where a mortgage deed provides that the interest will be paid year by year and in case of default it will be added to the principal and compound interest will be charged; that the mortgagee might realise the interest every year by suit or might have it added to the principal, and that at the time of redemption or foreclosure the total interest due would be deemed to be a separate item which the mortgagee would be entitled to recover from the person and other property of the mortgagors, the mortgagee has an option either to sue for his interest year by year or to allow it to be compounded and to sue for it at the time of redemption or foreclosure and no part of the interest can become barred by time. [p 690, col. 2,]

In order to establish undue influence as defined by section 16 of the Contract Act, it must be shown that the lender took advantage of the necessity and of the position of the borrower and imposed unconscionable terms. The mere fact that the borrower was under urgent need to borrow is not of itself sufficient to raise the presumption that undue influence was exercised, nor does the existence of urgent need, accompanied by the fact that a high rate of interest is charged, establish such a presumption, [p. 689, col. 2; p. 690, col. 1.]

Appeal from a decree of the Subordinate Judge, Sitapur, dated 18th July 1919.

Mesers. A. P. Sen, Kanhaiya Lal and Tinkuari Mohon Ghosh, for the Appellant.

Mr. Bisheshwar Nath Srivastava, for Respondent No. 1.

Mr. K. N. Chak, for all the Respondents.

JUDGMENT .- Mahraj Prag Din brought a suit on the basis of two registered mortgage-deeds executed in his favour on the 3rd October 1899 by Nand Kishore, Girja Dayal, Bhagwan Das, Gur Prasad, Parbhu Dayal, Musammat Mul Kunwar, Sami Dayal, Behari Lal, Kanhaiya Lal and Bans Gopal. One of these deeds was a usufructuary mortgage for Rs. 900. It provided that the mortgagee should be put in possession of the mortgagor's share of 6 biswas and 13 biswansis of Bagipur and should take the profits of it in lieu of interest, that the mortgaged property would be redeemed after seven years and that, on failure to redeem, the mortgage-deed would be treated as a moregage by conditional sale. The other deed was a deed of further charge for Rs. 900. It provided that the principal sum should be paid along with the money due on the deed of usufrustuary mortgage at the stipulated time and in case of default it should be considered as a portion of the purchase money, and that the interest would be treated as an amount separate from the principal which the mortgages in oase of nonpayment at the time or redemption or absolute sale would be entitled to recover from the other moveable or immoveable property of the original mortgagors. Nand Kishore, Girja Dayal, Bhagwan Dar, Parbhu Dayal, Kanhaiya Lal and Bans Gopal are dead. The mortgagee brought his suit against their representatives and the other mortgagors for foreelosure in respect of the principal amounting to Rs. 1,800 and for a simple money decree for Re. 25.338 in respect of interest due on the deed of further charge. The learned Subordinate Judge gave the plaintiff a decree for foreclosure in respect of the principal sum and a simple money-deeree for Rs. 3,318 in respect of interest due on the deed of further charge. The rate of interest entered in the deed was Re. 1.10.0 per cent. per month with yearly rests, but the learned Subordinate Judge bas allowed only simple interest at that rate. The defendants pleaded that the property mortgaged was joint family property, that there was no valid necessity for raising the money on such bard terms, and that undue influence had been exercised. The learned Subordinate Judge has not some to a very clear finding on these pleas. He seems to have held that, although the principal money was borrowed for legal necessity, there was no such necessity as would justify the high rate of interest at which money was borrowed. held that the terms of the deed were hard and unconscionable but he does not appear to have held that undue influence, as defined in section 16 of the Indian Contract Act, had been exercised. The defendants also pleaded that the suit for a simple money decree was either premature or barred by time, but this plea was not accepted by the lower Court. The deeree passed by the lower Court in respeet of the interest was a personal decree against Gur Prasad, Musammat Mul Kunwar, Sami Dayal, and Behari Lal. Against the other defendants the lower Court gave a decree only to the extent of the assets of the deceased mortgagors which had come into their hands or which were proved to have been received by them and not duly accounted for. The defendants have paid the principal sum of

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Rs. 1,800. Against the decree for Rs. 3,318 in respect of interest they have filed an Appeal (No. 60 of 1919) and the grounds taken are that the rate of interest allowed by the Subordinate Judge was excessive and that a claim for a simple money-decree was either premature or time barred, plaintiff has also filed an Appeal (No. 48 of 1919) and he elaims that interest should have been allowed at the stipulated rate and that, in any case, compound interest should have been allowed against those persons who had executed the deed of farther charge. It will be noted that the plaintiff does not claim that a personal decree should have been passed against any of the defendants who were not

parties to the deed. . In view of the decree which has been passed and of the grounds taken in appeal, it seems to us that the question of legal necessity does not arise. It is urged on behalf of the defendants, that as there was a morigage on the joint family property, and that as it was sought to enforce the mortgage against the members of the joint family, then each covenant in the mortgage should be scrutin'zad whether it affects the joint family property or not, and that even if any of the sovenants does not affect the joint family property it cannot be binding on the members of the joint family unless it be proved that there was legal necessity in respect of it, We find onreelyee unable to assept this view of the law. The learned Counsel for the defend. ants relies upon the rulings reported as Nawab Natir Begam v. Rao Raghunath Singh (1) and Sorab it Singh v. Gur Bakhsh Singh (2); but in both those cases it was sought to enforce the mortgage debt against the joint family property. In the present case it is not sought to enforce the covenant in the deed of further charge in respect of interest against the mortgaged property and only a simple money. deeree has been asked for in respect of it. In the absence of fraud, undue influence, or other eirenmetances which would invalidate the contract, the defendants who entered into the covenant are clearly personally liable and the other defendants are clearly liable to the extent of the assets of the executants who

(2) 36 Ind, Cas. 916; 19 O. C. 159.

are dead which have come into their hands. Indeed, we think that a personal decree could have been passed against the sons and grandsons of the deseased executants who have been made defendants in the present ease as, in the view of the ruling in Sahu Ram Chandra v. Bhup Singh (3), they are under a pious obligation to discharge the debt as there is no suggestion that it was insurred for immoral purposes.

The questions, then, that remain for decision

in these two appeals are ;-

first, was any undue influence, as defined in section 16 of the Indian Contract Act, exercised, and, if sc, what rate of interest should be allowed? and

secondly, was the claim in respect of interest barred by limitation or prema-

ture ?

With respect to the question of andue inflaence, we find that a forcelosure deeree for Rs. 709.12.0 had been obtained in respect of the property mortgaged by the defendants in a suit against the mortgagors and the 6th of October . 899 was the last day allowed for payment. The deeds in suit were executed on the 3rd of Ostober 1899 and the amount borrowed on them was Rs, 1,800. It is elear, therefore, that the mortgagors were in urgent need of obtaining money to pay off the foreelosure decree. But the mere fast that such urgent need existed is not of itself sufficient to raise the presumption that undue influence was exercised: Sundar Koer v. Rai Sham Krishen (4), and Oharan v. Kanchan Kuar (5). Nor, indeed, does the existence of urgent need accompanied by the fact that a high rate of interest was charged establish such a presumption. In ordinary circumstances, the more pressing the necessity the higher the rate of interest is likely to be, for the borrowers have not time to make such inquiries as will ensure that they are borrowing at the cheapest rate obtainable. In order to establish undue influence, as defined by section 16 of the Contract Act, it must

^{(1) 50} Ind. Cas. 434; 41 A. 571; 38 M. L. J. 521; 17 A. L. J. 591; 28 C. W. N. 700; 21 Bom. L. R. 434; 26 M. L. T. 40, 80 O. L. J. 86; (1919 M. W. N. 493; 1 U. P. L. R (P. C., 49; 46 I. A. 145 (P. C.).

^{(8) 39} Ind. Cas. 280; 89 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 438; 26 O. L. J. 1; 83 M. L. J. 14; (1917) M. W. N. 439; 23 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

^{(4) 84} C. 150; 4 A. L. J. 109; 5 C. L. J. 103; 9 Bom. L. B, 304; 11 C. W. N. 219; 17 M. L. J. 48; 2 M. L. T. 76; 84 I. A. 9 (P. C).

^{(5) 8} O. C. 198,

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be shown that the lender too's advantage of the necessity and of the position of the borrower and imposed unconsciousble terms. [Kamla Prasad v. Ram Chantra Frasad Narain Singh (6).

In the present case the terms are by no means unusual. The interest charged was at the rate of Re. 1.10 0 per cent. with yearly restr. We find that the defendants had borrowed money previously on practically the same terms in order to purchase the property mortgaged by the deeds in suit and that the mortgages in respect of which the foreslosure decree was obtained earried interest at the same rate. And the fact that no less than nine adult male members of the family joined together in excenting the deed of further charge is in itself an indication that no undue is figence is likely to have been exercised. Furthermore, we find that the defendante, in paragraph 14 of their written statement, set out in definite terms the manner in which they alleged that undue influence had been exercised. They declared that they had negotiated a loan from Auseri Singh, resident of Taralia, on interest at Ro. 1 per cent. per mensem for the purpose of paying off the forselosure deeres; that when the plaintiff agreed to lend them the money at the same rate of interest they dropped the negotiations with Auseri Singh, and that when the time for foreclosure came very near and the parties went to Sitapur to exesute the deed, the plaintiff resiled from his agreement and insisted on taking compound interest on the deed of further charge at Re. 1.10 0 per cent. per mensem; and as the time was so short the defendants were compelled to assept the terms offered to them and took the loan in order to save the property from foreelosure. Had the defendants been able to prove these allegations we should not have besitated in holding that undue influence had been exercised, but there is no evidence whatsoever to support this story nor has it been accepted by the learned Subordinate Judge. Auseri Singh himself has not been examined as a witness. Not one of the defend. ants has gone into the witness-box and we have merely the statement of Jang Bahadur, the son of Auseri Singb, to the effect that twenty years ago Bhagwati Sahai, Nand

(6) 51 Ind. Cas 495; 4 P. L. J. 565; (1919) Pat.

Kishore and Giria Dayal approached him and asked for a loan of about R: 2,000, but he does not remember what interest he asked or for what purpose the money was required; nor does he say that he agreed to lend the money. In all these circumstances, we must hold that the defendants have failed to prove that any undue influence was exercised. That being so, the plaintiff is entitled to enforce the terms of the bond and no reduction in the rate of interest can be allowed.

The deed of further charge provides that the interest will be paid year by year; in case of default it will be added to the principal and compound interest will be charged; that the mortgagee might realise the interest every year by suit or might have it added to the principal, and that at the time of redemption or foreelosure the total interest due would be deemed to be a separate item which the mortgages would be entitled to recover from the person and other property of the mortgagors. The deed, therefore, gives the plaintiff an option either to sue for his interest year by year or to allow it to be compounded and to sue for it at the time of redemption or foreelosure. In there eireum. stances, following a series of rulings of this Court, we hold that the claim for interest as brought was not barred by limitation. Durga v. Tota Ram (7), Ram Farshad v. Qadro (8), Mubarak Ali v. Gopt Nath (9), Basant Singh v. Rampal Singh (10), Kali Charan v. Ohhab Nath (11).

Finally, it is urged that the suit for interest is premature because under paragraph 6 of the deed of further charge the right to recover accreed only after redemption or fore-closure had taken place. We are of opinion that there is no force in this contention and that the plaintiff was under the terms of the deed entitled to bring his suit for the interest due along with his suit for forcelosure.

The result is, that we allow the plaintiff's appeal (No. 48 of 1919) and dismiss the defendant's appeal (No. 60 of 1919). The

^{(7) 19} Jnd. Cas 738; 16 O. C. 45.

^{(8) 40} Ind. Cas. 232; 20 O. C. 132; 4 O. L. J. 341,

^{(9) 45} Ind Cas. 613; 5 O. L. J. 73.

^{(10) 51} Ind. Cas. 985; 6 O. L. J. 243; 1 U. P. L. R.

⁽J. C.) 45. (11) 52 Ind. Cas. 413, 22 O. C. 159; 1 U. P. L. B., (J. C.) 39, 6 O. L. J. 358.

KEDAR MATH MOTI LAL U. BURHAMAL BANSIDHAB.

deeres of the lower Court will be amended and the plaintiff will be allowed a simple money-decree for Rs. 25,338, the full amount of the interest claimed, against all the defendants. The defendants Nos. 4 and 15 to 17 will be personally liable. The remaining defendants will be liable only to the extent of the assets of Nand Kishore, Girja Dayal, Bhagwan Dae, Parbhu Dayal, Kanbaiya Lal and Bans Gopal in their hands and proved to have been received by them and not duly assounted for. In view of the fact that the interest had mounted up to such an enormous sum, we are of opinion that the parties should bear their own costs throughout and we order accordingly.

Z K.

Appeal No. 48 allowel.
Appeal No. 60 dismissed

ALLAHABAD HIGH COURT.

OSIGINAL CIVIL SUIT No. 3 of 1921.

March 9, 1922.

Fresent: - Mr. Justice Piggott and

Mr. Justice Walsh.

KEDAR NATH MOTI LAL-1925 C ANT

MESSES, SUKHAMAL BANSIDHAR-OPPOSITE PARTY.

Arbitration-Interpretation of arbitration clauses-Arbitrator's powers-Arbitrary interpretation-Jurisdiction of Civil Courts.

Although generally the interpretation of arbitration clauses is for the arbitrator, yet when a Court is asked to file an award, it must determine whether the document propounded as such is the production of an arbitration tribunal duly constituted under the terms of a contract or agreement binding

upon both parties. [p 692, col. 2.]

In a contract of sale there were two clauses, one providing that the parties would refer their disputes to arbitration the other that no claim or dispute of any sort was to be recognised unless made within a certain specified period. In course of time the sellers claiming damages for breach of contract referred the matter to arbitration, but did so after the period specified had expired. The buyers raised objection but the arbitrator gave the award holding that the second clause referred to disputes raised by the buyers only and had nothing to do with any claim for damages by the sellers. On an application to file the award the buyers contended that the award was without jurisdiction. The sellers replied that the Court had no jurisdiction to open the matter as the interpretation of the clause was for the arbitrator

Held, that the Court had jurisdiction to go into the matter, that the clause was applicable to both parties and that, therefore, the award was invalid. [p 632, col. 2.]

Per Walsh, J.—The interpretation of arbitration clauses is for the arbitrator but in the present case there is no question of interpretation. To hold that a plain and unambiguous clause applies against one party to the contract and not against the other is misconduct [p. 693, col. 1.]

Mesere. P. L. Banerji and U. S. Baipzi,

for the Applicant.

Messre. B. E. O'Conor, G. W. Dillon, Dr. S. N. Sen, Dr. K. N. Katju and Mr. Durg: Prasad, for the Opposite Party.

JUDGMENT.

Piggort, J .- This is an application to file an award, dated November 22nd, 1920, made in connection with a trade dispute between two firms upon a private submission and an arbitration conducted without the intervention of the Court. The defendant-firm is the same as in cases Nos. 1 and 2 to-day desided by us, and the fasts of the dispute are broadly similar. Here also, the award is that of an umpire appointed by the Committee of the Delhi Piece Goods Assoeiation after the arbitrators chosen by the parties had failed to agree. There are two points upon which the present case is distinguishable from those above referred to:-

(t) The order placed by the defendantfirm with the plaintiff firm was embodied in seven indents; the letters of acceptance in respect of two of these are not forthcoming, but in each of the remaining five letters the form of words employed is as follows:—

"We have to intimate that your indents have been assepted by wire and the same are subject to revision and confirmation by mail." The qualifying expression, "if required," to which I attached considerable weight in deciding the connected cases, is not to be found here; though we do not know for certain that it did not appear in the letter of acceptance which was undoubtedly written and delivered in respect of the first two indents. Mr. Tota Ram, Manager of the plaintiff firm, has made a very clear and (as I think) straightforward statement regarding the course of business batween the parties and the reasons why he did not think it necessary to make REDAR NATH MOTI LAL &. SUKHAMAL BANSIDHAR.

any further communication to the defendantfirm when the arrival of the mail from
England showed that there had been no
error of transmission in the cables which
had passed between his firm and their
Manchester correspondents. If this were
the only point in the case I should be
prepared to hold, though not without some
hesitation, that the meaning of the reservation with which the plaintiff firm's acceptance was qualified was perfectly understood by both parties, that it had reference
only to a contingency which never in fact
arose, and that there was a completed contract between the parties.

(ii) There is, however, another difficulty in the way of the plaintiff-firm. According to clause (14) of the printed form of indent, which is the basis of the contract between the parties.—

"No elaim or dispute of any sort whatever can be recognized if not made in writing within sixty days from due date of payment."

The first letter written by the plaintiffafter the defendant firm had refused delivery and repudiated the contract, in which the former prefer any claim for damages is one dated April 13th, 1920, considerably more than sixty days after due date of payment in respect of the very latest of the indents concerned. The umpire has considered this point: he says, in effect, that the clause above quoted refers to elaims put forward or disputes raised by the buyers and has nothing to do with any claim by the sellers for damages for breach of contract. It must be remembered that elause (3) of the indent form provides the sellers with a prompt and effective remedy against failure on the part of the buyers to accept delivery: if the plaintiff. firm had shoren to avail themselves of this remedy we should have had a "elaim" on their part well within the prescribed period of limitation. Thay shore not to avail themselves of this remedy and to fall back on their rights under the ordinary law as the vendors under a contract of sale which the vendees had repudiated and refused to perform. The question is, whether the plaintiff firm, having done thie, can claim the benefit of the arbitration elause, which is No. 15 in the irdent form, without first fulfilling the obligation im-

posed upon them by clause 14; that is to say, without preferring a claim in writing within the prescribed period of sixty days. On the contract as it stands nothing could well be plainer than the expression: "No elaim or dispute of any sort whatever" used in clause 14. We were asked to consider the terms of the contract as a whole; and on doing this it seems to me impossible to avoid the inference that the condition laid down in this clause was intended as a condition precedent to the operation of elause 15. It was arged that the arbitrator was in a better position than this Court ean be to understand the ordinary course of business in this matter and the intention of the parties when entering into this contract. If this point is seriously pressed, it seems to me that we cannot altogether shut our eyes to the fact that the umpire represents the views of the Delbi Piece Goods Association, that is to say, of the importing firms, who are vitally interested in throwing the burden of the loss consequent on the slump in the Indian market after November 11th, 1918, as far as possible, on the "buyers in India" rather than on the importers. In any case, the duty is east upon this Court of interpreting the terms of the contract and I do not see how we can agree to twist the plain language of clause 14 into something wholly different. Finally, it was contended that the point was one for the decision of the arbitration tribuoal and that we are not sitting as a Court of Appeal from the arbitrators or umpire. This last proposition is correct, and I have endeavoured studionsly to bear it in mind throughout; but when the Court is asked to file an award it must determine whether the document propounded as such is the production of an arbitration tribunal duly constituted under the terms of a contract or agreement bind. ing upon both parties. In my opinion the plaintiff-firm was not entitled to elaim the benefit of the arbitration clause (No. 15 of the contract) unless and until the provisions of the previous clause had been complied with. If this view is correct, it follows that the award of the umpire is not the decision of a tribunal to which the defendant-firm was bound, under the terms of their contract, to submit.

I would, therefore, dismiss this appli-

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eation with costs, including fees on the

higher seale.

WALSH, J .- I agree that the applicants in this ease are not entitled to an order filing the award. In my jadgment the arbitrator and umpire had no jurisdiction on the ground of the failure by the sellers to comply with clause 14 of the contract. The interpretation generally of clauses is for the arbitrators. But there is no question of interpretation in this case. To bold that a plain and unambiguous slause applies against one party to the contract and not against the other is misconduct. In this ease it is clear that it was so held in the interests of a class to which the arbitrator himself belonged. Au arbitrator cannot give himself jurisdiction by arriving at a conclusion which there is no evidence to support, and on the evidence it was plain that no elaim in writing was made within the sixty days, nor was there any evidence that this stipulation had been waived.

N. H.

Application dismissed,

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 140 OF 1920.
February 24, 1921.
Present:—Pandit Kanhaiya Lal, J. O.
PAHALWAN SINGH AND ANOTHER—
PLAINTIPPS—APPLICANTS

versus

GANGA BAKHSH SINGH AND ANOTHER-

Civil Procedure Code (Act V of 1908), a 152-Plaint, rectification of error in, after disposal of suit.

Under section 152, Civil Procedure Code, errors in judgments and decrees can be corrected at any moment; and if those errors follow from clerical or accidental mistakes committed in the plaint or other proceedings it is open to the Court to ascertain by enquiry whether any accidental slip has occurred and to rectify it if the real points at issue are not affected thereby. [p. 693, col, 2.]

Application against an order of the Munsif, Musafirkhana, dated the 28th August 1920.

Mr. H. K. Ghosh, for the Applicants.

JUDGMENT.—This is an application for the correction of an accidental slip in the plaint filed in a suit which was decreed by the Munsif of Musafirkhaus on the 31st August 1917. Recently, the plaintiffs discovered that grove No. 1494 khasra was wrongly described in the decree and in the plaint as No. 11464 khasra. They applied to the Court below for the rectification of the error under section 152 of the Code of Civil Procedure but the Court refused to entertain the application.

It appears that the grove in question was described in the plaint not only by the number but also by its area and by the number of trees which it contained. The allegation of the plaintiffs is, that the area and the number of trees given in the plaint are correct and apply to grove No. 1494 khasra but they do not apply to plot No. 146 & khasra which is cultivated land and not a grove and contains only 3 biswas of land. It might be argued that section 152 of the Code of Civil Procedure applies only to a pending suit or appeal and that no amendment can be made in the plaint after the suit or appeal has been decided. But errors in judgments and decrees can be corrected at any moment; and if those errors follow from elerical mistakes committed in the plaint or other proceedings it is open to the Court to assertrain by enquiry whether any assidental slip has occurred and to restify it, if the real points at issue are not affected thereby. The suggestion is, that the descrip. tion given in the plaint is partly correct and partly incorrect and that effect should be given to the portion which is correct, and the incorrect portion rectified. In Sheo Balak Pathak v. Suchdei (1) a elerical error of this kind was allowed to be corrected and the whole record, beginning with the plaint, was allowed to be restified after the suit was desided. In Gang: Prasad v. Subhag Chand (2) it was held that where a deeree described the mortgaged property in more ways than one and one description applied to one set of existing facts and another to another set of

(1) 23 Ind. Cas. 844; 12 A. L. J. 183.

^{(3) 25} Ind. Cas. 701; 17 O. C. 256; 1 O. L. J. 564.

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existing facts it was the duty of the Court excenting the decree to ascertain by a reference to the reacid or other evidence to which description the decree was interded to apply. If this can be done in the course of excention, it can equally be done before execution takes place by an ameriment of the decree, provided the error is of a clerical nature or ascidental and the trial or result of the case is not prejudicially affected thereby.

The application is, therefore, allowed and the ease remanded to the Court below with a direction to re-admit it under its original number and to dispose of it in accordance with the directions above given after taking such evidence as the parties may adduce with regard to the identity and correctness of the description of the grove in question. As the plaintiffs are responsible for the mistake they shall not be allowed any costs here of this proceeding.

Z. K.

Retision accepted.

OALCUTTA HIGH COURT.
AFPEAL FROM ORIGINAL DECREE
No. 111 (P 1920.
June 14, 1921.

Tresent: - Justice Sir Acutoch Mookerjee, Kr., ard Mr. Justice Brokland.

KRISHNA KISOR DE-DEPENDANT

tersus

NAGENDRABALA CHAUDHURANI— PLAINTIFF—RESPONDENT.

Mortgage suit - Mortgage, denial of, by mortgagor and stranger — Recital as to jayment of consideration—Burden of proof—Question of onus of proof, when immaterial—Consideration recited not paid in full—Validity of bond, if offected—Pardanashin lady, dealings with—Principles applicable—Alteration of document after execution, effect of—Material alteration, what is—Court's decision not to rest on mere suspicion—Execution purchaser—Property purchased subject to mortgage—Mortgage invalid—Benefit, by whom taken.

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the recital as to the payment of consideration for the deed which he executed is untrue. When, however, the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove his case [p. 695, col. 2; p. 6! 6, col. 1.]

The question of onus of proof arises only where there is no evidence one way or the other which will enable the Judge to come to a conclusion upon the question of fact to be determined; but where evidence has been adduced by both the parties and the relevant facts are before the Court, the question of burden of proof becomes immaterial and importance should not be attached to the question on whom the initial onus lay, in such circumstances, the question of the burden of proof is really not pertinent [p. 626, cols. 1 & 2.]

Though there may be ground for suspicion, though the conduct of the parties may engender doubt, the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. [p. 698, col. 1.]

The validity of a bond is not affected by the fact that the consideration recited was not paid in full; the bond is operative to the extent of the sum actually advanced. [p. 699, cols. 1 & 2.]

The Court when called upon to deal with a deed executed by a parda-nashin lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do: secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered, and, thirdly, that she had independent and disinterested advice in the matter. These principles fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself [p 699, col. 2; p. 700, col. 1: p. 701,

Either party to a document may show that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed.

[p. 702, col 7]

The addition to a mortgage-bond after execution and attestation, of anything perfectly immaterial does not affect the liability of the parties, and where the alteration is an immaterial one, it does not vitiate the instrument, even though made by a party thereto [p. 70°, col. 2]

What alteration is immaterial must depend upon the nature of the instrument as also upon the nature

of the charge. [p 703, col 2]

The insertion of a schedule to a mortgage-bond,

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tioned in the body of the bond does not constitute a material alteration as it does not vary the meaning of the instrument or change the rights or interests, duties or obligations of the parties in any essential

particular. [p. 703, col. 2.]

If a mortgage notified at the time of an execution sale turns out to be invalid, the benefit is taken by the purchaser, and the judgment-debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage; and the purchaser is free to contest the reality or validity of the mortgage when he is attacked by the mortgagee, [p. 698, col. 2.]

Appeal against the decision of the Subordinate Judge, Howrah, dated the 25th Fabruary 1920.

Babus Surendra Madhab Mallik and Pramatha Nath Baner, ee, for the Appellant.

Dr. Sarat Chandra Basak and Babu Binode Lat Mooker es, for the Respondent.

JUDGMENT.

MOOKERJEE, J .- This is an appeal by the seventh defendant in a suit on a mortgage. bond executed by the first six defendants in favour of the plaintiff on the 13th Fabruary 1915 to seeure a loan of Rs. 12,000 which was made re payable on the 12th April 1916 and was to earry interest at nine-and-a-half per cent. per annum with half yearly rests. The right, title and interest of the mortgagors in the hypothesated property was sold in execution of a deeree for money at the instance of one of their ereditors and was purchased by the seventh defendant on the 20th June 1916 in the name of his son inlaw, the eighth defendant, who excented a release in his favour on the 25th January 1917. The mortgages instituted the present suit on the 20th February 1918 for realisation of the mortgage dues and joined as defendants the mortgagors as also the purchasers of the equity of redemption.

The mortgagors did not enter appearance, and the claim was resisted by the seventh defendant alone who arged that the bond had not been executed in conformity with section 59 of the Transfer of Property Act, and was not a bona fide document executed for concideration, but was in fact a colourable deed brought about with a view to defraud the unescured creditors of the mortgagors. It was further alleged that the stipulation as to payment of interest and compound interest was an unconscionable bargain. On these pleadings, five issues were raised in the following terms:

1. Was the mortgage bond in suit duly excepted and attested?

2. Was there any consideration for the

bond in suit?

3. Is the plaintiff entitled to get compound interest as claimed?

4. Is the contract for payment of interest a hard and unconscionable bargain? Is the contract legally enforceable?

5. To what reliefe, if any, is the plaintiff.

entitled?

The Subordinate Judge has answered all the issues in favour of the plaintiff and has decreed the slaim in full. On the present appeal, the decree of the Subordinate Judge has been shallenged substantially on three grounds, namely, first, that the plaintiff has failed to prove that the consideration recited in the bond was paid either in whole or in part; secondly, that the plaintiff has failed to prove that the mortgage bond was operative against Saratkomari Debi, a pardanashin lady, who acted as gnardian of her infant sons, the fourth and fifth defendante; and thirdly, that the bond was void by reason of material alteration after execution and attestation.

As regards the first point, there has been some discussion at the Bar as to the onus of proof upon the question of payment of consideration, as the bond contains a recital that the money secured thereby had been received by the borrowers; there is, however, no room for controversy as to the true role on the subject. If an action to enforce a mortgage scentity is contested by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the resital as to the payment of sonsideration for the deed which he executed is untrue. in accord with the decisions of the Judicial Committee in Kaleepershad Tewarres v. Rajah Sahib Perhlad Sein (1), Ali Khan v. Indar Parshad (2) and the decision of the Full Bench in Fulli Bibi v. Bassirudi Midha (3), where reference is made to Chowdry Deby Persad

^{(1) 12} M. I. A. 282; 12 W. R. P. O. 6; 2 B. L. R. P. C. 111; 2 Suth P. C J. 225 at p. 2-0; 2 Sar. P. C. J. 4-9; 20 E R. 845; 1 Ind. Dec. (N. 8.) 554.

^{(2) 2:} I. A. 92, 23 C. 950; 7 Sar. P. O. J. 63; 12 Ind Dec. : N. a) 681 · P. O.).

^{(3) 4} B. L R. 54 F. B.); 12 W. R. 25 (F. B.).

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v. Chowdry Dowlut Singh (4). When, however, the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove his ease. This position may be fortified by reference to a long line of desisions, amongst others, to the cases of Brazeshware Peshakar v. Budhanuddi (5), Shib Narain v. Shankar Panigrahi (6), Ghurphekni v. Furmeshar Dayal Dubey (7), Bisheswar Dayal v. Harbans Sahoy (8), Rohimjan v. Imanjan (9), Manohar Singh v. Sumirta Kuar (10), Babbu v. Sita Ram (11). The rule recognised in these cases is also supported by the analogy of the principle explained by the Judicial Committee in Brij Lal v. Inda Kunwar (12) that recitals of legal necessity in mortgages or conveyances executed by Hindu widows are not of themselves evidence of such necessity, without substantiation by evidence aliunde as against reversioners who are strangers to the transaction: Maheshar Baksh Singh v. Ratan Singh (13), Deputy Commissioner of Kheri v. Khanjan Singh (14), Khub Lal v. A; odhya Misser (15). In the case before us, the reality of the mortgage transaction is impugned by the purchaser of the equity of redemption and the burden of proof lies, consequently, in the first instance, on the plaintiff to establish that the deed was duly excented and the consideration was paid. We may add, however, that the question of onus of proof arises only where there is no evidence one way or the other which will enable the

(4) 3 M. I. A. 347; 6 W. R. P. C. 55; 1 Suth. P. C. J. 161; 1 Sar. P. C. J. 288; 18 E. R. 531.

(5) 6 C. 268; 7 C. L. R. 6; 8 Ind. Dec. (N. s.) 175.

(6) 5 C. W. N. 403.

(7) 5 C. L. J. 653. (8) 6 O. L. J. 659; 3 M. L. T. 38.

(8) 6 C. L. J. 659; 8 M. L. 1, 66. (9) 15 Ind. Cas 698; 17 C. L. J. 178

(10) 17 A. 428; A. W. N. (1895) 93; 8 Ind. Dec. (N. s.) 597.

(11) 25 Ind. Cas. 426; 36 A. 478; 12 A L. J. 806. (12) 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 895; 16 Bom. L. R.

352; 1 L. W. 794 (P. C.). (13) 23 I. A. 57; 23 C. 766; 7 Sar. P. C. J. 19; 6 M.

L. J. 127; 12 Ind. Dec. (N. s.) 508.

(14) 84 I. A. 72; 29 A. 831; 5 C. L. J. 344; 9 Bom, L. R. 541; 11 C. W. N. 474; 4 A. L. J. 232; 2 M. L. T. 145; 17 M. L. J. 233; 10 O. C. 117 (P. C.).

(15) 31 Ind, Cas, 438; 43 C, 574; 22 C. L. J. 345,

Judge to come to a conclusion upon the question of fact to be determined; but where evidence has been adduced by both the parties and the relevant facts are before the Court, the question of burden of proof. pointed out by Viscount Haldane in Kundan Lal v. Begam-un-nissa (16), and by Sir Lawrence Jenkins in Seturatnam Aiyar v. Venkatachala Goundan (17), besomes immaterial, and importance should not be attached to the question on whom the initial onus lay; in such eireumstances, the question of the burden of proof is really not pertinent. We shall now examine the evidence as to the execution and attestation of the mortgage deed and the payment of consideration.

The first three defendants, Khagendra. nath, Kumudindu and Mobanial, along with their brother Makhanlal (who was the father of the fourth and fifth defendants and has since died), were members of a family of Zemindars, the Mookerjees of Janai, in the District of Hughli. The family had got involved in financial troubles, and on the 12th June 1907 the four brothers executed a deed of trust in favour of the sixth defendant Rajanikanta Bhattacharya (the father. in-law of Makbanlal) for the better management of their properties and for the payment of their debts. The embarrassment, however, was so grave that plan, to save the family estates proved fruitless, and to. wards the end of the year 1914, the Mooker. jees were much harrassed by execution proeeedings instituted by at least two unsecared ereditors who held decrees for money against them, namely, Phanindranath Mitra and the present plaintiff, Nagendrabala Chaudhurani. The pressure was indeed so persistent that it became necessary to raise a loan by mortgage of portion of the estate. But a difficulty was created by the eircumstance that Makhanlal had died leaving a widow Saratkumari (the daughter of the trustee defendant Rajanikanta) and two infant sons. In 1910, after the death of ber husband, Saratkumari had obtained a certificate of guardianship of the person and prop-

(16) 47 Ind. Cas. 337; 22 C. W. N. 937; 8 L. W. 233 (P. C.).

^{(17) 56} Ind. Cas. 117; 47 I. A. 76: 43 M. 567; (1920; M. W. N. 6; 27 M. L. T. 102; 11 L W. 349; 38 M. L. J. 476; 22 Bom. L. R. 573; 18 A. L. J. 707; 25 C. W. N. 485 (P. C.).

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erties of her infant children. On the 3rd September 1914 she obtained permission from the District Judge to raise a loan of Bs. 45,000 jointly with the uncles of the minors and the trustee, in order to pay off the debts due from the estate which, at the time, were alleged to amount to over a lakh of rupees. This permission was revoked on the 2nd December 1914 but liberty was reserved to renew the application when negotiations would be completed. On the 8th February 1915 Saratkumari applied again for sanction to join her brothers-inlaw and her father in raising a sum of Ra. 12,000, the loan to earry interest at nine. and-a-half per cent, per annum. It was stated that the money was required to pay the decretal debts due to Phanindranath Mitra and Nagendrabala Chaudhurani as also the accommodation loans which had been taken from time to time to avert threatened execution sales, and to avoid a sale under Regulation VIII of 1819 of a valuable patni held by the family under the Mabaraja of Burdwan. The security proposed to be offered to the ereditor was the paini which had been previously mortgaged to one Haridae Banerjee on the 30th August 1907. The District Judge heard the Pleader, Babu Grish Chandra Ghose, who appeared in support of the petition and has been examined as a witness in this case. The application was allowed and the petitioner was directed to file within one month the proofs (that is, the statement of the debts and payments). This was carried out and the accounts were duly filed on the 8th March 1915 showing that a sum of Rs. 12,000 had been raised on a mortgage to Nagendrabala Chaudhurani and had been applied in the discharge of numerous debts, large and small, which were due from the estate and were described in minute detail. These antesedent eireumstances lend strong support to the genuineness of the transaction which is set up by the plaintiff and is spoken to by her witnesses. Dharanidhar Ghose, who was her officer from 1908 to 1916 and is an attesting witness to the mortgage-bond, deposes to the fact of exeention and attestation and also proves the actual payment of the consideration. According to this witness, the execution and attestation took place in the house of Rajani Kanta where his daughter Saratkumari

lived with her shildren. The document was then taken by Bhudar Chandra Dutt, the seribe (an officer of the plaintiff), to her house where the payment was to be made. The first defendant Khagendra Nath and the sixth defendant Rajani Kanta accompanied him and received the money in the presence of all the attesting witnesses. The story, as narrated by this witness, is corroborated by Murali Mohan Ray who was formerly an officer of the trust estate in the employ of Rejani Kanta. The astual payment was made by the witness Surendra Nath Bose who was at the time the manager of the estate of the mortgages. The testimony of these witnesses is pima facie trustworthy and has been shaken in no way by cross-examination. But we have in addition the evidence of the plaintiff herself who has pledged her oath that the sum of Rs. 12,000 was advanced from her own funds and under her direction by her manager Surendra Nath Bose. this mass of evidence, what have we on the other side? We have the testimony of Sashi Bhuean Mitra, an attesting witness, who asserts that at the request of the sixth defendant, he affixed his signature after the body of the document had been written out but before the executants had signed it. He adds that he did not see the passing of the consideration; obviously, this does not cast doubt upon the case of the plaint. iff, for the execution took place in the house of Rajani Kanta, while the payment was made in the house of the plaintiff, We have also the testimony of the seventh defendant, the appellant before us. He has admittedly no personal knowledge of the mortgage transaction and naturally presses the Court to sean with suspicion every incident connected therewith. We must bear in mind, however, that, as stated by Sir Lawrence Jenkine in Mina Rumari Bibi v. Bijoy Singh (18) and Lord haw in Muhammad Mahbub Ali Khan v. Bharat Intu (19), recalling the dietum of Lord Westbury in Sreemanchunder Deu v.

(18) 40 Ind. Cas. 247; 41 I, A. 72; 44 C. 662; 25 C. L. J. 508; 1 P. L. W. 425; 5 L. W. 711, 33 M. L. J. 425; 21 C. W. N. 585; 21 M. L. T. 844, 15 A. L. J. 8821 19 Bom L. R. 424 (1917) N. W. N. 473 (P. C.).

(19) 53 Ind. Cas. 54; 23 O. W. N. 821; (1919) M. W, N, 507 (P, O),

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Gopaulchunder Ohuckerbutty (20) and of Parshad v. Lord Hobbouse in Uman Gandharp Singh (21), though there may be ground for suspicion, though the conduct of the parties may engender doubt, the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony. Such as it is, the legal proof here is all on the plaintiff's side, while if indirect signs are sought, the suggestions thrown out by the defendant turn out to be of the most un. substantial character, entirely unsupported by solid evidence. It has been insinuated against the plaintiff that she lent her name to enable the mortgagors to defrand their unsecured creditors But no theory has been propounded, no motive has even been hinted at, to make this hypothesis eredible. The evidence shows that the plaintiff is a wealthy parda nashin lady whose income from her personal estate is half a lakh a year; she is the wife of a wealthy landowner whose income from his own properties is one lakh a year. Mr. Mallik who has pressed the appeal with great zeal and earnestness could not suggest ever a plausible reason why a parda nashin lady in the position of the plaintiff should consent to lend her name to a fistitious transaction of this character, with the inevitable result that she would be involved in a litigation and be examined as a witness. But if it seems unlikely that she sould be prevailed upon to enter into such a transaction, it is no less improbable that her husband, who is shown by the evidence to have been present at the time of the payment, should have permitted his wife to get entangled in such a situation. But it is still more inexplicable that she should perjare herself in Court and conspire to divide the appils after success in a nefarious litigation. On the other hand, the course followed by the appellant is not ealenlated to inspire confidence in his case. He purchased the equity of redemption at an execution sale after it had been proclaimed that Nagendrabala Ohaudhurani elaimed to have a mortgage on the property about to be sold.

(20) 11 M. I. A. 28; 7 W. R. P. C. 10; 2 Sar. P. C. J. 21f; 1 Suth. P. C. J. 65i; 20 E R. 11 P. C.).
(21) 14 I. A. 127 (P. C.); 15 C. 20; 5 Sar. P. C. J. 71; Rafique & Jackson's P. C. No 98; 11 Ind. Jur. 474; 7 Ind. Dec. (N. 8.) 599.

Indeed, it transpires that on the 16th February 1916 the Execution Court had recorded an order that as she had filed documents to substantiate her prayer under Order XXI, role 62, Civil Proceedure Code, her petition was to be read over by the Court Officer to the intending purchasers at the time of sale. No doubt, as pointed out by the Judicial Committee in Iteatunnica Begam v. Fertab Singh (22), if the mertgage notified turns out to be invalid, the benefit is taken by the purchaser, and the judgment-debtor is not entitled to elaim from bim a refund of the amount alleged to have been due on the mortgage; and the purebaser is free to contest the reality or validity of the mortgage when he is attacked by the mortgagee; Shib Kunwar Singh v. Shen Prasad Singh (23); Jairai Mal v. Radha Kishan (24', Ganesh v. Furshottam (25), Naroyan v. Umbar (26). But the fact, nevertheless, remains that the appellant, when he purchased the equity of redemption in the name of his son in law on the 20th June 1916, was apprised of the alleged mortgage. We have the further fact that after he had purchased the equity of redemption for R. 24,000, the judgment debtors applied to have the sale set seide under Order XXI, role 90, Civil Procedure Code, on the ground that there were irregularities in the execution proceed. irgs which had caused them substantial injury as the property had been sell at an inadequate prise. In that proceeding, the Coart held, on the objection of the appellant, that the property was worth at least Rs. (0,000, and that as it had been sold subject to two mortgages, namely, a first mortgage for Rs. 24,000 in favour of Sambhunath Kshetri, and a second mortgage for Rs. 12,000 in favour of Nagendrabala Chaud. burani, it could not be deemed to have been sold at an inadequate price. This order was made on the 16th December 1916 and the sale to the appellant was confirmed. We must take it, accordingly, that at the time of the purchase, as also at the time of the

(22) 3 Ind. Cas. 79²; 36 I. A. 203; 31 A. 583; 10 C. L. J. 313; 13 C. W. N. 1143; 6 A. L. J. 817; 11 Bom L. R. 1220; 6 M. L. T. 277; 19 M. L. J. 682 (P. C.).

(23) 28 A. 418; A. W. N (1903) 68; 3 A. L. J. 200, (24) 20 Ind Cas. 182; 35 A, 257; 11 A, L, J. 357. (25) 1 Ind Cas. 10²; 33 B, 311; 11 Bom. L. B. 26; 5

M. L. T .2.. (26) 10 Ind Cas. 913; 35 B. 275; 18 Rom, L. R. 807. RRISHNA KISOR DE U. NAGENDRABALA CHAUDHURANI.

confirmation of the sale, the appellant believed in the reality of the mortgage. The question naturally arises when, how, and from whom did he receive information which made him change his faith and adopt the conclusion that the mortgage was fietitions. He admits in his deposition that he had known the Mookerjess for twenty years; he had also known their trustee Rajanikanta for seven or eight years. There had also been a proposal to sell the disputed property to him five or six months before the auctionsale. In such o'runmatances, and in view of the fact that he is not altogether a stranger to law (he is an experienced Solicitor of this Court), it might be expested that he would make enquiries and would also make a frank and full displosure to the Court as to the information he had gathered in respect of the title to this property, both before and after his purchase. Toere is a singular absence of such materials from the record and the appellant cannot make a legitimate grievance if the Court holds that the positive evidence adduced on behalf of the plaintiff cannot be summarily swept away by vague allagations of a conserted scheme to defraud the creditors of the borrowers, when there is no trace in the evidence of such a design or of a plan for its execution. We feel no doubt whatevar that the Sabordinate Judge was right in his conslusion that the mortgage was a geomine transaction, that the deed was executed and attested, and that the consideration was paid. We may add that, as a last resort, it has been faintly suggested that the whole of the consideration was not paid. There is, however, no foundation for this contentior, which is based on the endorsement on the bond made by the trustee on the 19th March 1315 to the effect that Rs. 2,000 had been paid on the 13th Februry 1915, that is, on the day the bond was executed. There is some discrepancy in the evidence as to whether this sum of Rs. 2,000 was re-paid on that date or subjequently; but we see no reason to doubt that the payment was in fact made and the plaintiff has aspord. ingly saed on the basis that the sam beenavia Was R. 10,000. Ag WAS printed out in Munshi Bajrangi Sahai v. Ulit Narsin Singh (27), the validity of a bond is not affected by the first that the en.

(27) 10 0. W. N. 932; 3 O. L. J. 54 (Short Notes).

sideration resited was not paid in full; the bond is operative to the extent of the sum astually advanced. The first ground urged in support of the appeal cannot consequently be sustained.

As regards the second point, it has been urged that the mortgage should not be held operative in respect of the one-fourth share of the hypothesated property owned by the fourth and fifth defendants, inasmuch as there is no evidence to show that the deed was executed by their guardian Saratkumari Debi, a parda nashin lady, under eireum. stanses which would make the transaction binding upon her. Stress has been laid on the absence of specific evidence to establish that the document was read over and explained to her and that she had independent advise. In capport of this position, reliance has been placed upon the decisions in Bindubashini Dasi v. Giridhari Lal Boy (28), Alikjan Bibi v. Rambaran Shah (29) and Kali Bakhen Singh v. Ram Gopal Singh (30). In our opinion. there is no real force in this contention. The objection now put forward was not specifieally set cut in the written statement and is not covered by the isense. The evidence was consequently not directed to this point and the judgment of the Sabardinate Judge doss not indicate that this aspect of the matter was urged before him in the course of argument. Nor ean we discover the faintest trace of the point in the numerous grounds embodied in the memorandum of appeal presented to this Court. Not withstanding these circumstances, we have enter. tained the objection, inasmuch as the interest of infants represented by a parla nashin lady ssemed to be involved; but for reasons presently to be stated, we have arrived at the conclusion that there is no substance whatever in the objection urged by the appellant. It is well settled that the Court, when called upon to deal with a deed executed by a parda nashin lady, must satisfy itself upon the evidence, first, that the deed was astually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; scoondly, that she had full knowledge of

(28) 3 Ind, Cas. 330, 12 C. L. J. 115. (29) 7 Ind. Cas. 166, 12 C. L. J. 357.

(80) 21 Ind. Cas. 945; 41 I. A 23; 36 A. 81; 19 C. L. J. 172; 18 C. W. N. 282; (1914 M. W. N. 113; 16 O. C 378; 12 A. L. J. 115; 15 M. L. T 130; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147 (P. C.).

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the nature and effect of the transaction into which she is said to have entered; and, thirdly, that she had independent and disinterested advice in the matter. The leading judicial decisions which recognise these principles are collected in the judgment of this Court in Mariam Bibee v. Muhammad Ibrahim (31), and on examination they will be found to fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former elass of eases, the Court will act with great eaution and will presume confidence put and influence exerted; in the latter class of eases, the Court will require the confidence and influence to be proved intrinsieally. This is a fundamental distinction which does not appear to have been always kept in view, with the result that observations made in the one class of cases have been applied without serutiny to the other elass of eases. Illustrations of the confusion which has resulted from this failure to diseriminate between the two classes of cases, are furnished by the decisions in Rance Usmut Koowar v. Tayler (52), Tayler v. Rance Asmedh Koonwar (33), Scondur Koomaree v. Kishoree Lal (34), Ram Perchad v. Rance Phoolputtee (35), Kanai Lal v. Komini Debi (36), Roop Narain Singh v. Gugadhur Pershad (37), Latchemy Umma V. Leucock (38), Ohellummal v. Garrow (39), Na. rsummall v. Lutchmana Naic (40). Reference may also be made in this connection to the two decisions of the Judicial Committee in Moonshee Buzloor Ruheem v. Shums oon nissa Begum (41) and Geresh Ohunder Lahoree V. (31) 48 Ind Cas. 561; 28 C. L. J. 306 at p. 367.

(32) 2 W. R. 307.

(33) 4 W. R. 86.

(34) 5 W. R. 246.

(35) 7 W. R. 98.

(36) 1 B. L. R. (O. C. J.) 31 foot-note.

(17) 9 W. R. 297. (98) (1800) 1 Strange (N. c) 26 at p. 30; 5 Ind.

Dec. (o. s.) 14. (89) (1812) 2 Strange (N. c.) 1; 5 Ind. Dec. (o s.)

238. (40) (1809) 1 Strange (N. c.) 312; 5 Ind. Dec. (o. s.)

165. (41) 11 M. I. A. 551 at p. 585. 8 W. R. P. C. ?; 2 Suth, P.C. J. 59; 2 Sar, P. C. J. 259; 20 E. R. 208,

Bhuggobutty Debia (42). In the former ease, where the transaction was btween a hasband and a wife, their Lordships observed that the burden of proving the reality and bona fides of the purchases pleaded by her husband was properly thrown on him. In the latter case, which was one of a death-bed gift in favour of the donor's brothers in their wives' names to the exelusion of her husband's adopted son, their Lordships pointed out that the Judicial Committee and the Courts in India had always been eareful to see that deeds taken from pardah women had been fairly taken and that the party executing them had been a free agent and duly informed of what she was about. The substance of the matter then is that the fairness of the bargain is the erueial test. This principle runs through the later decisions of the Judicial Committee, though the rule is more specially enforced in cases where a fiduciary relation involving trust and confidence is shown to exist; Syud Fussul Hossein v. Amjud Ali Khan (43), Ashgar Ali v. Delroos Banoo Begum (44), Tacoordeen Tewary V. Nawab Syed Ali Hossein (45), Sudisht Lil v. Sheobarat Koer (46), Mahomed Butch Khan v. Hosseini Bibi (47), Amarnath Sah V. Achan Kuar (48), Annoda Mohun Rai V. Bhuban Mohini Debi (49), Shambati Koeri v. Jago Bibi (50), Ismail Mussajee v. Hafie Boo (51), Sajjad Husain v. Abid Husain Khan (52),

(42) 13 M. I. A. 419 at p. 431; 14 W. B. P. C. 7; 2 Suth. P. C. J. 339; 2 Sar. P. C. J. 579; 20 E. R. 607.

(43) 17 W. R. 523 (P. C.); 2 Suth. P. C. J. 585. (44) 8 C. 324; 3 Sar. P. C. J. 749; 3 Suth. P. C. J. 444; 2 Ind. Jur. 601; 1 Ind. Dec. N 8) 794.

(45) 1 I. A. 192: 13 B. L. R. 427; 21 W. R. 340; 8 Sar. P. C. J. 368 (P. C.).

(46) 8 I. A. 39; 7 C. 245; 4 Sar. P. C. J. 222; 5 Ind.

Jur. 270; 3 Ind. Dec. (N. s.) 707. (47) 15 I. A. 81; 15 C. 694; 12 Ind. Jur. 291; 5 Sar.

P. C. J. 175; 7 Ind. Dec. (N. s.) 1040.

(48 19 I. A. 196; 14 A. 420; 6 Sar. P. C. J. 197; 7 Ind. Dec. (N. s.) 637 (P. C.),

(49) 28 I. A. 7'; 28 C. 54 : 11 M. L. J. 164; 5 C. W. N. 48 7, 8 Bom. L. B. 896; 8 Sar P. C. J. 58 (P C.). (10) 29 I. A. 127: 29 C. 749, 6 C. W. N. 632: 4 Bom,

L R. 444: 8 Sar. P. C. J. 304 (P. C.).

(51) 33 I. A. 86; 33 C. 773; 3 C. L. J. 494; 8 Bom. L R. 879; 10 C. W. N. 570; 16 M. L. J. 166; 3 A. L.

J 353; 1 M. L. T. 137 (P. C.). (52) 16 Ind. Cas. 197; 39 I. A. 153; 34 A. 455; 16 C. L. J. 613; 14 Bom. L. R. 1055; 16 C. W. N. 887; 23 M. L. J. 210; 10 A. L. J. 334; 12 M. L. T. 351;

(1912) M, W. N. 976; 15 Q. C. 271 (P. C.).

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Kali Bakheh Singh v. Ram Gopal Singh (53). It may also be observed that the Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of basiness habits, to have been literate and to have possessed a eapacity to judge for herself; Hodges v. Delhi and London Bank Limited (54), Bindu. Dasi v. Giridhari Lal Rou (28), Alikian Bibi v. Rambaran Shah (29). These are only general principles, and it eannot be too strongly emphasised that there is a grave risk of failure of justice, if they are moulded into inelastic formulas or erystalised into inflaxible rales, and treated as of universal application, regardless of the special facts and surrounding sireumstances of the concrete case which requires adjudication. Tested in the light of these principles, how does the case before us stand? Saratkumari, though a pards. nashin lady, was in no sense illiterate and was able to read the mortgage deed which had been written in her vernacular. The execution of the deed bad been preseded by an application on her behalf to the District Judge who had granted the requisite sanetion. The terms of the deed were of the simplest character imaginable, and the covenant for the payment of interest was in no way nousual. She lived with her infant children in the family of her father and had the benefit of his advise; indeed, it was at his instance that the loan was raised with a view to discharge the family debts and to save the estate from sale in execution of decrees obtained by unsecured ereditors, she was joined in the mortgage transaction by her three brothers in law who were the uneles and so sharers of her infant children and were equally interested in the protestion of the estate. The only persons whose advice she could have taken, either in the family in which she was born or in the family into which she had married, were her father and the brothers of her husband; they were present throughout the transac-

(58) 21 Ind. Cas. 935; 41 I. A. 23; 36 A. 81; 19 C. L. J. 172; 18 C. W. N. 282; 16 O. C. 378; (1914) M. W. N. 112; 12 A. L. J. 115; 15 M. L. T. 130; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L. R. 147 (P. C.). (54) 27 I. A. 168; 23 A. 137; 2 Bom. L. R. 967; 5 C. W. N. 1; 10 M. L. J. 279; 7 Sar. P. C. J. 767 (P. C.).

tion and themselves joined as parties. It is also significant that neither she nor her father nor her brothers in law have entered appearance in this suit and contested the slaim, though their personal liability under the mortgage instrument has not been extinguished by the lapse of time. In these circumstances, we are of opinion that the deed has been amply established to have been fairly taken from her, that she executed it as a free agent, and that she was duly informed of what she was about. Consequently, the deed cannot be successfully impeached, and the second objection urged by the appellant must be overruled.

As regards the third point, it has been contended that the mortgage deed has become void and inoperative by reason of a material alteration made therein, without the assent of all parties concerned, after execution and attestation. It appears that the mortgage deed as written out did not contain a schedule of the details of the consideration money. There was a statement in the first clause to the following effect:

"We borrow this day from your fund the sum of Rs. 12,000 as per details given below and asknowledge rescipt of the said money by this document." The details, however, sould not be inserted then, because it had been arranged that the document would be executed and attested in the house of Rajani Kanta where his daughter Sarat Kumari lived, but the actual payment would be made in the house of the plaintiff. A blank space was accordingly left on the final sheet, and when the payment was made in the house of the plaintiff, the scribe made the following entry in the blank space:

"Schedule of consideration money.

Currency Note No. P.B. 28,620, one piece Rs. 1,000
No. Do, 06918, one piece 1,000
Small notes, one thousand pieces at Rs. 10 10,000 each 12,000
Twelve thousand rupees only."

On these facts, it has been argued that

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there was a material alteration in the dosument which should have been re-execut. ed by the borrowers and re attested by the witnesses, in order that it might be operative in law as a m:rtgage instrument. The Subordinate Judge has overruled this contention in the Court below on the authority of the decision in Ananda Mohan Soha v. Ananda Chandra Saha (55), which shows that an alteration in a document after its execution and registration, made in good faith to earry out the original intention of the parties, does not vitiate the instrument. We are of opinion that there was in this ease no material altera. tion in the deed when the schedule setting out the details of the consideration money mentioned in the body of the document was inserted in the blank space and that peither re execution nor re-attestation was necessary to revive its vitality which had in no way been affected, much less suspended, by what had taken place. It was ruled by this Court in Gour Chandra Das v. Prasanna Eumar Chandra (56) and Achhuta. nand v. Rom Nath (57) that a material change or alteration of an instrument is one which causes it to speak a language different in legal effect from what it originally spoke. Accordingly, any which changes the legal effect of the instrument, that is, which changes the legal identity or character of the instrument, either in its terms or in the relation of the parties to it, is a material change or technically an alteration. It is the effect of the act upon the instrument and not the particular manner in which it is done, that is material, and hence an alteration to be material must be an actual alteration, whether by erasure, interlineation, addition or substitution of material matter affecting the identity of the instrument or contract; it must also be in a material part of the instrument and must affect the rights and obligations of the parties thereto. To constitute an alteration material, it is enough that, if the instrument were genuine, it would operate differently from the original. Such is the

of the rule that a material alteration in an instrument invalidates it against all parties not consenting to the alteration. Bat it would be a fruitless task to endeavour to reconsile or even to compare the numerous souflisting decisions, and often times fine. spun distinctions, of which the alteration of promissory-notes and other like instruments and the legal consequences flowing therefrom have been the prolife theme. Accordingly, the most advantageous course to follow is to test the fasts of the litigation before the Court in the light of the fundamental principle just enunciated. Now, in the case before us, the first clause of the document resites that R. 12,000 was the consideration for the mortgage and acknow. ladges receipt of the sum by the borrowers. The bond would be operative even though the details of the consideration money were not set out: its validity depends not upon the detailed enumeration but upon the actual payment of the consideration money: and it is well settled that either party to a document may show that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed: Hukumchand v. Hiralal (58), Vasudeva Bhatlu v. Narasamma (59), Kumara v. Srinivasa (60), Edityam Iyer v. Ramahrishna Iyer (61), Lala Himmat Sahai v. Llewehellen (02), Gopal Singh v. Lalso Singh (63), Indarit v. Lal Ohand (64). It has been urged, however, that though the alteration in the present case was not material in the cense that it varied the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varied the legal effect of the instrumen; as originally

fundamental principle which lies at the root

^{(58) 3} B. 159; 2 Ind. Dec. (N. s.) 107. (59, 5 M. 6; 2 Ind. Dec. (N. s.) 5.

^{(60) 11} M. 213; 12 Ind. Jur. 217; 12 Ind. Jur. 384

⁴ Ind. Dec. (N. s.) 148. (61) 21 Ind. Cas. 458; 38 M. 514; (1913) M. W. N.

^{847; 14} M. L. T. 382; 25 M. L. J. 602.

^{(63) 11} C. 485; 5 Ind. Dec. (N. s.) 1083. (63) 2 Ind. Cas, 953; 10 C. L. J. 27.

^{(64) 18} A. 168; A. W. N. (1898) 16; 8 Ind. Dec. (N. 8.) 818,

^{(55) 85} Ind. Cas. 182; 25 C. L. J. 155; 41 C. 154. (56) 33 O. 812; 10 C. W. N. 783; 3 C. L. J. 363.

^{(57) 21} Ind, Cas. 79; 18 C. L. J. 354.

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expressed [Gardner v. Walsh (65)], it was still a material alteration, sufficient to invalidate the instrument, as it reduced to certainty a provision which was originally unasser!ained. This argument is manifestly fallacious. The provision that the consider. ation was Rs. 12,000 was not open to the objection of uncertainty and the schedule did not make that certain which was previously unascertained. What was made certain by the schedule was the mode of payment of the money, but that was not material for the validity of the deed: Markham v. Gonzeton (66), Eigleton v. Gutteridge (67), Barned's Banking Co., In re. Contract Corporation, Ex parte (68). The distingtions which have been recognised in some of the eases as to the materiality of words inserted in blanks in a deed are of a refined character and some of the desisions are not easy to resonaile. in Sellin v. Frice (69) the addition of a schedule of creditors to a composition deed, after execution and registration, was held to be a material alteration which vitiated the deed; but in Wood v. Slack (70) the addition to the schedule of the names of two ereditors after execution and registration was held to be immaterial; see also French v. Patton (71), Weeks v. Maillardet (72), Daines v. Heath (73), Dyer v. Green (74), Batten, In re, Milne, Ex parte (75). The substance of the matter is, that the addition of anything perfectly immaterial does not affect the liability of the parties | Oatton v. Simpson (76)], and where the alteration is

an immaterial one, the Queen's Beneb, deslining to be bound by the second resolution in Figot's case (17), decided in Aldius v. Cornwell (73) which was followed in Orediton v. Bishop of Exeter (19), that the alteration does not vitiate the instrument, even though made by a party thereto. What alteration is immaterial must plainly depend upon the nature of the instrument as also upon the nature of the change; reference may be made in this connection to Murkham v. Goniston (66) and Paget v. Paget (80) among earlier eases, and to Adsetts v. Hives (81) and Green v. Attenborough (82) among modern decisions. We hold, assordingly, for the reasons set out above, that the insertion of the schedule, setting out the details of the consideration mentioned in the body of the mortgage bond in this ease, did not constitute a material alteration; it did not vary the meaning of the instrument or change the rights or interests, duties or obligations of the parties in any essential particular. The third contention of the appellant sannot thus be possibly supported.

The result follows that the desree of the Subordinate Judge must be affirmed and this appeal dismissed with sosts.

BUSKLAND, J .- I agree and have nothing to add.

B. N.

Appeal dismissed.

· (65) (1855) 5 El. & Bl. 83 at p. 89; 103 R. R 377, 24 L, J. Q. B. 285; 1 Jur. (N. s.) 828; 3 W. R, 460; 119 E. R. 412,

(6d) (1598) Croke, Eliz. 626 at p. 327; 78 E. B. 866. (67) (1843) II M. & W. 465 at p. 499; 2 Dowl. (N. s.) 105 1 12 L. J. Ex. 859; 152 E. R. 888; 63 R. R. 655.

(68) (1867) 3 Ch. 105 at p. 115; 37 L. J. Ch. 81; 17 L. T. 269, 16 W. R. 193.

(69) (1867) 2 Ex. 189; 86 L. J. Ex. 93; 16 L. T. 21;

15 W. R. 719. (70) (1869) 8 Q. B. 879, 87 L. J. Q. B 180; 18 L. T. 510, 18 W. R. 859,

(71) (1803) 9 East 351; 9 R. R. 571; 1 Camp. 72; 103 E. R. 606.

(72) (1811) 14 East 588; 104 E. R. 719. (73) (1847) 8 C. B. 938, 16 L. J. C. P. 117, 11 Jur. 185; 186 E. R. 876.

. (74) (1847) 1 Ex. 71, 16 L. J. Ex. 233, 154 E. R. 30. (75) (1830) 22 Q B. D. 635; 58 L. J. Q. B. 333; 37 W. R. 490; 6 Morrell 110.

(76) (1838) 8 A. & E. 183; 3 N. & P. 356; I W. W. # H. 226; 7 L. J. Q. B. 213; 2 Jur. 803; 112 H. R. 789,

(77) (1614) 11 Coke Rep. 26b (27a); 77 E. R. 1177. (78) (1868) 3 Q. B. 573; 9 B. & S. 607; 37 L. J. Q. B. 101; 16 W. R. 1045.

(79) (1905) 2 Ch. 455; 74 L. J. Ch. 637; 93 L. T. 157; 54 W. R. 156.

(80) (1686) 2 Ch. Rep. 410; 21 E. R. 701.

(81) (1863) 38 Beav 52, 140 R. R. 14, 2 N. R. 474; 9 Jur (N. s) 1063; 9 L. T. 110; 11 W. R. 1092; 55 E. R. 286.

(82) (1864) 3 H. & C. 468; 140 R. R. 562; 34 L J. Ex. 88; 11 Jur. (N. 8) 141; 11 L. T. 513; 18 W, R. 185; 159 E. R. 614.

SUNDAR LAL O. SHIB NABAIN.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 972 of 1920.
March 30, 1922.

Present: -Mr. Justice Ryves and Mr. Justice Gokul Prasad. SUNDAR LAL-DEFENDANT-

APPELLANT

versus

SHIB NARAIN-PLAINTIFF-

Mortgage with possession—Interest on part of mortgage-money to be paid by mortgagor—Interest on rest set off against rent of property mortgaged—Mortgage, divisibility of—Suit for redemption—Limitation,

A shop was mortgaged for Bs. 200 and possession of it was delivered to the mortgagee and it was agreed that the interest on Rs. 100 of the mortgage-money would be set off against the rent of the shop, and the interest on the remaining Bs 100 would be paid by the mortgagor at a certain rate from his own pocket. It was further agreed that the money would be re-paid within two years, and if not paid the mortgagee would have the right to realize the whole amount from the shop. The mortgagor sued for redemption on the payment of Rs. 100 only on the ground that Is 100 which was payable with interest had become time-barred:

Held, that the mortgage was one simple mortgage on the security of the shop, that the mortgagor could not treat it as being in fact two mortgages, and that he was bound to pay the mortgage-money which included the whole of the principal and interest due upon it at the time of the suit. [p. 704,

col. 2.]

Second appeal against a decree of the Second Additional District Judge, Aligarh, dated the 19th May 1920.

Mr. Haribans Sahai, for the Appellant. Mr. P. L. Banerjee, for the Respondent.

JUDGMENT,-In this case the suit was by the respondent, mortgagor, to redeem a mortgage of the lat of September 1876. This mortgage was for Rs. 200. He elaimed redemption on payment of Rs. 100 only on the ground that the balance of Re. 100 which was payable with interest at 18 per eent. per aunum had become time-barred because of a lapse of time. The mortgagee contended that the amount actually due to him was Rs. 678.8 0 the principal and interest under the terms of the mortgage and a further sum of Rs. 50 which he had spent out of his own posket in keeping the mortgaged property in repairs. The Munsif agreed with the contention of the defendantmortgages and allowed the amount of mortgage-money elaimed by him plus Rs. 20 on account of repairs. The plaintiff went up on appeal and the learned Judge of the

lower Appellate Court has, purporting to follow the ease of Phul Kuar v. Murli Dhar (1). upheld the defendant's contention in part and allowed the mortgages the principal amount of mortgage-money together with interest on Rs. 100 for 12 years only, apparently on the ground that the suit for recovery of Rs. 100 and interest thereon was barred by time. In our opinion the learned Judge seems to have totally misunderstood the nature of the mortgage-deed which the plaintiff sought to redeam. The mortgage commences with the recital that the mort. gagor mortgages the shop in lieu of Rs. 200 to the mortgagee. It then goes on to say that he has removed his own possession and put the mortgagee in possession, the mort. gagee being at liberty to keep it in his own possession or to let it to tenants. Then the mortgage goes on to say that the interest on Ra. 100 out of the mortgage money is to be set off against the rent of the shop and as to the interest on the remaining amount he would pay it at the rate of Bs. 18 per cent. per annum from his own pocket. The mortgage deed further goes on that when the money is re paid within two years the shop will be redeemed, and in case the money is not paid within two years then the mortgagee will have a right to realise the money from this very shop by suit. It is clear from the above extract that the property was really mortgaged for Rs. 200 but the income of the mortgaged property, being insufficient to meet the interest agreed upon, the mortgagor promised to pay the balance of the interest, that is, interest on Rs. 100 from his own pocket at the stipulated rate. The mortgage being a usufrustuary one the mortgagee could not have, as such, brought a suit for sale. However, leaving this aspest of the question aside, there can be no doubt that the mortgagor is not warranted in treating this document as being in fact two mortgages. It was one simple mortgage of Rs. 200 on the security of the shop. He was bound to pay the mortgage money which included the whole of the principal and interest due upon it at the time of the suit. The ease referred to by the learned District Judge has absolutely no application to the fasts of the present ease, In our opinion the desree of the Trial Court was

^{(1) 2} A. 527, 1 Ind. Dec. (x. s.) 905,

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she right one. We, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

J. P.

Appeal ailowed.

OALGUTTA HIGH COURT.

ORIGINAL CIVIL SGIT No. 303 OF 1920.

February 23, 1921.

Present:—Mr. Justice Rankin.

SHASHI BHUSAN SHAW—DEFENDANT

—APPELLANT

versus

HARI NARAIN SHAW-PLAINTIFF-

Hindu Law-Bengal School-Partition-Partial-Mother's share, incidents of-Compromise decree-Matters outside scope of suit dealt with-Res judicata.

In a partition in a joint Hindu family, it is quite competent for any members, who are so minded, to continue joint. [p, 707, col. 1.]

The share that a Hindu mother in Bengal takes on a partition among her sons is in lieu of the right of maintenance which is carved out of the son's shares and at her death goes back to and forms part of the shares out of which it came. [p 706, col. 1]

Where in a suit a compromise decree is passed dealing with marters that do not relate to the suit, the decree is without jurisdiction and does not operate as res judicata [p 7:0, col 1.]

In a partition among certain brothers of a Dayabhaga Hindu family and their mother, some of the brothers separated and the rest continued joint with their mather. Subsequently a partition suit was fought out among the latter. The suit was compromised and a consent decree passed according to which the brothers who had previously separated relinquished in favour of the brothers suing for partition any rights they might acquire in the share of the mother at her death. The mother died, and in the dispute over the share left by her the question was about the effect of the consent decree;

Held, that the decree, in so far as it dealt with the relinquishment of the rights of the previously separated brothers in the shares of the mother, was without jurisdiction, inasmuch as it dealt with matters with which the suit in which it was passed was in no way concerned, and that, therefore, it did not operate as res judicata. [p. 710, col. 1.]

Mr. H. C. Maiumdar (with him Mr. N. Goswami), for the Plaintiff.

Messre. I. B. Sen, S. N. Banerjee, S. N. Chatterjee, for the Defendants.

JUDGMENT,-Ganesh Chandra Shaw, a Hindu, governed by the Bengal School of Law, died in 1885 leaving him surviving eight sons and his widow, Nittyakumari Dassi. The second son, Gour, brought a suit in this Court (No. 76 of 1885) for partition. The suit was referred to arbitration and resulted in an award which was confirmed by the Court on the 18th August 1887. By that award the arbitrator 'divided and partitioned the said estate into nine equal parts" and "allotted one of such parts or shares to each of the parties, as per schedule G hereto appexed, to be held and enjoyed by them absolutely separately, but as the defendants Hari Narain Shaw, Kanai Lal Shaw, Ranco Lal Shaw, Rashbehary Shaw and Panna Lal Shaw are infants and they have expressed desire by their mother and natural guardian, Srimati Nittyakumari Dassi, that they will continue to live together joint in food and estate, I have only declared their shares to be Rs. 9,890-5 10 each, but have not divided the same by metes and bounds (the said Srimati Nittyakumari Dassi being only entitled to a widow's estate in such shares)." The schedule to which reference is made in the passage just quoted shows that of the adult sons of Ganesb, Gour had already received more than his share and Sashi and Nangteswar were now being given certain specific properties and moveables to hold in severalty; whereas to the mother and her five infant sons, taking these six people as one collective whole, certain other assets were allotted without any distribution of such assets between the six so as to answer individual shares. Each of the infant's shares as well as each adult's share is defined by money value in an addendum described as "Explanation of schedule G," which shows the arithmetic SHABBI BHUSAN SHAW U. BARI NABAIN SHAW.

of the arbitration. It is not on the facts really contestable that Nittzakumari Dassi and her infant sons did in fact continue to live together as members of one family as contemplated by the award, nor that the three elder sons became separate therefrom and from each other in fact as well as in law. Nittyakumari having recently died intestate, two questions now arise upon this position.

The first question is as to the nature during her lifetime of the right of her sons to take her share among them at her decease. It is contended by the eldest son that until her death there was no more than a mere spes successionis as regarde her share, that no son of bers in her lifetime had an interest in the reversion of her share but only a chance or pcs. sibility within the meaning of section 6, sub clause A, of the Transfer of Property Act. On this point, Counsel for the younger sons tendered an issue whether the share allotted to Srimati Nittyakumari Dassi by the award of the 12th August 1887 was held by her as a Hindu widow or as a Hindu mother, but as Counsel for all parties were agreed that it was held by her as a Hindu mother it became unnesessary to frame this issue. In my opinion neither epithet is precise, but there is no room for dispute as to how and why she obtained her share; and the effect of authority binding upon me is, that the share in question is an interest in lieu of the right to maintenance which upon partition amongst sons is carved out of the son's shares and at the death of the mother goes back to and becomes part of the shares out of which it came. I accept as the law upon this question the desision in Sorolah Dossee v. Bhoobun Mohau Neoghy (1), and I think it inconsistent with the contention that is now put forward on behalf of the eldest son.

The second question is, whether the infant sone remained united and undivided in spite of the partition suit brought by Gour in 1885. In a case which was one of partition by agreement without reference to any Court, the Privy Council in Balabux v. Rukhmabai (2) said: "There is no presumption when one co-pareener se-

(1) 15 C. 292, 7 Ind, Dec N. s.) 779.

parates from the others, that the latter remain united. In many cases it may be necessary, in order to accertain the share of the entgoing member, to fix the chares which the other co-parceners are or would be entitled to, and in this sense the separation of one may be said to be the of all. And their Lordships separation think that an agreement among the remaining members of a joint family to remain united or to re unite must be proved like any other fact." In the present ease the question is one of partition by authority. The mother and the infant sons wer) impleaded as defendants in a partition suit and when partition was sought against them the arbitrator purported to give effect to their desire, "that they will continue to live together joint in food and estate." He made no reference to worship ard nothing has been said about it to me either in evidence or in argument. Living together may certainly be consistent with severance of interest and a joint enjoyment of property may not mean a complete junction of estate, but in this care the evidence, in my opicion, thows an intention to remain joint. The defendants are resisting partition inter se; the Court refuses to thrust it upon them; and in the presence of the elder sons dcelares this position. The award states the full intent of jointness as theretofore and the conduct of the parties ie, in my judgment, consistent with that. It is true that the wording of parts of the award and also the wording of that part of the order confirming the award which appointed a Receiver of the shares of the infants ie, from this point of view, not absolutely accurate and precise. It does seem to me, however, that the part of the award which must be given effect to is that part in which the arbitrator expressly declares the intention which he has in making only partial partition and I find it very difficult to suppose that the phrase 'they will continue to live together joint in food and estate" could have been used save with the intention of stating that these parties were to remain undivided. I think, therefore, that that was the position ereated by the award which was confirmed, The elder sons by their Counsel object that the mere issue of a writ by one co-pareener elaiming partition effects a separation by

^{(2) 80} C. 725 (P. C.); 30 I. A. 130; 7 C. W. N. 612; 5 Bom L. R. 469; 8 Sar P. C. J. 470 (P. C.),

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itself and that a minor cannot make an agreement to re unite. This, if it ba sound, is a contention which carries with it very serious and far reaching consequences-consequences which I the find to be laid down as law in text books or decided eases. If the full logic of this contention be correct, then any single so pareener entitled to partition can always by issuing a writ compel the minor co-parceners into separation from others and all the other so. all the pareeners into separation from the minors. Farther, no adult so parsener in such eirenmetances can become divided even if he so desires save upon the terms bringing about such consequences between the minor and other parties, and the Court itself would have no way of preventing this.

Now, the obervation as to minors which was made in the Privy Council ease already sited is to be read in connestion with the assumptions of fact upon which it was made. These were that the minors' father had separated from brothers by agreement and died not long thereafter, whereupon his widow went to live with one of the brothers. This latter fact Was put forward as a basis for a case of union and it was with reference to that the observation that Was No made. ease, certainly no Bengal case, so far I can find, has pushed abstract logic to conclusions so wide and so cerions as I have indicated. The question here is, whether the infant sors remained undivided interse. What then is the position? As I understand it, any so parcener under the Bengal School has a right to partition. It is not necessary that there should be an agreement because it is a right capable of being exercised by any one of the parties who has the right to separate his share from the share of all the others; and in that sense the issue of a writ being an unequivocal deslaration of intention sarried out in conduct may be said to effect the partition by itself. But the elaim of one member to have a partition does not mean that the other copeseners are ipeo f cto divided as between themselves. On the centrary, the position of the minor in such cases is this; a partition is in general not in the interests of a minor;

when one co-parcener claims to separate, it is the duty of the guardian of the minor. who has not any right to object to such separation, to make as good and beneficial arrangement in the minor's interest as he possibly ean. If the arrangement be fair in method and result, the arrange. ment will bind the minor's estate. By arrangement the partition may be partial as regards the persons separating. Bycause the right of A to become separated from B and C is absolute, one would suppose prima facis as the mere converse of this, that if B and O being adults so desire they remain joint with each other, and if both are minors the Court in desresing partition may direct that they continue undivided inter st. If I am right in my sonstrus. tion of this award of the 12th August 13:7 and of the conduct of the parties thereafter, I see no reason to doubt that this matter having been submitted to arbitration, the question is a question not of agreement to re-unite on the supposition that all parties were divided, but of an arrangement made with proper sanstion under which separa. tion elaimed by the elder brother was partial as regards the persons interested in the family property. I think, therefore, that the infants remained in the position of undivided brothers and that the elder sons besame divided from the infants and in partioular from Rashbehary,

Apart from the transaction which is the main subject of contention and which took place in 1904, three things have happened sines the award of 1937 was emfirmed. First, Rashbahary, one of the five infant sons, died in that same year intestate leaving Nittyakumari, his mother, as his sole heiress for the estate of a Hindu mother. Secondly, Nangteswar, the third of the elder brothers, who had attained majority before the award of 1837 was confirmed, died before Nittyakumari, but after the transaction which I am about to consider. Thirdly, Nittyakumari herself died in 1919, I gather from the documents that Gour is also dead, but direct proof as to this is I think omitted from the evidence before

In 1899 Hari, the eldest of the five sona who in 1887 were infants, brought a partition suit in this Court (No. 85 of 1899)

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against his mother and his four younger brothers. By his plaint he alleged against his mother that part of the corpus of the collective share left undistributed by the award of 1887 had been improperly paid to Nangteswar, the third of the separated sone, by way of loan to him; but the eldest son, Sashi, plaintiff in the present suit, is not charged as implicated in any matter of complaint. All parties joined in a petition asking for payment to Hari and Ranco (now of age) their one-sixth shares in the money and securities and for a direction that the mother should pay to Hari onesixth of the net rents of the immoveable estate with certain adjustments. This was referred to the Registrar for enquiry and report as to whether an order as asked be for the benefit of the infants. Before the Registrar, the terms were modified and before the Court thereafter they were modified again. Kanai had by now attained majority leaving Panna as the only minor. The consent decree of 3rd January 1902 directed payment to Hari and Ranco of their one sixth shares of the money and securities and also that the immoveable properties should after the death of the mother be divided between the parties in equal shares. This decree has of itself no force or effect whatsoever as regards the elder brothers who were not parties. the 27th August 1903 a petition in the same suit was presented by the mother and Panna who by this time apparently had come of age. From this it appears that Hari, Ranco and also Kanai had each been paid his one sixth share of the money and securities. Panna now asks for payment of his share likewise and the mother asks for payment to her of the corpus of her two one-sixth shares in the money and securities, the one-sixth she got in 1887, and the onesixth she inherited as beiress of Rashbehary. In addition, the Court was asked to confirm the provision in the previous consent decree as to the immoveable property, namely, that on the mother's death divided between "the parties to this suit only" in equal shares. These orders were sought on the strength of the consent of all the sons: and Soshi, Gour and Nangteswar, the divided elder sone, signed their "sonsent to the prayer of the foregoing patition."

On the 28th August 1903 the Court ordered Panna's share in the immoveable estate to be paid to him, but refused to make any further order until further and better grounds were shown.

The mother returned to the charge on the 26th January 1904. By affidavit of that date she says that she wants the money in order that she may keep it till her death and make a Will providing for two young grand-daughters who are to live upon the interest, and as each dies, one half is to go back to the estate of Ganesh and become divisible among his This remarkable proposal beire. thought to be in some danger of meeting with criticism or possibly with incredulity on the part of the Court and in any event affected in no way the immoveable estate. The affidavit states, however, "I have received the consent of all my sons for the withdrawal of the said several monies and also for the purpose of the modification of the decree mentioned in the pstition herein and they, my said sons, are alone interested in the said money." bashi, Gour and Nangeteswar, describing themselves as parties to the suit to 1835, swear a joint affidavit on the 12th Janu. ary 1904 "that we have understood the contents and meaning of the foregoing affidavit of our mother and we consent to her obtaining the order she prays for should it please this Hon'ble Court to grant the same." The order prayed for is that asked for by the pravious petitions.

given have Panna Now, Hari and Hari in before me. evidence evidence says that after he had instituted his suit in 1899 he got information that Sashi and Gour had after his father's misappropriated certain stock in trade belonging to his father's wine. shops; that he had some evidence, or at least some witness upon this; that he threatened to have the partition of 1885 re-opened; that this was a real and bona file claim on his part and that after many family discussions, the abandonment thereof was part of the consideration verbally arranged for the agreement by Sashi and Gour to give up all claims to the mother's two sixths share after her death. Another part of the arrangement was that Hari

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would sink his slaim pleaded in his suit in respect of Nangteswar's improper borrowing from the undivided estates. Hari's evidence in ne way suffices to establish the truth of the allegations which he says he made. As to his having made them and as to the verbal discussions and alleged verbal agreement, Hari's evidence is sadly lacking in precision and the evidence of his younger brother is very faint corroborstion. I view the evidence of both with great suspicion not merely because of the way in which it was given but besaure of the difficulty in making real or probable to myself the story as it is told. The dates in this case are very important, and when I come to consider the documents in connection with the suit of which I have just been speaking, I find that in no single document was it ever put forward to the Court that there slaims were being compromised as part of the agreement in connection with the reversion to the immoveable estate. This part of the story is no more than verbal evidence verbal bargain many years ago that these brothers would release their claims to the mother's share after her death.

On the 14th April 1914 the Court made the order asked for, prefacing the same by a recital of the consent of Sashi, Gour and Nangteswar to the petition and of their subsequent affidavit repeating their consent. It ordered that the rights conferred by the someent deeree of 3rd January 1902 as to the division of the immoveable property after the mother's death "between the parties to this suit only in equal shares" do stand.

The question for decision is restricted to the share which the mother took in 1885 on the partition amongst her sons, As to that shere, is the consent order of 14th April 1914 valid and binding as against the elder brothers or their representatives in favour of the yourger brothers ?

I have to consider the matter in the light of section 17, sub section (1), clause (b) and of section 49 of the Indian Registra tion Act (XVI of 1:08). The first question must be whether the consent order ops. rates as an estrppel by record or res Special reliance is placed judicata. Counsel for the elder brother upon the decisions in this Court where parties to

a suit have compromised matters in issue in the guit together with other matters in difference between them. These authorities are said to show that even when both classes of matters are dealt with together as one compromise, so that the arrangement of the matters not in suit is part of the consideration for the arrangement of the matters that are in suit, and even when both classes are put before the Court to be dealt with by its order, the order when made is without jurisdiction and wholly ineffectual in so far as it deals with matters not comprised in the pleadings. There is a considerable body of judicial decision upon this branch of the law. Of eases technically binding upon me, there are two decisions of the Privy Council, but what is said on this matter is not in either case the actual basis of decision.

The two esses are Bindesri Naik v. Ganga Saran Sahu (3), Pranal Anni v Lakshmi Anni These eases, however, have been interpreted in this Court in the light of a somewhat strict construction of section 375 of the Ocde of 1882 and of Order XXIII, rule 3 of the present Code. In particular, there are two sases of great importance: Birbhadra Rath v. Kalpataru Pania (5) and Gurdeo Singh v. Ohandrikah Singh (6). Somewhat difficult to reconcile with these last two eases are the cases which say that any arrangement as part of the consideration for the agreement as to matters in suit can be validly recorded and decreed as relating to the suit whether they other. wise relate to the suit or not. For this proposition there is the decision in Gobinda Ohandra Pai v. Ewarka Nath Pal (7) and the eases there eited. Now, in my opinion, the part of the decree which purported to deal with the rights in the mother's shares after her death is not, upon any fair construction of section 375, matters which relate to the suit. The suit was a partition suit for the purpose of dividing

^{(8) 20} A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar, P. O. J. 278, 9 Ind Dec. (N. s.) 471 (2. O.).

^{(4) 22} M. 508 (P. C), 1 Bom L. R 394; 8 C. W. N. 485; 26 I. A. 101; 9 M. L. J. 147; 7 Sar. P. O. J. 516; Ind Dec. (N, 8) 863.

^{(5, 1} C. L. J. 388.

^{(6) 1} Ind. Cas. 913; 88 C. 193; 5 C. L. J. 311.

^{(7) 85} C. 887; 7 C. L. J. 492; 12 C. W. N. 849.

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up a given collective share left undivided by the award. That suit was brought in the mother's lifetime, and the ascertainment of what would be rights of the sons or other persons after the mother's death was no part of its scope. So much so is this true, that when it was thought desirable to bring that question into the case, the parties necessary for so doing were not before the Court. At a time when none of the elder sons had been made a party, what happened was that in dealing with the question of payment by the Receivers to the mother of the corpus of the moveable estate, this other matter was put in as an entirely foreign matter introduced not by the consent of the parties jointly but by the consent of persons not parties at all. Unless decisions which say that compromise decree is to be confined to so much as is necessary in order to dispose of the corclusions of the suit, are to be abrogated altogether, I cannot bring this part of the compromice decree within the scope of section 375. There is no question bere of the Court granting a form of relief which has not been asked in connection with the subject matter of the suit. I think this is a bad case of the abuse of an existing legal process for the furtherance of ends with which the suit as a suit was in no way ecreerned. In some of the decisione, section 575 has been applied by making a distinction between property in suit and property extraneous to the litigation, Where a suit is merely for the recovery of specific properties, that distinction will be adequate and will be equal to the distinction between matters which relate to tle suit and matters which do not. tome carer, however, suits are not for the recovery of property but to establish particular rights and I certainly prefer the opinion expressed in the sace reported 88 Gobinda Chandra Pal v. Dwarka Nath Pal (7) to the effect that the facts have to be locked at as a whole in order to decide whether matters have been introduced into the suit that do not relate to the suit. In the view that I take of this matter, it seems to me that the conclusion according to the cases is that this part of the decree was without jurisdiction and dces not operate as res judicuta. The next question ie, wietter the infant cope can

found upon the petition and affidavit, as being an agreement which operates in their favour, a release of the elder brothers' rights. According to the Calentta authorities, if such a petition and affidavit do purport to have that effect, they are not (?) valid as part of a judicial proceeding but invalid for lack of registration; it, therefore, seems to me that the position of the case becomes this. There is no evidence in the petition or in the affidavit of a family arrange. ment such as is spoken to by Hari; and his younger brother's evidence of that family arrangement is extremely weak, vague and unreliable. I do not hold and I do not think that the agreement pleaded was a sale or exchange within the meaning of the Transfer of Property Act. Assuming it to be open to me to give effect, in the circumstances, to a verbal agreement if I find it to be proved, I have no hesita. tion in saying that in a case where one brother alleges against another that by a verbal agreement his rights in reversion to a share have been released I should require much better proof than I have here. would only act secundum allegata et probata; the evidence and the pleading here are very discrepant. In my view, there is no reason for thinking that anything more tappened, according to the documents, than that the brothers gave their consent to get a decree which I now think to be an invalid decree. I find that the younger brothers fail altogether in so far as they go outside the documents and endeavour to prove to my satisfaction a family arrangement alleged in the written statements of Hari, Kanai and Ganesh.

It appears to me that, in these sireumstances, in spite of the decree in the suit
of 1289, the direct result upon the evidence
and upon the law is this, that so far as regards
one-sixth chere reserved to the mother by
the award of 1297, all the brothers out of
whose shares that share was carved out must
be allowed in this suit to make their
claim.

As a matter of fact, I think the contest has been occasioned by the acts to which the elder brothers were parties. I think they have done very well in getting out of the consent decree that they so carefully endeavoured to get into. I shall not interfere with the ordinary terms as to costs.

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I declare the shares as set forth on the piece of paper which I shall now sign for identification and I shall direct the Commissioner of Partition to take an enquiry and account against the defendant, Hari, as to the rents, profits or income of any part of the properties in the plaint mentioned which have some to his hands since the death of Srimati Nittyakun ari Dassi, as to what are the properties belonging to the undivided share referred to in the award and what now represents that collective share. Then, this division into shares will be of the estate as so ascertained.

I will give a direction to the Commissioner of Partition authorising bim in his discretion to earry out an immediate sale by public auction with liberty to the parties to bid at the sale.

N. H.

Order accordingly.

PATNA HIGH COURT.
MISCELLANBOUS APPEAL No. 226 of 1920.
March 24, 1922.

I resent: - Mr. Justice Das and Mr. Justice Ross.

INDER CHAND BOTHRA AND ANOTHER-

versus

SURENDRA NARAIN SINGH-JOIG.EST.
DEBIOR-RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 65-Tenure, transfer of-Transferee, whether personally liable for rent due prior to his transfer.

A transferce of a tenure is not personally liable for rent which accrued due prior to the transfer, [p. 714, col. 1.] Sreemutty Jogemaya Dassi v. Girindra Nath

Mukherjee, 4 C. W. N. 590, referred to.

Appeal against an order of the District. Judge, Purneab, dated the 6th Ostober 1920.

Mesere. Manut, 8 P. Sen and Chindred Sekhar Baner ee, for the Appellants.

Mesers. P. K. Sen. O. M. Agarwala and Bail untha Nath Mitter, for the Respondent.

JUDGMENT.

Das, J .- All the material fasts giving rice to this appeal are stated with precision in the judgment of the learned Subordinate Judge; and, when these fasts are properly understood, the point which we have to decide in this appeal arises free from all complications. The point is this, whether the appellant, who in 1-96 obtained a desree for rent against one Chatrapat Singh in respect of a paini metal known as lot Sabebgunj, situate within the ambit of the appellante' Zemindari, known as Pargana Havelie, is entitled to execute the deeree against the respondent, who in September 1902 purchased the right, title and interest of Chatrapat Singh in the patni metal notwithstanding the fact that prior to the institution of the proceedings which have given rise to this appeal, the paini mehal passed from the hand of the respondent into the hand of one Forbes. The learned Subordinate Judge has found against the appel. lants on the main question that was argued before him. In my opinion, the decision of the learned Subordinate Judge is right and ought to be affirmed.

Dhanpat Singh was the Zamindar of Pargara Havelie. As I have said before, Chatrapat Singh was the patnidar of lot Sahebgung, situate within Pargana Havelie. Mr. Fortes held a darpatni interest under Chatrapat Singh. Dhanpat Singh died on the 21st July 1593, and the appellants are the trustees of his estate under a deed of trust executed by Dhanpat prior to his death.

On the 27th June 1893 Dhanpat Singh sold Pargaus Havelie to Musammat Bhagwanbati. On the 21st September 1893 he instituted a suit against Chatrapat for recovery of rent that accrued due to him prior to the 27th June 1893. On the 10th July 1896, the Calcutta High Court passed a decree in favour of Dhanpat as against Chatrapat. In 19.0 Chatrapat failed to pay the painirent to the new landlord, Musammat Bhagwanbati; the lady took proceedings under the Paini Regulation, whereupon Mr. Forbes, for the protection of his darpaini interest deposited the rent in full and took possession

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of the pathi mehal under section 13 (4) of the Paini Regulation. In September 1902, the respondent purebased the pathi mehal in execution of a money decree against Chatrapat and became liable by such purchase to make good to Mr. Forbes the money deposited by him in the proceedings instituted by Musammat Bhagwanbati against Chatrapat. The position in September 1902 was, therefore, this: there was a decree for rent against Chatrapat Singl; but the patni mehal in respect of which the rent decree had been obtained was then the property of the respondent, though Mr. Forbes, the darpatridar, was actually in possession of the paini mehal under section 13 (4) of the Patni Regulation. It is obvious that both Mr. Forbes and the respondent were interested in resisting the execution proceedings which had been started by the appellants against Chatrapat Singh in 1897 and they resisted the excention proceedings on the ground that the decree that had been obtained by Dhappat against Chatrapat was a money. decree and not a rent decree. It will be necessary now to trace the history of the execution proceedings but, before doing sc, I should mention that Mr. Forbes irs'ituted a spit as against the respondent for recovery of the money which had been deposited by him in the proceedings taken by Musammat Bhagwanbati, under the Regulation, against Chatrapat, and that on the 15th May 1916, he got a decree as against the respondent for Rs. 57,166, the decree providing that, if the respondent failed to pay the decretal amount to Mr. Forbes, the patni itself should be sold. The respondent failed to satisfy Mr. forbes' deeree, and as a result of his failure, the paini was put up for sale on the 3rd July 1917 and was purchased by Mr. Forbes for Rs. 2,000. It is necessary to remember that the respondent was at no time in possession of the prini, and that the title to the pathi which had accrued to the respondent in September 1902 by virtue of his purchase in execution of a money decree against Chatrapat, passed away from him on the 3rd July 1917.

I now some to the execution proceedings, and it will appear that the question whether the decree that had been obtained by Dhangat against Chatrapat was a rent decree or a money decree was early raised and was long debated. The point arose on the admitted

fact that Dhanpat brought his suit for arrears of rent against Chatrapat after be had parted with all his interest in the Zemindari in favour of Musammat Bhag. wanbati; and, as will presently be seen, it was contended, first, on behalf of Chatrapat, then on behalf of respondent, and lastly on behalf of Forbee, that the right to proceed for sale under section 65, Bengal Tenancy Act, was dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law was sought to be enforced, and that as the appellants were not the landlords at the time they started the execution proceedings they were not entitled to execute the decree as a rent-decree. In 1897, the appellants started execution proceedings against Uhat. rapat, and the objection put forward on behalf of Chatrapat to the execution of the decree as a rent decree was rejected by the Courts in India. The execution proecedings, however, for some reason which bas not been made clear to us, failed to produce any result, and in 1964, the appellants presented another application for execution. The respondent, who was now the painidar, objected that the decree was a money decree and not a rent-decree, and that the patni was not liable to be sold in execution of that decree. A similar objection was put forward on behalf of Mr. Forbes, who also insisted that having deposited the amount of the arrears under section 13 of the Regulation in the proceeding commenced by Musammat Bhagwanbati against Chatrapat, he had a first charge on the point for the sum so deposited by him. The objections were disallowed by the Courts in India, In 1905 the respondent instituted a suit for a declaration that Dhanpat's decree against Chatrapat was a money decree and that the pathi could not be sold in execution of that deeree. The Courts in India decided against the contention of the respondent, the date of the decision of the High Court being the 8th April 1908. The respondent then applied for, and obtained, leave to appeal to His Majesty in Council, but that appeal subsequently failed for non-prosecution. Forbes also instituted a similar suit, and though the Courts in India decided against him, he carried his appeal to the Judicial Committee where his contention prevailed.

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By its decision, which was pronounced on the 4th March 1914 and which is reported in Arthur Henry Forbes v. Maharas Bahailur Singh (1), the Judicial Committee held that the right to bring the tenora to sale under section 65, Bengal Tenancy Act, exists only so long as the relationship of landlord and tenant existe, and appertains exclusively to the landlord, and that a person, to whom rents are due and who obtains a decree to them after he has parted with the property on which the tenancy is situate has no such right. The position then is this: as between the appellants and Mr. Forbes, the decree must be regarded as money deeree and not as a rent decree; but as between the appellants and the respondent the decree must be re-

regarded as a rent-decree. It is not necessary to follow the fortunes of the different execution proceedings that were from time to time commenced by the appellants. I come to the application of the 22nd January 1915 when the appellants applied to have the decree treated as a money decree and the respondent added as a judgment debtor. It will be remembered that the position then was that the respondent was the patnidar and Mr. Forbes was the darpainidar in actual possession of the patni mehal. On the 19th March 1915, the appellants presented another application to the Execution Court. They stated in their petition that the Judicial Committee has held that the decree obtained by them against Ohatrapat was a money-decree. They submited that it was not possible to resover the amount of the decree without proceeding against the properties other than that in respect of which the decree had been obtained and they applied for attachment and sale of sertain properties belonging to Chatrapat. This application was presented on the 19th March 1915; but it will be remembered that they had already, on the 22nd January 1915. applied to have the respondent added as a judgment debtor in the execution proceeding. On the 27th March 1915, the respondent objected to being added as a judgment debtor. He contended that, as he was neither the judgment debtor nor the legal representative of Chatrapat, the decree-holders could not proceed against the patni metal in his hands. (1) 28 Ind. Cas 682, 18 O. W. N. 747: (19 4) M. W. N. 897; 15 M. L. T. 880; 12 A. L. J. 658; 27 M. L. J. 4; 41 0, 926; 1 L. W. 1059; 41 L. A. 91; 25 0. L. J. 484 (P. C.),

Before this application was heard and disposed of, the patni metal passed into the hands of Mr. Forbes. The decree holders abandoned their application of the 19th March 1915, and on the 23rd November 1918 they presented an application for attachment and sale of certain properties belonging to the respondent. It is this application which has given

rise to this appeal,

Mr. Manck on behalf of the deeree holders. appellants contends that the decree obtained by Dhanpat Singh against Chatrapat Singh must be regarded as a rent decree so fer as the respondent is ecneerned, and that it was open to him to proceed against the paini mehal in the hands of the respondent. I have no doubt whatever that, had the appellants proceeded against the respondent at any time between September 1502 and July 1917, during which period the title to the prini mehal was in the respondent, there sould be no answer to the elaim of the deeree holders. It having been held in proceedings between the appellants and the respondent that the decree obtained by Dhanpat was a rent decree, the appellants had a charge on the tenure so long as the tenure was in the hands of the respondent, and it was plainly impossible for the respondent to resist the claim of the appellants. But the tenure has now passed from the hands of the respondent to the hands of Mr. Forbes. Mr. Manuk contends that if the respondent allowed the tenure to go into the hands of a third party, he must be personally liable for the decree In my opinion, there is neither principle nor authority for this contention. It was, in my opinion, open to the decree holders to proceed against the tenure in the bands of Mr. Forbes. It was argued by Mr. Manuk that he could not take this course having regard to the decision of the Judicial Committee in the suit between the appellants and Mr. Forbes that the deares was a money-decree. That may be so; but Mr. Forbes, as the purchaser of the paini mehal from the respondent, was in an entire. ly different position, As the representative in interest of the respondent, Mr. Forbes would be bound by the decision in the suit as between the appellants and the respondent. By that decision the decree was held to be a rent decree and as involuntary alienations stand on the same footing as voluntary alienations, the appellants

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could, in my opinion, follow the patni mehal in the hands of whomscever it might be under a title derived from the respondent.

Mr. Manuk next contends that the respondent must be regarded as the representative in interest of Chatrapat Singh and is, therefore, personally liable to satisfy the decree obtained against Chatrapat Singh. In my opinion, there is no warrant for the proposition. The deeree was not obtained against the respondent. It may be that, as the result of the litigation between the appellants and the respondent, it must now be held that, so long as the putni mehal was in the hands of the respondent, there was a charge upon the paini mehal for the decretal claim of the appellants against Chatrapat Singh. But it has been held that a transferee of a tenure is not personally liable for sent which accrued due prior to the trans. fer. See Sreemutty Jegemaya Dassi v. Girindra Noth Mukherjee (2). The recent desision of the Judicial Committee in the case of Nanku Pra. and Singh v. Kamta Prasad Singh (unreported) pronounced on the 19th January supports this contention. That was a case in which it was sought to make the purchasers of mortgaged properties personally liable for the mortgage debt. The Judieial Committee in a very short judgment said as follows : -

"Their Lordships have considered this case, and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption, who, their Lordships understand, are defend ants Nos. 2 to 11, of whom only five are respondents here. Their Lordships, therefore, think that the decree of the High Court was right and that the point made by the

appellant faile."

The position occupied by the respondent is in no way different from the position which a purchaser of the equity of redemption occupies. The utmost that can be said in favour of the appellants is, that they had a charge upon the tenure in the hands of the respondent. The respondent was the purchaser of the tenure which was already subject to a charge in favour of the appellants. He is in the same position as the purchaser of an equity of redemption, and, in my opinion, no personal liability was incurred by him by such purchase.

In my opinion, the desision of the learne Sabordinate Judge is right and must be affirmed. I would dismiss this appeal with costs.

Rose, J .- I agree.

J P.

Appeal dismissed.

SEC IND CIVIL APPEAL No. 967 OF 1920.
March 3, 1922

Present: - Mr. Justice Stuart.
SARABJIT MAL-PLAINT PR - APPEL'ANT

RAM KHELAWAN MAL AND OTHERS-

Res judicata—Decree of Revenue Court—Agra Tenancy Act (II of 1901), ss 59, 189—Ejectment suit — Question of proprietary title referred to Civil Court —Question already determined by Revenue Court— Jurisdiction of Civil Court.

The decision of a Revenue Court does not operate as res judicata in a civil suit unless the case comes within the purview of sections 199 to 201 of the

Agra Tenancy Act. [p. 715, col. 1.]

Therefore, in matters outside the purview of those sections, when a decree of a Revenue Court is pleaded as bar to a civil suit, there is no question of res judicata, but simply whether the point before the Civil Court has been decided by a Rent Court under its exclusive jurisdiction in such a manner as prevents the Civil Court having jurisdiction to decide it and if it is not so decided it is not open to a Civil Court to refuse to determine the point. [p. 715, col. 2.]

The defendant sued plaintiff for declaration that he was the proprietor of the plot in question and that the latter was his tenant. The plaintiff asserted his own proprietary title. The suit was decreed. Subsequently the defendant sued to eject the plaintiff. The plaintiff again asserted proprietary title, and was referred to a Civil Court under section 199 of the Agia Tenancy Act. He brought this suit accordingly but the Civil Court considering it barred under the provisions of section 11 of the Civil Procedure Code refused to entertain it:

Held, that the issue as to the question of proprietary title was not res judicata, and that it was not open to the Civil Court to refuse to determine it. [p. 715, col. 2.]

Second appeal against a decree of the Officiating District Judge, Azamgarh, dated the 20th April 1920.

Mr. Haribans Sahai, for the Appellant.

Mesers. Jang Bahadur Lil and S. P. Sinha,
for the Respondents.

ants and others are recorded so sharers in Taloga Sultanpur in the Azımgarh District.

Plot No. 1871/2 is occupied and cultivated by the plaintiffs, Parmeshar Mal, father

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of the present defendant, Ram Khelawau Mal, instituted a suit against the plaintiffs in 1915 asserting that he was one of the proprietors in the plot in question and that Sarabjit Mal, one of the plaintiffs, was a tenant. Sarabjit Mal in that suit asserted proprietary title. The suit was decreed against him for six annas, arrears of rent, The suit was in the Court of an Assistant Collector of the Second Class. In 1917 the defendant, Ram Khelawan Mal, appears to have obtained an ex parts deerse for rent in respect of the same plot in the Court of an Assistant Collector of the Second Class against the plaintiffs. In 1919 the defendant then saed to eject the plaintiffs from this plot under sestion 53 of the Tenancy Ast. The plaintiffs asserting their proprietary title, the Assistant Collector of the First Class who was trying the suit referred them to a Civil Court under the provisions of section 199 of the Tenancy Act. They instituted a suit within three months assording to that order. The Civil Courts have refused to adjudicate upon their title, holding that the suit is barred under section 11 of the Code of Civil Prosedure on the principle of res judicata. They appeal here.

No question of res judicata properly arises. In such esses the qrestion is not whether the suit is barred on the principles of res judicata, for a Revenue Court decision cannot operate as res judicata in a Civil Court unless the case comes within the purview of sections 199 to 201 of the Tenancy Act, but whether the point before the Civil Court has been decided by a Rent Court under its exclosive jurisdiction in such a manner as prevents the Civil Court having jurisdiction to decide it. The ratto decidendi is given in Ram Sing's v. Girraj Singh (1).

Now, it is clear enough that as against the actual defendants and as between parties the relationship of landlord and tenant in respect of this plot was beld to exist in so far as the Courts of the Assistant Collectors of the Second Class are concerned. The 1915 and 1917 desisions sertainly of the Assistant Collectors of the Second

operated as res judicata binding the Coorts Class in suits for arrears of rent until the matter was decided by a higher Court, but

when the matter of the plaintiff's ejectment under section 58 of the Tenancy Act same before an Assistant Collector of the First Class he was in no way bound by the deeisions of the Assistant Collector of the Second Class to find that the relationship of landlord and tenant existed between the parties, and it was open to him either to determine himself when the plaintiffs set up proprietary right, that the relationship of landlord and tenant did or did not exist, or to refer the plaintiffs under section 19 of the Tenancy Act to the Civil Court for a desision as to whether they had proprietary right in plot No. 187 /2. He took the latter course. It is not open to the Civil Courts to refuse to determine the point. The point as far as they are conserned is not determined by res judicata and the point under the Tenancy Act itself is within their jurisdiction. I, therefore, set aside the desisions of both the Courts below and send the case back to be restored to its original number and determined on its merits by the Mansif of Mahammadabad Gobna, Azımgarh District. Costs here and hereafter will follow the result.

M. H. Care returned.

CALCUTTA HIGH COURT. APPEAL PROM ONIGINAL ORDER NO. 5 (F 1921 IN INSOLVE: CI SUIT No. 18 CF 1923. March 17, 1921.

Fresent :- Sir Lancelot Sanderson, Kr. Ohief Justice, and Mr. Justice R'shardson. Re ALBERT FELIX SELDANA, INSOLVENT. Ex parte RAI SUKHLAL KARNANI

BAHADUR-APPELLANT

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THE OFFICIAL ASSIGNEE OF CALCUTTA-RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 86 (1)-Application for examination of witness-Procedure-Person oggrieved, remedy of.

Applications under section 36 (1) of the Presidency Towns Insolvency Act for the examination of persons thereunder are intended to be made ex parte under the rules of the Calcutta High Court, and rule 30 of those rules is applicable to such applications, and not rules 17 and 18. [p. 718, col. 1.]

Where any person is aggrieved by an exparte order for the examination of a witness by the Registrar in Insolvency, and there are grounds which justify an application to the Court, the proper course

^{(1) 26} Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252.

SURBLAL KARNANI D. OFFICIAL ASSIGNEE OF CALCUTTA.

is to move the Court to set aside such order. [p. 719, col. 1.]

Appeal from the judgment of Mr. Justice Greaves, dated the 7th January 1921.

Mesers. F. R. Das, S. W. Bannergee and J. Langford James, for the Appellant.

Mr. A. A. Atetoon, for the Respondent.
JUDGMENT.

Sandreson C. J.—This is an appeal from the judgment of my learned brother, Mr. Justice Greaves, whereby he refused an application made on behalf of one Rai Sukhlal Karnani Bahadur in the insolvency of one Albert Felix Seldana.

The application consisted of a prayer (1) for an order that the order of the 29th of November 1920, should be set aside, (2) alternatively, for an order that the proceedings thereunder should be set aside, (3) alternatively, for directions as to the scope of the enquiry before the Registrar.

The matter arcse in this way: Seldana was adjudicated an insolvent on the 2nd of July 1920, and, on the 8th August 1920, a complaint against Seldana was filed by the Munitions Board, charging him with certain offences under certain sections of the Indian Penal Code which may be shortly described as cheating, conspiracy to cheat and forgery. On the 26th of August 1920, a complaint was made against Sukhlal Karnani, the appellant in this appeal, charging him with conspiracy to cheat, The Official Assignee made an application: before the Registrar in insolvency, in respeet of which an order was made on the 29th of November 1920. In that application, after stating that Seldana had been adjudicated insolvent on the 2nd of July 1920, the Official Assignee went on to allege that Sukhlal Karnani was capable of giving information regarding the dealings and properties of the above named insolvent, and the Official Assignee applied that Karnani should be summoned and examined by the Court on a day and hour to be fixed there. for and to produce all books, papers, correspondence, accounts relative to trans. actions had between him and the insolvent in connection with their partnership and dealings with the Munitions Board from the 16th of March 1918. That application was made ex parte, and the order of the 29th of November was to this effect, viz.,

that "Sukhlal Karnani being served with a sealed sopy of the order should, on Wed. nesday, the 8th of December, at the hour of 11 o'elock in the forencon, attend before the Registrar to be examined regarding the dealings and properties of the insolvent and that he should bring with him and produce at the time and place aforesaid all books, papers, correspondence, and accounts relating to transactions had between him and the said insolvent in connection with their partnership and dealings with the Manitions Board from the 16th of March 1918." On the 15th and 17th of December 1920 Karnani appeared before the Registrar in insolvency and was examined by learned Counsel on behalf of the Official Assignes. was alleged by the learned Counsel appearing on behalf of the appellant that, although the learned Counsel nominally appeared for the Official Assignee, he was really instructed by the insolvent Seldana, who was represented by the Attorney who was appearing for the Official Assignee: and, it was alleged, that the real object of the examination of Karpani was to obtain information which might be useful to the prosecution instituted by the Munitions Board. Karnani was represented by learned Counsel who took objections to certain questions, and it is stated that the Official Assignee had alleged that the object of the examination was to ascertain whether or not Karrani was indebted to Seldana in a sum of Rs. 2,64,000. A petition was then presented by Karnani to the learned Judge, on the 4th of January 1921, applying for the reliefs to which I have already referred.

The main ground of the argument in this appeal was, that the further examination of Karnani ought to be stayed until after the criminal prosecution has been finished, for, it was alleged that, although the answers which might be given by Karnani in his examination might not be used against him, still it might be that those who were conducting the prosecution might obtain information from the answers which might be useful in the criminal proceedings.

The learned Judge stated in his judgment three grounds on which the matter was argued before him: SURBLAL KERNANI U. OFFICIAL ABSIGNEE OF CALCUTTA.

First, it was said that under the Incolvancy Rules of this Court such an application must be verified by affiliavit and that the verification was insufficient as it only related to the information and belief of the Offisial

Assignee.

Secondly, it was said that the application was insufficient, in that it only referred to information regarding the dealings and properties of the insolvent, that it contained no reference to any indebtedness of Sukhlal Karnani to the insolvent and that being so the insolvent had wrongly been questioned with regard to his indebtedness, especially having regard to the terms of an agreement between the insolvent and Sukhlal Karpani dated the 22nd of August 1918; and lastly. it was said that with regard to the Police Court proceedings pending against the insolvent and against Karnani the examination was being used for an improper purpose and, amongst other thinge, to displace clause 7 of the said agreement. The learned Judge deelined to accept any of those argumente, and said that there was ample material before him to show that Sukhlal Karnani was in a rosition to give some information with regard to the dealings and property. He made an order that the examination should proceed. Then he added as follows: "This being se, I think it is difficult to say that questions were incompetent with regard to any question of the indebtedness of Sukhlal to Seldana, if they arose in the course of the examination, although I think that if it had been desired to establish this, the application should have so specifically stated but I am not prepared to interfere under the eirsumstances on the ground that such questions have been put. Then, lastly, with regard to the alleged improper purpose of the examination, it seems to me that it is for the witness to object to such questions as he considers are put for an improper purpose and, if necessary, I think he would be justified on the advice of Counsel in refusing to answer such questions even if directed to do so. Under these circumstances, it would be for the Registrar in Insolveney, if he thought the refusal was ill-founded, to report to the Court the refusal, in order that the Court might consider the nature of the question and of the objection and I think that if this course is followed

the witness will be amply protected with regard to the putting of any question which may be improper; and I only desire to add that I think the Official Assignee in future, when he makes similar applications, should place the Court in possession of further materials for considering if any application under section 36 is well-founded or not."

The first two grounds which are referred to in the learned Judge's judgment were not seriously argued in this Court. new point was taken, namely, that the order of the Registrar was made without jurisdiction, or, at any rate, that it ought not to have

been made ex parte.

The learned Counsel who appeared for the Official Assignee assured us that it is the practice of this Court that such applications as this by the Official Assignee are always made ex parte before the Registrar; and that practice was not disputed by the learned Counsel who appeared for the appellant. But the learned Counsel for the appellant urged that the practice was wrong and was not justified by the rules of this Court. Since the argument, of this ease the officer of the Court has drawn my attention to a ease, Kissory Mohan Roy Shaha, In re (1), in which the very point was decided by my learned brother, Mr. Justice Greaves. Neither of the learned Counsel drew our attention to it. It is a decision directly in point and authorizes the practice to which I have referred. The learned Judge based his judgment upon the grounds which were suggested by my learned brother, Justice Richardson, during the course of the argument, and I assume that since this judgment, which was in 1916, the practies has never been questioned until the hearing of this appeal. The application was made under section 26 (1) of the Presidency Towns Insolvency Act, which runs as follows: "The Court may, on the application of the Official Assignee or of any ereditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belong. ing to the insolvent,....or any person whom the Court may deem capable of giving information respecting the incolvent, his dealings or

^{(1) 33} Ind. Cas. 999; 29 O. W. N. 1155; 44 O. 286.

BURHLAL KARNANI C. OFF. CIAL ASSIGNER OF CALCUTTA.

property; and the Court may require any such person to produce any documents in bis enstody or power relating to the insolvent, his dealings or property." There is nothing in the section which goes to show that notice of the application has to ba served upon the person who it is desired should be examined. But it is said that the Insolverog Rules of this Court make it obligatory that notice of the application should be given; and reliance was placed upon rules 17 and 18 of the Insolvency Rules of 1914. Those rules are to be found in the portion of the rules which deals with "Motions and Practice," and there is another rule, No. 30, (which is under the heading "Discovery of Dobtor's Property") which is elearly applicable to an application under scotion 36, and it is as follows: "Every application to the Court under section 36 of the Act shall be in writing and shall state shortly the grounds upon which the application is made". It appeared to us in the course of the argument that that rule showed that it was not intended that rules 17 and 18 should apply to an application under section 36 by the Official Assignee for an order that a person should be examined. I now refer to the case which was decided in 1916 by my learned brother Mr. Justice Greaves; The head note is, "Applications under section 36 (1) of the Presidency Towns Inscluency Act for examination of persons thereunder are intended to be made ex parts under the rules framed by the Oaleutta High Court under section 112 of the Act. To such applications rule 30 applies and not rules 17, 18 and 19, and this view is supported by the English Bankruptey Act (1914), 4 and 5 George V, Ch. 59 and the rules thereunder". The portion of the learned Judge's judgment which I desire to read is this: After referring to the section (36) and rules 17 and 18, he goes on to say, 'If these rules govern applications under restion 36 of the Act, then the ex parte order was clearly wrong unless the Registrar thought that any delay would entail serious mischief. But I was referred to another rule by Counsel who opposed the application, that is to say, to rule 30 which is as follows:" (then he reads the rule). 'This rule to my mind elearly sontemplates a procedure other than that laid down under rules 18 and 19 and it

contains no provision for service of the application upon the person sought to be examined such as is contained in rule 19. Under these circumstances, the inference to my mind is irresistible, that applications under section 35 are intended to be made exparts and that this is the manner presented by the rules framed under section 112 of the Act." Speaking for myself, I entirely agree with the learned Judge. I only regret that the learned Counsel did not draw our attention to that case, which would have eaved considerable argument and time of the Court.

Consequently, the first point which was relied upon, namely, that this order should not have been made expirte, is without any foundation.

The other ground, namely, that the examination has been used for an improper purpose, in my judgment, equally fails. I am not satisfied that this examination was used for any ulterior purpose. The learned Counsel for the appellant did not draw our attention to any passages in the evidence or any questions which were put during the examination to justify this allegation. the other hand, the learned Counsel for the Official Assignee drew our attention to some of the questions and some of the answers which were given by the witness, and such answers led me to think that they were by no means satisfastory and that the attitude of the witness was obstructive. Farther, this was a matter for the discretion of the learned Judge, and I am not prepared to interfere with that discretion, especially having regard to the fact that in the order which I have read, in my julgment, the learned Judge has provided a safeguard which will protect the witness from improper questions being put to him during the course of his examination.

For these reasons in my judgment the

appeal fails.

There is one other matter to which I must refer. The learned Counsel for the Official Assignee took the point that the application before Mr. Justice Greaves was in fact an appeal from the order of the Registrar in Insolvency, and if it were an appeal he argued that it was out of time.

In my judgment this was not an appeal, it was, as I have already said, a petition to set aside the order of the Registrar in

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Insolvency, and it then proceeded to ask in the alternative for a stay of the examination of the appellant or for direction; as to the scope of the examination and, in my judg. ment, in a case of this kind where an ex parte order is made for the examination of a witness by the Registrar in Insolvensy, if there are any grounds justifying an application to the Court, the proper source is to move the Court to set aside the order which has been made by the Registrar in Insolvency and that is what was done in this case. In my judgment it was not an appeal, and, consequently there is nothing in the point, which the learned Counsel for the Official Assignee raised with regard to the so called appeal being out of time.

The learned Conneel for the Official Assignee raised a further point that there was no appeal to this Court from the judgment of my learned brother, Mr. Justice Greaves. Having regard to the fast that I have come to the conclusion that this appeal should be dismissed, it is really not necessary to decide that point but, as at present advised, I am inclined to the opinion that the order of Mr. Justice Greaves was an appealable order, because it involved not only a decision that there should be no stay of the examination but also a refueal of the application of the appellant that the order of the 29th November 1920 should be set aside.

For the foregoing reasons, the appeal is dismissed with costs.

RICHARDSON, J .- I agree. The preliminary question whether this appeal is somps. tent involves two points. The first is, whether the application to Mr. Justice Greaves to set aside the order made under sestion 36 to examine the appellant was an appeal under clause (2) of sestion 8 or an applies. tion under elause (1). If it was an appeal it was out of time under esstion 101 and the appeal before as ought to be dismissed in limins on that ground. But I think it should be regarded, for reasons which have just been stated by my Lord, as an application under the first clause for the review of an ex parts order. The second point is, whether the order of Mr. Justice Greaves from which this appeal has been taken, is a "judgment" within the meaning of clause 15 of the Letters Patent. I should be disposed to say, if it were necessary to deside this question, which it is not, that the order is a "julg.

ment," because it assumes, if it does not decide, that the Register had jurisdiction to make the order, and because, at any rate, it decides that on the merite the appellant had shown no cause sufficient to justify the order being set aside, that is to say, it rejects the claim made on the appellant's behalf that no order for his examination should ever have been made and that the whole proceedings should be quashed.

The next question relates to the jurisdiction of the Registrar. I agree that the Registrar had power under section 6 (d) and (e) to deal with an application made exparts on behalf of the Official Assignes that the appellant should be examined under section 36, and, further, that under section 35 and rule 30 of the Rales of the High Court, the Registrar had also power to make the order for the appellants' examination exparts, without notice to the appellant. On this part of the case I have nothing to add to what my Lord has said.

Listly, on the merits, I can see no reason why we should disturb the order made by Mr. Jastise Grazves. The appellant is entitled to the protection afforded by section 132 of the Evidence Act. Mr. Justice Greaves had been eareful to couple his order with a safeguard against improper questions being put to the appellant. appellant undoubtedly comes within description of a person capable of giving information regarding the insolvent, his dealings, or property. In the interest of the general body of the creditors the Official Assignee is entitled to have him examined and I feel confident in my own mind that if the appellant is au honest man be will lose nothing by being frank. I hesitate to suggest any other hypothesis, but, if any other hypothesis be suggested, I can see no reason why we should go further than Mr. Justice Greaves has already done to relieve the appellant from the situation in which he finds himself,

For these reasons, I agree with my Lord that this appeal should be dismissed.

W. C. A.

Appeal dismissed,

TIBATHMAL LOKOOMAL D. THAWARSING,

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 35 OF 1918. November 8, 1921.

Present: - Mr. Kennedy, J. C., and Mr. Kemp, A. J. C.

TIRATHMAL LOKOOMAL-

versus

THAWARSING AND OTHERS -

Will, interpretation of -"Malik" and "varis," meanings of - Intention of testator.

The words "malik" and "varis" connote absolute

ownership. [p. 720, col. 2.]

Where the word "malik" is used and where there is nothing in the text or circumstances of the Will which indicate an intention on the part of the testator to cut down the absolute estate clearly or unmistakeably then the absolute estate should be taken to have been bequeathed. [p. 720, col. 2.]

Appeal from a decree of the District

Judge, Sukkur.

Mr. Tahilram Maniram, for the Appellant. Mr. Isardas Udharam, for the Respond.

ent.

JUDGMENT.—In this case one Chellaram died leaving a widow called Premibai and a daughter named Devibai. During the lifetime of Chellaram, Devibai had become a widow of one Lokcomal and had one son. Subsequent to the death of Chellaram but before the death of Premibai, Devibai died having re married and given birth to three sone, the father being one Jassomal. This is a suit by one of the sone of Devibai by Jassomal against Tirathmal, a son of Devibai by Lokcomal and the other sone of Jassomal (formal defendants) to partition certain family property.

This property was originally the property of Chellaram, Lut the distribution of it does not depend upon the ordinary law of succession, but has to be settled according to the provisions of two Wills. Premibai by her Will, excented on the 5th April 1909, left half the property to Tirathmal and the remaining half to the three sons of Jassomal. But it is necessary to refer to the Will of Chellaram from which Premibai purports to derive her interest in the estate which she bequeathed to the parties to the present litigation. That Will is da'ed 1853 and seems to have been executed about seventeen years before the death of Chellaraw, at a time, as I have said, when Devibai was still

the widow of Lokoomal, and had only this son Tirathmal, and had not contracted a marriage with Jassomal and it would appear that no such marriage with Jassomal was at that time contemplated. The question, of course, is what interest did Premibai take under the Will of Chellaram, because the Will of Premibai purports to dispose off properties which she took under that Will as if the were the complete owner. On the side of Tirathmal it is set up that all she took by reason of the Will of Chellaram was a life. interest and that the Will by implication gave to Tirithmal the reversion after the death of Premibai, which he, in any case, would have had, had there been no Will and had his mother remained unmarried at the death of Devibai as they stood at the time of the Will of Chellarum. On the other hand, it was set up that the Will of Chellaram gave complete ownership to Premibai without reserving any interest to Tirathmal and that the interests of the parties are dependent on the Will of Premibai.

Both the Courts below have interpreted this Will in a sense which gives complete ownership to Premibai and we concur with them in this. The words used by the testator are such as in the ordinary interpretation convey the meaning of complete ownership. He used the expression 'malik' and "varis." He did not use the words usual enjoyment or management." But the words which he does use, tit, 'malik' and connote absolute ownership. such eases it has been held, vide ease quoted in Motilal Mithalal v. Advocate General of Bomb y (1), where the word "malik" is used and where there was nothing in the text or eirenmstances of the Will which indicated an intention on the part of the testator to ent down the absolute estate clearly or upmistakeably that the absolute estate should be taken to have been bequeathed. In the present case there is no clause which clearly or unmistakeably cuts down the estate. There is estainly a negative clause in which the testator cays that during the lifetime of his wife, Tiriathmal should not have any interest but it does not seem correst to deduse from that, that his intentions were that if Tirithmal survived Pramibai he should have the absolute estate. He probably meant to emphasise (1) 1! Ind, Cas. 547; 35 B. 279; 13 Bom L R. 471.

CHANDAR SEEHAB C. AMIR BEGAM,

his desire to prevent any interference in the property by Tirithmal, during the lifetime of Premibai, and reading the clause which follows that statement it seems to us that that really was the intention of the testator.

It is not proper for us to make a Will for the testator and we may have to interpret the Will as it stands, in the light of the eireumstanses, but in any ease there does not appear to be any strong reason for thinking that the testator probably meant to give the wife a life-interest merely and his grandson a reversionary estate because in that case there does not seem any necessity for him to make any Will at all, Moreover, the Will was made in 1883 and this widow was then 40 and Tira hmal was then quite a young shild and we do not think it is at all unlikely that a Hindu having a family of that sort to deal with (a middle-aged wife, a young widow daughter and a shildish grandson) would leave the ultimate destination of his property in the hands of his wife to dispose of essording to the cirsum. stances which might exist after she had stopped needing it. We think, therefore, that the interpretation put on this dosament by the lower Court is erreet and wi dismiss this appeal with easts.

J. P.

Appeal dismissel.

ALLAHABAD HIGH COURT,
PRIVE COURCIL APPRAL No. 40 of 1921.

March 30, 1922.

Present:—Sir Grimwood Mears, Kr.,
Chief Justice, and Justice
Sir P. C. Banerji, Kr.

CHANDAR SEKHAR AND OTHER!—
DEPENDANTS—APPRILANTS

Musammat AMIR BEGAM AND OTHERS:

—PLAINTINGS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), s. 110—

Pring: Council Appeal—Decree partly in favour and partly against—Portion against in confirmance of lower Court's decree—Right to appeal.

In the case of an application for leave to appeal to His Majesty in Council where a portion of the decree is in favour of the applicant and the other portion, which is adverse to him and against which he seeks to appeal, is in confirmance of the decree of the Court of first instance, he is not, as a matter of right, entitled to prefer the appeal.

Application for leave to Appeal to His

Majesty in Conneil.

Mr. N. P. Asthana, for the Appellants. Mr. S. A. Haidar, for the Respondents.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council on the ground that this Court did not affirm the decision of the Court below, and as the value of the subject matter exceeded Rs. 10,000 the applicants were entitled as of right under section 110 of the Code of Civil Procedure to appeal to His

Majesty in Counsil.

The suit was one to enforce a mortgage the amount elaimed far Rs. 10,000. The present applicants for leave to appeal were some of the defendants to the suit, they being the grandsons of the mortgagor. In the Court below it was contended that the property comprised in the mortgage was ancestral property, that the debt was not incurred for family neeessity, and that, therefore, the portion of the debt which was not for family necessity could not be recovered from the ansestral property. There were other pleas also, anch as a depial of the fact of the mortgage, and also as to other portions of the mortgaged property being or not being The Court of first ansestral property. instance found in favour of the plaintiffs and held that the whole of the mortgage debt had been incurred for family necessity and desreed the claim in full. The defendants, the present applicants, appealed to this Court and this Court held that a portion of the properly comprised in the mortgage was ancestral property and that two of the items which formed the consideration mortgage for the BIBW not which for the family property BAW legally liable. 'As to these two items, the total amount of which was over Rs. 13,000 interest. including this High held that the present applicants and the ancestral property were not liable. So that, as regards this portion of the claim, the decree of this Court was in favour of the applicants, and as regards the remainder

BETTAPFA CHETTI U. METTAPPAN SERVAI.

of the elaim it was a deeree in affirmance of the decision of the lower Court. The applicants defendants, now seek to appeal to His Majesty in Council against that portion of the decree which is adverse to them, that is to say, in regard to that portion of the decree of this Court which affirmed the decision and the decree of the Court of first instance. We are of opinion that they are not entitled to appeal to His Majesty in Council as regards this part of the claim and to re open that part of the ease which was decided adversely to them by the lower Court as well as by this Court. As observed by the Calcutta High Court in the case of Roja S-es Noth Roy v. Secretary of State for India in Council (1), the Court has to look to the substance of the matter. It is true that this Court varied the decision of the Court below but that modification was in favour of the present applicants and did not afford them a right to appeal because the decision was in their favour. As regards the portion of the claim which was decided against them there was in substance an adverse consurrent decision of both the Courts, the decision of this Coart being a concurrent decision with that of the Court of first instance and in affirmance of that decision. In this view, the present application cannot be granted. No question of law is involved in the ease.

A similar view was held by this Court in Kamal Nath v. Bithal Das (2).

We accordingly reject the application with costs including fees on the higher scale.

J. P.

Application rejected.

(1) 8 O. W. N. 294.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 314 OF 1920.

April 15, 1921.

Present:—Mr. Justice Oldfield and

Mr. Justice Ramesam.

N. K. M. MEYYAPPA CHETTI

—RESPONDEET No. 2—APPELLANT

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V. E. MEYYAPPAN SERVAI—PETITICNER —RESPONDENT.

Transfer pendente lite - Decree, ejectment against transferor-Transfer pursuant to prior agreement, validity of-Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 97—Decree in ejectment-Resistance to possession by purchaser pendente lite-Order of removal-Appeal-Limitation-Act (IX of 1908), Sch. I, Art 167, application of-Application against second obstruction

A transfer pendente lite, even though made in pursuance of a registered agreement to sell executed prior to suit, is inoperative against the holder of a decree in ejectment, where there is nothing to show that the seller had, at the date of the agreement, any better title to the property than at the time

of the suit. [p. 724, col. z.]

Savithri Ammal v. Ramasami, 8 M. L. J. 266, Rebala Venkata Reddi v. Mangadu Yellappa Chetty, 38 Ind. Cas. 107; 5 L. W. 234; Madan Mohan De Sarkar v Rebati Mohan Poddar, 34 Ind. Cas. 953; 23 C. L. J. 115; 21 C. W. N. 158, Chamiyappa Tharakan v. Rama Iyer, 62 Ind Cas. 11; 44 M 232; 40 M. L. J. 65; (1921) M. W. N. 53 and Kuppana Kaundan v. Kumara Kavundan, 7 Ind. Cas. 418; 34 M. 45C; 8 M. L. T. 240; (1910) M. W. N. 574; 20 M. L. J. 961, distinguished.

Orders of removal of obstruction are appealable if passed under Order XXI, rule 98, Civil Procedure Code, against the judgment-debtor or an obstructor at his instigation. The latter description does not necessarily apply to a person who merely relies on a title derived from the judgment-debtor. Such a person can prefer an appeal only if he is authorised to do so under section 47 of the Code, i. e., if he can show that he was a party, or the representative of a party, to the decree, [p. 723, cols. 1 & 2.]

A decree-holder in ejectment was resisted in getting possession of the property in execution by a person who had purchased the property in suit pendente lite. On an application under Order XXI, rule 97, the obstruction was ordered to be removed.

The purchaser appealed:

Held, (by Cldfield, J., Ramesam, J., centra) that as the seller had no title to the property, his transferee could not be considered to be a representative of a party to the suit to enable him to prefer the appeal under section 47 of the Civil Irocedure Code. [p. 725, cols. 1 & 2.]

Order XXI, rule 97 is permissive and merely affords a summary procedure which an obstructed person has the option to use or forego. Failure to avail of it does not deprive a person entitled to possession of any further right to obtain it in execution. [p. 725, col 1.]

An application for removal of a second obstruction thoughmade more than 80 days after an acquioscence in an earlier one, is not barred by Article 167 of the

^{(2) 64} Ind. Cas. 916, 2) A. L. J. 3.

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Limitation Act as the obstruction referred to in the third column of the Article refers to that mentioned in the complaint and not to the one previous to it. [p. 725, cols. 1 & 2.]

Ramasekara Pillai v. Dharmaraya Goundan, 5 M.

113; 2 Ind. Dec. (N. e.) 79, followed.

Appeal against an order of the Court of the Subordinate Judge, Sivaganga, dated the 16th November 1920, in Execution Application No. 462 of 1919, in Execution Petition Revieion No. 555 of 1919 (Original Suit No. 2 of 1908 on the file of the Court of the Temporary Subordinate Judge, Madura). Mr. K. V. Krishnaswamy Iyer, for the Appellant.

Messrs. T. Narasimha Iyengar and K. V.

Ra agopalan, for Respondent No. 1.

This appeal coming on for hearing on the 30th and 31st of March 1921 and having been posted to be spoken to on the 5th and 7th of April 1921 and the case having stood over for consideration till this day the Court delivered the following

JUDGMENT.

Outrieur, J.—The order under appeal was passed on an application under Order XXI, rale 97, Uivil Procedure Code, by respondent, assignee of a decree in a suit in ejectment, for removal of the obstruction to delivery in execution, raised by appellant, second respondent in the lower Court, and his son, third respondent, now deceased, whom he rapresents. Appellant claimed the property in virtue of a purchase, valid, as he contends, against respondent, nothwithstanding that it was pendente life. We have to decide whether an appeal lies against the lower Court's order removing his obstruction and, if so, whether that order was right on the merits.

Orders of removal are appealable, if passed under Order XXI, rule 98, against the judgment debtor or an obstructor at his instigation. But the latter description does not necessarily apply to a person, who, like appellant, merely relies on a title derived from the debtor. Such a person will, if his good faith is established, be maintained in possession under rule 99 unless, with reference to rule 102, the transfer to him was after the institution of the suit in which the decree was passed. Rule 103 deals with the further remedy open to the unsuccessful party by suit or appeal, but not exhaustive. ly. For it has been held in Meyvappa Obetty

v. Chidambara Chetty (1) and Veyindramuthu Pillai v. Maya Nadan (2) that this rule does not exclude an appeal, if one is authorised by section 47. These decisions were no doubt given in cases of delivery to the purchaser in execution, not to the holder of a degree in ejectment like respondent; and in the second, the obstructor relied on a purchase at Court-sale, in execution of a different decree, not, as here, on a private conveyance. But, although these facts may be material in connection with the merits of the appellant's claim, they justify no distinction against the application of these authorities; and in fact in the penultimate paragraph of my judgment in Veyindramuthu Pillai v. Maya Nalan (3), when it was before a Fall Bench, the positions of a decree-holder purchaser in execution of another decree and of a stranger purchaser, whether in execution or private sale, were expressly treated as the same.

But, whilst these authorities justify an obstructor pleading a conveyance from the judgment-debtor in proseeding after an order removing his obstruction by appeal under section 47 and not by suit, that only means that in order to have his appeal beard on its merits and to have an adjudication on his paramount right to possession against the purchaser he must first eatisfy the Appellate Court that he is a party or the representative of a party to the decres; and not the less so, because in many cases, of which this is one, that adjudication and the decision whether he is entitled to proceed under sestion 47 will rest on the same In the present esse it no foundation. doubt appears that appellant was for a short time on the record of the suit in which the decree was passed as 105th defendant. But he was impleaded without notice and his name was removed without his participating in the proceedings. His ease, therefore, resembles Gudicherla Ohina v. Gadicherla Seetayy 1(4) not Ramas vani Sastrulu v. Kameswaramma (5) and we must, therefore,

(4) 21 M. 45, 7 Ind Doc. (N. s.) 883.

^{(1) 61} Ind. Cas. 849; 39 M. L. J. 603; 12 |L. W. 278; (1920) M. W. N. 562

^{(2) 58} Ind. Cas. 501; 43 M. 696; (1920) M. W. N. 299; 89 M. L. J. 456; 28 M. L. T. 812.

^{(3 · 54} Ind. Cas. 20); 43 M. 107; (1919) M. W. N. 881; 26 M. L. T. 891; 88 M. L. J. 88;

^{(5) 23} M. 861; 10 M. L. J. 186; 8 Ind. Dec. (N. s.)

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decide whether he is a proper party to proeeedings under section 7 in the other charas. ter on which he relies as the representative of a party to the decree. That is, whether his conveyance of the suit property is for the present purpose valid. His connection with the property is alleged as originating in Exhibit I, a sale by 5Cth defendant on 4th September 1901 to the sons of Nainar Mahomed, of whom one is 71st defendant, and Exhibit II, a sale by them to him on 3rd Ostober 1901. These sales were, it is not disputed, pendente lite, the plaint in respondent's suit having been presented on 2nd August 1901 and registered on 3rd September 1901, the day before the former document. The lower Court has, however, found, and these findings are not disputed, that 50th defendant had already on 2nd December 1896 given Nainar Mobamed. who died before the suit, a registered agreement to sell, Exhibit 111, although possession did not pass to the latter or sons, but only later to appellant. bis The contention is that appellant's title relates back to the date of Exhibit III and is, therefore, unaffected by the dostrine of lis pendens.

This has been supported only by reference to cases, in which an agreement to sell or mortgage made before attachment, but merged later in an actual transfer, was held enforceable against the subsequent purchaser at Court-sale, Savithri Ammal v. Ramasimi (6), Bazineedu v. Venkayya (7), Rebala Venkata Reddi v. Mangadu Yellappa Chetty (8) and Madan Mohan De Sarkar v. Rebiti Mohan Poddar (9), the two last mentioned being referred to with approval by Seshagiri Aiyar, J. in Chamiyappa Tharakan v. Rama Iyer (10). These decisions, it should be observed, were given in suits and accordingly were also referred to as direct authorities against the admissibility of this appeal and as, so far, inconsistent with Kuppana Kaun. dan v. Kumara Kavundan (11) on which

(6) 8 M. L. J. 266. (7) 7 Ind. Cas. 795; 21 M. L. J. 82; 8 M. L. T. 197;

(1910) M. W. N. 440. (8) 38 Ind. Cas. 107; 5 L. W. 234.

(9) 34 Ind as. 953; 23 C. L. J. 115; 21 C. W. N.

163. (10) 62 Ind. Cas. 121; 44 M. 232; 40 M. L. J. 65;

(1921) M. W. N. 53. (11) 7 Ind. Cas. 4!8; 34 M. 450; 8 M. L. T. 240;

(1910) M. W. N. 574; 20 M. L. J. 661.

appellant originally relied in that connce. Bat it is a sufficient answer to this that there was no question, except in Bapineedu v. Ventayya (7) of any order in claim or obstruction proceedings; and in it the order on the plaintiff's claim was passed before he had completed his title by taking a ecnyeyance. To return, however, to the main argument, it derives no assistance from these cases. For, if they were in point, their tenor, and in particular the reference in Ecbala Venkata Reddi v. Mangadu Yellappa Ohetty (8) to section 40 of the Transfer of Property Act, suggest that the enforcement of prior agreements to purchase is contemplated only against subsequent purchasers, who have notice of them; and appellant, who in fact did not refer to Exhibit IV in his counterpetition at all, has not proved that respondent or his assignor had notice of it either during the suit or before the latter's pur- base. And next, a fundamental ground of distinction, there is no analogy in this respect between deliveries after attachment and Court-sale and those made under an ejestment decree. For in the former the original title of the judgment debtor is common ground for all concerned and, in the words used in Rebala Venkata Reddi v. Mangadu Yellappa Chetty (8), the decreeholder can be regarded as selling the property subject to an obligation attached to its ownership, whereas in the latter that ownership is ordinarily, as it is here, precisely the matter in dispute and has been negatived by the deeres under execution. No suggestion has been made that the title of 50th defendant as against respondent was any better at the date of Exhibit III than it was when the suit began or the subsequent conveyances were giver; and further 71st defendant, one of appellant's transferors and a party throughout to the suit, failed equally with 50th defendant to establish his claim. To allow the validity of that claim to be agitated by appellant in the present proceedings would involve not only an infringement of the dostrine of lie pendens, but the authorisation of an attack in execution on the correstness of the decree, to which principle are opposed; and it is end convenience spits of its being inmaterial that, in pandente lite, appellant's conveyance may, as my learned brother points out, have

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some legal consequences against 50th defendant, when it has none against respondent, who alone is engaged in this dispute.

This entails that appellant's conveyance must for the present purpose be regarded as invalid against respondent and, therefore. that the former bas not established his right either to retain possession on the merits or, as the representative of a party, to appeal under section 47. The two remaining points raised may, therefore, be dealt with shortly. The first is that the respondent is now debarred from applying for removal of appellant's obstruction, because the decreeholder did not apply under Order XXI, rule 97, when he was obstructed in a previous attempt to obtain delivery on 23rd March 1919, This is argued alternatively on the grounds that an application for removal of a second obstruction made, as this is, more than thirly days after acquiessence in a previous one is barred by Article 167, Schedale I of the Limitation Act, and that such acquiescence deprives the person entitled to possession of any farther right to obtain it in execution and, therefore, of the right to removal of obstruction to his doing so. As regards limitation, the obstruction referred to in the third solumn of the Article must, as this Court held in Rama. sekara Pillai v. Dharmaraya Goundan (12), be that referred to as somplained of in the first and it would not be in accordance with fast or the ordinary use of words to treat the two obstructions which are in question, as continuous and to refuse to distinguish between them. As regards the more general contention it is material that the Code nowhere supports it explicitly and that Order XXI, rule 97 is worded as merely permissive and as affording a summary procedure, which the obstructed person has an option to use or forego. That is one ground taken in the judgment in Muttia v. Appasami (13) and is the basis of the exhaustive discussion of the matter in Raghunandan Protad Misra v. Ramcharan Manda (14). Respondent would distinguish the former case on the ground that the parties concerned were the decree-holder

purebaser and judgment debtor, relying on Vinayakrar Amrit v. Devrao Givind (15) and the judgment of Aikman, J., in Kesri Naruin v. Abul Hasan (16). But, whatever the signifisance of this distinction might be, if the question were still of the right of appeal against an actual order under rule 98 or rale 99, the facts in the first of these desisions and the reasoning in both are too obscure to support it for the present purpose; and in the second, Knox, J., held that the principle contained in the roling in Muttia v. Appasami (13) governed the ease. That principle, which was applied by the Patna High Court between the judgmentdebtor and a stranger purchaser. enunciated by it and in Multia v. Appasami (13) generally and as founded on the comprehensive language of rule 97 and the corresponding language of the earlier Code; and the references in the later decisions to the position of those concerned can be justified on the ground that the argument before the Court was conserned mainly with the question whether, with reference to the then section 244, an appeal would lie. In these circumstances, this objection must be disallowed.

Lastly, appellant demurs to the lower Court's refusal to award him compensation for the building, which he has erected on the property during his possession. That can be shortly dealt with. No such claim is countenanced by the decree; and the question, whether it is sustainable and against whom, respondent, who is alleged to have acquiesced in the expenditure, or the 50th or 71st defendant, who gave appellant a bad title, would (even if the present proceedings could be regarded as under section 47) not be one arising in execution which could be dealt with in them. The appeal fails and is dismised with costs.

Rawssam, J.—The facts are fully stated in the judgment of my learned brother and need not be repeated.

The first question that arises is, whether the order of the Court below was passed under section 47 and is, therefore, appealable. Whether the purchase by the appellant is affected by the rule of lis pendent or not it is certainly not void. A transfer pendentalite is inoperative only to affect the opposite

^{(12) 5} M. 113; 2 Ind. Dec. (N. s.) 79. (18) 13 M. 504; 4 Ind. Dec. (N. s.) 1063. (14) 49 Ind. Cas. 150; 4 P. L. J. 94; (1919) Pat. 81 (F. B.);

^{(15) 11} B. 473; d Ind. Dec. (N. s.) 311.

^{(16) 26} A. 365; 1 A. L. J. 86; A. W. N. (1904) 46,

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party's rights under the decree; it is certainly operative to transfer such rights of the vendor as may exist in the light of the findings in the suit. It is an assident that it was found that the vendor had no title in this ease. It is also operative to enable the transferee to maintain a suit for damages for breach of covenant for title. In this case it also operated to pass the vendor's possession to the transferee. In my opinion there is a valid contract of sale, as between the appellant and his vendor and whatever its effect may be on the respondent's rights, the appellant is the representative of the 50th defend. ant. The order of the Court below is a deeree and can be questioned only by way of appeal.

Coming to the merits, I agree with my learned brother in holding that the purchase by the appellant is inoperative against the respondent by reason of the rule of lis pendens and cannot be relied on for the purpose of resisting delivery to the respondent or for claiming compensation. As to the cases relied on by the appellant, Savithri Ammal v. Ramasami (6), Bapineedu v. Venkayya (7) and Madan Mohan De Sarkar v. Rebati Mohan Poddar (9), I do not think they are relevant as there is no more than an apparent analogy between the question arising in these eases, vie, the validity of the purchase of property attached in execution of a decree after the attachment and that of a purchase pendente lite of property the subject of the suit. It may be that where A agreed to sell property to B, and O then purchased it with notice of the agreement, B has an equitable interest in the property [Thiruvenkata Chariar v. Seshadri Iyengar (17) distinguisbing Kurri Veerareddi v. Kurri Bapireddi (18) vide also section 91 of the Trusts Act and the definition of "Trustee" in restion 3 of the Specific Relief Act and illustration (j)]. But where we have merely an agreement by A to B and no more, B has no interest in the land [Kurri Veerareddi v. Kurri Bapireddi (18), Ramanathan Chetty v. Ranganathan Chetty (19), Maung Shue Goh v.

(17) 34 Ind. Cas. 488; 30 M. L. J. £59; 3 L. W. 457; 19 M. L. T. 389.

(18) 29 M. 336: 16 M. L. J. 495; 1 M. L. T. 153 (F.B.), (19) 43 Ind. Cas: 138; 40 M. 1134; 6 L. W. 200; 22 M, L T. 173; 83 M. L. J. 252; (1917, M. W. N. 757.

Maung Inn (20)]. The passage at page 277 of Bennett on Lis Pendens relied on for the appellant is perhaps based on the fact that in England and America B would be regarded as an equitable owner of the property [See Rebala Venkata Reddi v. Mangadu Yellappa Ohetty (8) and Maung Shue Goh v. Maung Inn (23).] To allow the appellant's contention is to allow the rights of the respondent under the deeree to be affected-the very result sought to be avoided by section 52 of the Transfer of Property Act. The appeal, there. fore, fails on the merits.

The only other question in the case is the question of limitation. As to this, I have nothing to add to the reasons in my learned brother's judgment. It follows that we do not agree with the remark in Ramasekara Pillai v. Dharmaraya Goundan (12) that a Court ought not to issue a second warrant for delivery of possession.

In the result the appeal is dismissed with costs.

M. C. P.

N. H.

Appeal dismissed,

(20) 38 Ind. Cas; 938; 44 C. 542 at p. 552; 21 M. L. T 18; 15 A. L. J. 82; (19 7) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C. '.

BOMBAY HIGH COURT, ORIGINAL CIVIL JURISDICTION SUIT No. 537 or 1921. June 30, 1921.

Present: - Mr. Justice Kanga, FAZAL D. ALLANA-PLAINTIFF

versus

MANGALDAS M. PAKVASA-

DEFENDANT.

Contract for sale of shares-Share certificates-Moveable property-Contract obtained by fraud or cheating, effect of-Certified brokers of Native Stock and Share Brokers' Association - Del credere agents-Transfer forms, blank, delivered to brokers-Transferee for value without notice.

Share certificates are moveable property and are therefore, "goods" within the meaning of section 103 of the Contract Act. [p. 731, col. 2.]

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If a contract is obtained by fraud or cheating, it is voidable at the instance of the party defrauded or cheated, but if the performance of the contract is obtained by fraud or cheating, the contract cannot be avoided, [p. 734, col. 1.]

Where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer, and if the buyer sells and delivers the goods to a bona fide purchaser for valuable consideration without notice, such a purchaser gets a good title to the goods and the seller cannot recover the goods from such a purchaser. The seller has his remedies against the buyer under the contract and can sue him for the price of the goods. [p. 734, col. 2]

An agent by express contract with his principal or by the usages and rules of the particular place, market or business in which he is employed, may become personally liable to the principal. [p 736, col. 1.]

Certified brokers of the Bombay Native Share and Stock Brokers' Association are del credere agents of their constituents. They are in a fiduciary relationship to their constituents. Their duties are strictly to adhere to the position of agents, to act diligently for their principals, and to make enforceable bargains for them and keep those bargains open. [p. 738, col. 1.]

Where an owner of shares either signs the transfer forms and delivers the same with the certificates to a broker or where, never having had possession of the blank transfer forms and share certificates but knowing them to be in such condition that a broker could deal with them, he allows them to remain in the broker's possession and thereby enables the broker to part with them to another who takes them upon the faith of the apparent authority of the broker to deal with them, then the true owner is estopped from questioning the title of the person taking upon the faith of the apparent authority of the broker to deal with them. [p.741, col 2]

Mr. Vakil (with him Sir Thomas Strangman), Advocate General and Mr. Incerarity. for the Plaintiffs.

Mr. Taraporecalla, for the Defendant.

JUDGMENT—The plaintiff is a partner in the firm of Allans, Sons & Co. Up to 19th January 1921 Ebrahim Fezzl, Bogs, and Anvery were earrying on business in partnership in the old Bombay Share Market as Share and Stock Brokers. Ebrahim Fezzl was a member of the Native Stock and Share Brokers' Association and the eard issued by the said Association stood in the name of Ebrahim Fezzl. In October 1920 the plaintiff employed

the said firm of brokers, whom I shall 'the brokers' to hereafter refer to as for his firm of transact share business The plaintiff in Allana, Dossa & Co. Ostober 1920 through the brokers bought twenty-five Central India Mills shares for October 1:20 settlement at Bs. 4,800 per share and sold twenty five Central India Mills shares for Moorat (November) settle. ment at Rs. 4,860 per share according to the rules and regulations of the Native Stock and Share Brokers' Association for his firm of Allane, Dossa & Co. The twenty. five shares bought for Ostober settlement were for the sake of convenience transferred to the plaintiff's name in the books of the Central India Mills Co., and the firm of Allana, Dosea & Co., paid to the brokers Rs. 1, 20,000, being the price of the said shares.

At the time of the November settle. ment, plaintiff delivered five out of the said twenty-five shares and received from the brokers payment of the price at which the said five shares were sold. At the same time, the plaintiff through the brokers earried over the remaining twenty shares to the next settlement, i, c., he bought twenty shares for the Moorat (November) settlement at Bs. 4,600 and sold the same number of shares for Desember 1920 settlement at Ra, 4,646 according to the rules and regulations of the Share Stock Brokers' Association bca Erhibit H).

In the month of December 1920, the plaintiff through the brokers budlied nine-teen shares of the Central India Mills, t. e, he bought nineteen shares for December 1920 settlement and sold the same number of shares for January 1921 settlement according to the rules and regulations of the Native Stock and Share Brokers' Association.

As there was no further budley business done in respect of the said nineteen
shares the plaintiff had to deliver the
same at the time of the January settlement. Seventeenth of January 1921 was fixed
by the Native Share and Stock Brokers'
Association as the payment day (i. c., the
day for the payment of money in respect of

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shares delivered in the merket) and 20th January as the valan day, i. e., (the day for the payment of differences in respect of transactions of January settlement).

of transactions of January settlement). Defendant No. 1. in the middle of Deeember 1920, employed V.C. Sbrcff, a certified broker, of the Native Share and Stock Brokers' Association, as his broker to buy for him one Central India Mills share, for Jarnery 1921 delivery. Shroff bought one share for and on account of the defendant from Shiv Narian Nemani, certified brokers at Rs. 4,215 for January 1921 delivery. Defendant No. 1 told Shroff in December 1920 that he would take delivery of the one share bought by him. According to the rules and custom of the said Association, Shroff, who had to take delivery of one share on the January settle. ment, issued on or about 6th January 1921 a kapli (Exhibit No. 4) and sent the same to Chimanlal Hiralal with whom an outstanding contract for one be had Central India Mills chare. That kapli was eirenlated amongst the certified brokers between whom contracts in respect of one Central India Mills share were outstanding, and ultimately that kaple came into the hands of Ebrahim Fazal (the brokers), brokers retained the kapli because they deliver ene bad Central India Mills share and informed Shroff on cr before the 11th January that they had retained the kapli. The brokers, before January, gave the transfer forms for the said nineteen shares sold by the plaintiff for January settlement to Esmail, a cousin of the plaintiff, for the plaintiff's signature in performance of the plaintiff's transaction of December 1929, Esmail handed over the said transfer forms to the plaintiff for his signature. On the 9th January 1921 (Sunday), the plaintiff signed the said transfer forms and gave the same to Esmail for being handed over to the brokers and left for Pcona. On 10th January Esmail delivered the said transfer forms signed by the plaintiff to J. J. Trivedi, an employee of the brokers. According to the rules and peages of the said Assceiation, the brokers delivered the transfer form for one share duly signed by the plaintiff to Shroff on the 11th January Shroff sent the said transfer form 1921. defendant No. 1 for his signature.

Defendrat No. 1 signed the transfer forms and returned the same to Shroff.

According to the rules and usages of the Association the brokers had to deliver the share certificate or certificate in respect of the one share to Shroff on 17th January 1921 and Shroff had to pay the price of the same to the brokers on the same day, an bour or two after the share certificates were delivered to him. The brokers who have to deliver shares in the market on the payment day, according to the usages of the market, receive the share certificate from their constituent before the payment day and make payments to their constituents on the payment day or a day thereafter. So, on 15th January 1921, Anveri saw the plaintiff's cousin, Esmail, and demanded from him the share certificates.

According to the evidence of Esmail be asked for moneys when Anveri demanded from him share certificates. Account of the price was then made up. The price of nineteen shares at the rate of Re, 4,600 per share was Rs. 87,400. The firm of Allane, Dossa & Co., had given a lean to the brokers of Rs. 4,000. Balance due in respect of that lcan was Rs. 2,775 and interest on Re. 2,775 amounted to Rs. 85.60. The total amount was Re. 21,134 6.0. Anveri gave a post-dated cheque (Exhibit B) for Rs, 91,134 6 0 tut Esmail refused to take it. Thereupon, Anveri told Esmail that he had no money then in the Bank but he would get moneys on the 18th or 19th January from the purchasers of pineteen shares and would pay the moneys into his current account with the Bank and the cheques would be honoured on the 20th January. Esmail further says that, relying on the said representations of Anveri, he gave to Apperi the share certificates. Esmail forgot to calculate in the account that was made up interest on the niceteen shares for one month from November 1920 to December 1920 which interest amounted to Rs. 874. So on the same day he, through his servant, demanded Rs. 874 from the brokers and the brokers on the same day sent to him another chaque for Rs 874 post-dated the 20th January 1921 (Exhibit C).

On the 16th January, the plaintiff returned to Bembay from Poona and his cousin Esmail showed to him the said post-dated sheque

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and informed him of what had happened on the 15th January.

On the 17th January, at about 12 o'clock, the brokers delivered share certificates in respect of two half shares of the Central India Mills to Shroff, who compared the transfer forms and the share certificates and found them in order and at 5-30 P.M. on the same day made payments to the brokers in respect of the said half shares. He had at that time the moneys of the defendant in his bands. He had sold five Indore Malwa and five Currimbhoy Mill shares of defendant No. 1 in the market, and, according to his evidence, had received the sale proceeds of these shares before be paid the brokers. The brokers absconded on the 19th January without paying the moneys in respect of the said nineteen shares to the plaintiff. The plaintiff presented the chaques to the Central Bank on 20th January and 21st January, but the same were dishonoured. Plaintiff gave a public notice in the Times of India of the 21st January to the effect that the brokers had fraudulently received nineteen shares from the plaintiff and had absconded and that no one should deal with the said nineteen shares,

On the 19th or 20th January 192', defendant No. I sent the transfer form and two half shares to Shroff, asking him to get the same transferred to the name of defendant No. I in the Company's books. Shroff lodged the transfer form and two half shares with the Company on 20th January and the Company gave him a temporary receipt (Exhibit No. 10).

On 20th January 1921, the plaintiff wrote a letter to the Central India Spinning and Weaving Co. asking the Company not to transfer the shares standing in the name of the plaintiff to the name of any person. The Company, by their letter dated 22nd January 1921, etated that the transfer deeds in respect of thirteen shares standing in the plaintiff's name had been properly executed and called upon the plaintiff to obtain an injunction restraining the Company from transferring the shares. On the 25th January the plaintiff wrote to the first defendant asking him to return the two half shares, Nos. 12234 A and 1272 A, which the first defendant had lodged with the Company for getting the same transferred to his name.

The plaintiff in February 1921 filed this suit against defendant No. 1 and against the

Central India Spinning and Weaving Co., defendant No. 2, praying that it might be declared that he was entitled to the said two-half shares and that the first defendant might be ordered to deliver to him the share certificates and the transfer forms in respect of the said half shares.

1921, the plaintiff On 3rd February obtained an interim injunction and by a consent order, dated 24th February 1921, the said interim injunction was dissolved on defendant No. 1 undertaking to pay the value of the shares mentioned in the plaint as of 26th January 1921 in the event of a decreebeing passed against him. The said consent order was without prejudice to the rights and contentions of the parties. Subsequently, the shares were transferred to the name of the first defendant in the books of the Company. By the said consent order it was agreed that the suit was to be decided as if the shares had not been transferred to the first defendant's rame. The plaintiff also filed similar suits against the purchasers of the remaining eighteen shares, consent orders were passed in the said suits also on the application of the plaintiff for an injunction against the purchasers of shares and the Company. Six suits filed by the plaintiff were tried by me. The parties to this suit and to the other five suits tried by me are agreed that evidence given in all the six suits filed by the plaintiff should be treated as evidence given in each of the six suits. In the plaint as originally drafted plaintiff's ease was that in Desember 1920 he agreed to sell nineteen shares for eash payment in January 1921 through Ebra. him Fazal, Boga and Anveri and that, according to the usage of the Bombay market, the brokers were liable to the plaintiff for the performance of the said contract. On 15th January 1921 Esmail handed over share certificates for nineteen shares to Anveri on the representation of Anveri that on 17th or 18th of January, the blokers would reseive moneys from the purchaser and that the moneys would be paid into the brokers' surrent assount with the Bank and the post-dated cheques which Anveri gave to Esmail would be honoured, When Anveri made the said representations. the brokers had no intention to make avail. able at the Bank sufficient moneys to meet the cheques and the share certificates and FAZAL D. ALLANA C. MANGALDAS M. PAKYASA.

transfer forms were obtained from Esmail by means of an offence and fraud and the plaintiffs were entitled to the two half shares.

After the issues were raised Counsel for the plaintiff applied for amendment of the plaint and the same was granted.

The plaintiff's ease as amended is as follows:—

The plaintiff dealt with the brokers as principal with principals and not as principal with agents, that the contracts of the plaintiff with the brokers in October. November and Desember 1920 were voidable on the ground that the brokers had at the time of the said contracts formed the fraudulent intent of not paying for the said shares and had no intent of performing their promise to pay each for the said shares and that the original contracts entered into in October 1920 and the subsequent contracts in November and December 1920 were each of them voidable by the plaintiff. In the month of January the brokers had the said fraudulent intention and they had no intent of performing their promise that the cheques given by them would be eashed on presentation and that the contract then made was also voidable by the plaintiff, and further, that plaintiff was also entitled to avoid the contract under section 39 of the Indian Contract Act even if the contract or contracts to sell were not voidable ab initio. The brokers were the purchasers of the shares from the plaintiff and the brokers dealt with the purchasers in the market (the brokers of defendant No. 1 in this suit and defendants in other suits) as principals with principals and that the brokers' title being bad, they could not give to the purchaser, defendant No. 1, a better title to the shares than they them. selves had (section 108, Indian Contract Act) and that none of the Exceptions to section 108 of the Indian Contract Act applied, and so the plaintiff was entitled to the half shares in this suit and to the shares in the other suits filed by him.

It was contended on behalf of defendant No. I that the plaintiff dealt with the brokers as principal with agents and not as principal with principals, and that the plaintiff did not sell the shares to the brokers but sold the same in the market through the brokers and the brokers gave

the share certificates in the market in performance of the contract which the brokers had entered into for and on behalf of the plaintiff, and that the plaintiff being the seller of shares the plaintiff's title to the shares was transmitted to the first defendant. It was further contended that even if the plaintiff dealt with the brokers as principal with principals and the shares were purchased by the brokers from the plaintiff, the brokers were in possession of the shares under a valid contract with the plaintiff and the properly in the shares passed to the brokers and the brokers could give a good title to the shares to defendant No. 1 who was a bona file purchaser for value without notice of the two half shares of the Central India Spinning and Weaving Company.

It was also contended on behalf of defendant No. I that the plaintiff having delivered transfer forms duly signed by him and the share certificates to the brokers who handed over the same to the broker of the first defendant and received the price of the shares from the broker of the first defendant was estopped from questioning the title of the first defendant, who was a purchaser for value without notice, to the said two half shares.

All the three partners, Ebrahim F.z.l, Boga and Anveri, absconded on 19th January 1921 and their whereabouts are not known. The cheques given by them to the plaintiff on 15th January were dishonoured. From the current account of Messre. Bogs and Anveri with the Central Bark of India (Eshibit F) it appears that from lat January 1921 up to 19th January 1921 there was a debit balance of Rs. 1,115.6 ic against Messrs. Boga and Anveri. From the current account of Ebrahim Fazal Vieram with the National Bank of India (Exhibit Q) it appears that on 31st December 1920 there was a cradit balance of Rs. 8 15 2, and on 31st January 1921 a credit balance Thirty-three certified brokers of Rs. 5-13-2 of the Native Share and Stock Brokers' Association have sent in their claims against the brokers to the Secretary of the Association in respect of the share certificates delivered by them to the brokers at the time According to of the January settlement. the said claims the debts due by the brokers amount to R. 4 or 5 lakhs.

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Thirty certified brokers have sent in their claims to the said Secretary against the brokers in respect of differences due to them for the January settlement. The total amount of elaim in respect of such differences is Rs. 40,000. Haji Bashu Ali, the fatherin law of Boga, says in his evidence that he had entered into large budley transactions through the brokers, and the brokers bad to pay to him on the 17th or 18th January 1941 a sum of Rs. 1,89,000 in respect of budley transactions; that the brokers, on 17th January 192!, took away from him share sertificates of 6,500 shares of various sompanies and transfer forms signed by him in respect of the said shares and the brokers gave him on 18th January 1921 twenty three cheques all payable to Ebrahim Fozal or bearer of the value of Rs. 1,27,000 and stated that they would send to him the balance of Rs. 62,500 the next day. Out of the said twenty three sheques, twenty-two were erossed and one was not erossed. On 19th January the one cheque that was not crossed was cashed by Aladin, an employee of Haji Bachu Ali. Haji Bachu Ali further says that as his son was not in Bombay and that as he did not know how to read or write, he gave fifteen sheques to Visram, Esmail & Co. and six sheques to Mahomedali Visram, Visram, Esmail & Co. paid the said fifteen cheques into their current assount with the Bank of India and gave to Haji Bachu Ali the each amount of the fifteen chaques. Mahomedali Visram paid the said cheques into his current ascount with the Central Bank of India and gave to Haji Bachu Ali the eash amount of the said six sheques. One crossed cheque was cashed by Shariff Hasham by paying the same into his account with the Imperial Bank of Persia. Haji Basha Ali reseived the moneys in respect of all the said twentythree cheques on 18th or 19th January. According to his evidence he has a claim of Rs. 62,612.5.0 against the brokers.

On the evidence before me, it is quite elear that the first defendant (and defendants in the other suits filed by the plaintiff) acted with perfect good faith and purchased the shares for value. Except where a shareholder is estopped from

denying the title of some particular transferes the general rule of English Law is that a purchaser of shares acquires no better title than his vendor himself has [Colonial Bank v. Cady (1); and that shares in this respect are like other goods and shattels: see Cole v. North Western Bank (2), and Lindley on Companies, Vol. I, p. 568.

The expression 'goods' in section 108 of the Indian Contract Act includes all moveable property. See section 76 of the Indian Contract Act. The General Clauses Act No. 1 of 1868, section 2, sab section (6), defines moveable property as meaning property of every description except immoveable property and sub section (5) defines immove. able property as including land, benefits to arise out of land and things attached to the earth or permenently fastened to anything attached to the earth. It is enacted by section 25 of the Irdian Companies Act that shares in a Company shall be moveable property. Share certificates are moveable property and are, therefore, goods' within the meaning of section 108 of the Indian Contract Act. See ill. (a) to section 83 of the Indian Contract Act and Hatarimul Shohanlal v. Satish Chandra Ghoth '3). Counsel for the plaintiff, as well as for the defendant, admitted that Chapter VII of the Indian Contract Act applied to share certificates. Under section 108 of the Indien Contract Act no seller can give to the boyer of goods a better title than he himself has except in cases falling within the exceptions to that section.

Assuming that the plaintiff dealt with the brokers as principal with principals, the question is, whether the first defendant is entitled to the two half shares mentioned in the plaint?

It was argued for the plaintiff that the Court must infer that the brokers in October. November and, at all events, in December 1920 conspired together to purchase a lot of shares without any intent of paying for them, and that they had, at the time they entered into the transactions with the plaintiff in October, November and December 1920,

^{(1) (1990) 15} App. Cas. 267; 60 L. J. Ch. 131; 68 L. T. 27; 89 W. R. 17.

^{(2) (1875) 10} C. P. 854, 44 L. J. C. P. 233; 32 L. T. 733.

^{(3) 49} Ind. Cas. 966; 46 O, 381; 22 Q. W. N. 1086.

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formed the fraudulent intent of not paying for the said shares and had no intent of performing their promise to pay for the said shares sold, from the following fac's, namely:

(a) the brokers bought a large number of shares. The plaintiff had filed eight suits against ultimate purchasers in respect of the nineteen Central India Mills shares sold to and through the brokers. The brokers had bought from others also;

(b) the brokers took from the plaintiff share certificates and gave to him bogus cheques on Banks where they had no credit and that they gave cheques to others also

which were dishonoured;

(c) the debts due to other brokers from the brokers in respect of the shares delivered to them in the market amounted to four or five lass. The debts due to others brokers from the brokers in respect of differences amounted to about Rs. 30,000;

(d) all the three partners Ebrahim Fazal,

Boga and Anveri absended;

(e) Exhbit F shows that between 1st January and 19th January in the current account of the brokers with the Central Bank of India, there was a debit balance of Rs. 11,000 against them.

I do not think the Court can infer any such fraudulent intent in Ostober, November or December 1920. In October the plaintiff bought through the brokers twenty-five shares of Central India Mills for Ostober and sold the same number of shares for (November). The brokers brought to the plaintiff twenty five share certificates and transfer forms. The brokers must have got transferred twenty four shares to the plaintiff's name in the books of the Company in Ostober. The plaintiff kept with him the share certificate and transfer form in respect of one share with the name of the transferee in blank. If the brokers had any such fraudulent intent as is contended for, in Ostober, they would not have given the share certificates and transfer forms to the plaintiff. In November 1920, at the time of the Moorat settlement, the plaintiff delivered five shares in the market and budlied twenty shares. brokers paid to the plaintiff the price of the five shares delivered to the plaintiff. In December, according to the plaintiff, the brokers told him that the purchasers

of twenty-five shares were willing to budley (earry over) the transaction for January settlement and the plaintiff instructed the brokers to budley nineteen chares of the Central India Mills and accordingly the brokers sold nineteen shares for December and bought the same number of chares for January 1921. Some difference was due to the plaintiff in respect of December settlement. That was not paid to the plaintiff by the brokers then. The brokers promised to pay to the plaintiff the difference in January. There is no evidence before me that in October, November and December the brokers had not entered into bona fide transactions and it is too much to ack the Court to infer that in October, Novem. ber and December 1920, the brokers who were carrying on business in the share market had not the intention of paying for the charce bought by them and of performing their promise because on 19th January they abscorded with a heavy liability and gave post-dated cheques to their constituents which were dishonoured.

I hold, therefore, that the plaintiff has not proved that the brokers at the time they entered into the transactions in Ostober, November and December 1920 formed the fraudulent intent of not paying for the shares sold by the plaintiff and had no intent of performing their promise to pay for the said shares. The result is, that if the plaintiff dealt with the brokers as principals and not as agents and if the November and transactions of October, December were contracts between plaintiff and brokers as between principal and principals as contended for by the plaintiff and not as between principal and agents, the said contracts were not voidable, as consent to the same was not caused by fraud or misrepresentation. The said contracts, in my opinion, were, when they were entered into, bona fide contracte.

Then, it was contended for the plaintiff that in January the brokers formed the fraudulent intent of not paying for the said shares and had no intention of performing their promise that the cheques given by them would be cashed on representation and that the contract then made was also voidable by the plaintiff. The plaintiff has given his evidence in a very etraightforward manner and I accept his

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evidence in its entirety. Now it is clear from the evidence of the plaintiff and Esmail that on the 15th January the brokers gave to the plaintiff two cheques post-dated the 2 th January 1921. Anveri told Esmail on the 15th of January that he would get moneys from the purchasers on 17th or 18th January and would pay the amount he reseived from the purchasers into his our. rent eccount with the Bank and so he would be able to meet the cheques. From what transpired subsequently, it might eafely be inferred that when Anveri made these statements neither he nor his partners had the intention of making available at the Central Bank of India sufficient money to meet the said cheques. The said statements were false. If Anveri induced Esmail to deliver to him the said share certificates by tendering the post-dated cheques drawn on the Central Bank where he had no money and by which Bank he expected the cheque would be dishonoured, he made the plaintiff perform his part of the contract by cheating Esmail, but the question is, whether Esmail was induced by the said fraud and disbonest statements to deliver the said ebare eertificates to Anveri.

Esmail in his evidence says that he would not have delivered the share certificates but for the representations made to him by Anveri. But both Fazal and Esmail admitted that according to the usage they were bound to deliver the share certificates before payment was made to them. Esmail in his evidence stated that he had no reason to distrust the brokers on 15th of January. He also at first stated that the plaintiff did not tell him anything about the share certificates. When asked why be demanded payment and refused to part with the share sertificates without payment, he stated that the plaintiff had told him not to part with the share esrtificates without receiving payment and that he did not like to part with the chare certificates without asking the plaintiff about it. Plaintiff says he expected Esmail to hand over the share certificates to the brokers in the regular epurse of business and that he was bound to deliver the share certificates before the payment day without receiving any payment from the brokers, and that if he had been in Bombay and the brokers had asked

for the chare certificates he would have delivered the same to the brokers.

It seems to me, therefore, that there is no reason wby Esmail should refuse to part with the share certificates without money, and when he says he demanded money when Esmail asked for the share certificator, J. think he believed that to be the sace after the frauds of the brokers were discovered. It seems to me that the brokers, who had by that time formed the fraudulent intent of not paying for the shares in order that there might be no suspicions against themselves, volunteered to give a post-dated cheque and when Esmail asked wby the sheque was postdated told him that the purchase money would be put into the Bank and the sheque would be honoured. I am of opinion that Esmail would have parted with the share certificates even though no cheque or money had been paid to him and no representations made to him, though now he honestly believes that he would not have done so without being paid.

I hold, therefore, that the plaintiff handed over the transfer forms and delivered the share certificates in performance of the contract of December 1920 and that Esmail was not induced to deliver the share certificates by reason of the fraudulent representation of Anveri and that the share certificates and transfer forms were not obtained from the plaintiff's cousin, Esmail, by means of an offence and fraud. The nineteen shares were appropriated by the plaintiff for the purpose of the contract of December 1920 with the brokers and that propriation was assented to by Anveri who took the share certificates, and the plaintiff's title both legal and equitable in the shares passed to the brokers and the brokers transmitted their title to the shares both legal and equitable to the fendant and the other purchasers.

But, in my opinion, the result would be the same if Esmail was induced to perform his part of the contract of Desember 1920 and to deliver the nineteen share certificates on the fraudulent representation of Anveri that he would get the purchasemoney of the nineteen shares from the purchasers in the market and would pay the amount of purchase money into his account with the Bank and the post dated sheques would be honoured. The contract of December

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1920 was valid when made. In performance of that contract the plaintiff had to deliver to the brokers and did deliver to the brokers transfer forms duly signed by him about six days before the payment day. The plaintiff had also to deliver the nineteen sertificates before the payment day (17th January). The brokers had to pay the price to the plaintiff on the payment day or on the day following the payment day. Now, I assume that the brokers indused the plaintiff to perferm his part of the contract by representing to him that the brokers would perform their part of the contract of 20th January, and the plaintiff performed his part of the contract because he was descived into believing that the brokers would perform their part of the contract. If contract is obtained by frand or cheating, it is voidable at the instance of the party defrauded or cheated; but if the performance of contract is obtained by fraud or obeating, there is no authority for saying that the contract can be avoided. It was held in Jamsetji Nassar. wan i v. Hir ibhai Navro i (4) that fraud in the performance of a contract, apart from its making, is no ground for reseission and restoration of the parties to the position in which they were before the contract was entered into. From section 103 (3) of the Indian Contract Act, it appears that if the contract is rendered voidable because it was obtained by cheating or any other offence, no property passes to the buyer. But there is no authority for extending that proposition and saying that where performance of the contract is obtained by fraud or cheating, the property in the goods delivered in perform. ance of the contract does not pass to the buyer. In my opinion where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer and if the buyer sells and delivers the goods to a bona fide purchaser for valuable consideration without notice, such a purshaser gets a good title to the goods and the seller cannot recover the goods from such a purchaser. The seller has his remedies against the buyer under the sontrast and san sue him for the price of goods. When goods

sold have been delivered to the buyer and the price of the goods is not paid by the buyer, the seller can only sue the buyer for the price of goods except in the following cases:—

- (a) A seller is entitled to reseind the contract and retake possession of the goods delivered to the buyer on failure of the buyer to pay price at the time fixed where it is stipulated by the contract that he should be so entitled: section 121 of the Indian Contract Act.
- (b) Where the contract is voidable or terminable by the seller, the seller may disaffirm the contract and re-take possession of the goods which have been delivered under the contract.
- (c) The seller may also reseind the contract and re-take possession of the goods where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff. In such a case if the parties are in pari delict, the seller cannot reseind the contract and re-take possession of the goods from the buyer.

Even in eases (a), (b) and (c) the seller eannot re-take possession of the goods which have been delivered to the buyer under the contract where the ownership of the goods is transferred by the buyer to a third person who before the contract is reseinded buys them in good faith of the buyer who is in possession of the goods unless the circumstances which render the contract voidable amount to an offence committed by the buyer or those whom he represents: see section 103, Exception 3, Indian Contract Act.

I hold, therefore, that even if E-mail was induced to part with the share certificates on the fraudulent representations of Anveriwhich amounted to cheating, the plaintiff's title both legal and equitable in the shares passed to the brokers and the brokers passed their title in the two half shares to defendant No. I who is entitled to retain the two half shares.

Then it was contended that the plaintiff was entitled to avoid the contract under section 39 of the Indian Contract Act. Section 39 deals with discharge of contract by breach. The Indian Law on the subject of discharge of contract by breach is contained in sections 39, 51, 53, 54 and 55 of the Indian Contract Act. Section 39 deals with the two cases in which

(4) 19 Ind, Cas. 403; 37 B. 158; 15 Bom, L. R. 192,

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a party to a contract before or at the time fixed for its performance (a) refuses to perform his promise, and (b) disables himself from performing his promise. In either case the promisee may put an end to the contract unless he has signified by his words or conduct his acquiescence in its continuance. Where a party to a contract refuses to perform or disables himself from performing his promise before the contractual time for performance has arrived, the promisee may put an end to the contract, and if he does so, an anticipatory breach of the contract occurs. When B to a contract refuses to perform or disables bimself from performing his promise at the time fixed for its performance, be commits a breach of the contract unless, by agreement between the parties, further time is given and the contrast is kept alive. In this case the time for performance of the contract on the part of the brokers was 17th or 18th January. The plaintiff took the post dated sheque and gave time to the brokers till 20th January. The cheques were dishonoured on 10th Jacuary and so the brokers failed to perform their part of the contract committed a breach of the contract on 20th January 1921. If on 15th January when the brokers gave the bogus sheques they are to be deemed to have refused to perform or disabled themselves from performing their promise, the refusal or inability to perform was before the contractual time had arrived, and as the plaintiff did not accept the brokers' repudiation of the contrast that day no enticipatory breach occurred. In my opinion, therefore, section 39 of the Indian Contract Act does not help the plaintiff.

Then it was argued on behalf of the plaintiff that the plaintiff's signature as seller in
the transfer forms was not attested and the
transfer deeds were not stamped at the time
the plaintiff and defendant No. I signed the
same. It was further contended that by
delivery of transfer forms in blank signed
by the seller and the share certificates
property in the shares does not pass to the

purchaser.

Section 28 of the Indian Companies Act enacts that shares shall be transferable in manner provided by the articles of the Company. Article 33 of the Articles of Association of the Central India Mills provides that shares will be transferred by

an instrument in writing. It gives a transfer form. Article 34 provides that every instrument of transfer shall be executed both by the transferor and transferee. The Articles do not require any attestation. So there is nothing in the contention that the plaintiff's eignature was not attested when the plaintiff signed the transfer forms. Under the Indian Stamp Act if the transfer forms are not duly stamped on payment of the penalty required by law, the defect is sured.

It is a common practice for a seller of shares to sign an instrument of transfer with the name of the transferee in blank. The buyer then inserts his own name or without doing so resells and hands the blank transfer to the new purchaser who again either inserts his own name as the transferee or resells and delivers the transfer still in black to the purebaser from him and so on. Delivery of the share sertificates with the transfers executed in blank does not invest the holder of the certificates and the transfer forms with the ownership of the shares in the sense that no further act is required in order to perfect his right. The transferor continues to be the share holder recognised by the Company. As pointed out by Lord Watson in Colonial Bank v. Oady (1), delivery of the share certificates with the transfers executed in blank passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares without the risk of his right being defeated by the registered owner or any other person deriving title from the registered OWDER.

In my opinion, therefore, assuming that the shares were purchased by the brokers from the plaintiff as contended by the plaintiff, the first defendant is entitled to retain the shares and to fill in the blanks in the transfer forms and get the shares registered in his name in the books of the Company. If I am right in holding that even if the brokers dealt with the plaintiff as principals with principal, the first defend. ant is entitled to retain the shares and the plaintiff has no elaim to the same it is unnecessary to determine the question whether the brokers asted as the plaintiff's agents and if so whether the plaintiff is liable for the fraud of the brokers and

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has no claim to the shares and the question of estoppel raised by the first defendant's Counsel. But as this case may go further, I shall express my opinion on the abovementioned questions.

Mr. Inversity has contended that the plaintiff dealt with the brokers as principal with principals and not as principal with agents. He further contended that the contracts of share-brokers with their constituents in Bombay are contracts on pakki adat terms. The incidents of a contracts entered into on pakki adat terms are given in Bhogwandas v. Kanji (5). No evidence has been called to show that the relations between the plaintiff and the brokers were governed by the usages of the Bombay market known as the pakki edat eystem. No attempt has been made up to now in any case between a share-broker and his constituents in these Courts to show that transactions between a share broker and his constituents are entered into on pakki adat terms. The evidence clearly shows that the broker is bound to sell the shares in the market at the proper rate and eannot buy for his constituents his own shares nor sell to himself the shares of his constituents. I, therefore, hold that the contracts of the plaintiff with the brokers were not on pakki adat terms.

The next question is, whether transactions between the plaintiff and the brokers were between principal and principals, in other words, between buyers and sellere? In the plaint as originally drafted it is stated that the plaintiff sold nineteen shares through the brokers who were earrying on business as share-brokers on the old Stock Exchange and that according to the usage of the Bombay Share Market the brokers were liable to the plaintiff for the performance of the contract. Ebrahim Fazal was a member of the Native Share and Stock Brokers' Association and the brokers' eard stood in his name. The plaintiff has produced the contract note dated 22nd November 1920 sent to the plaintiff by the brokers. According to the contract note, Exhibit H, twenty shares were bought for Moorat (November)

settlement at Rs. 4,500 and sold for December settlement at Re. 4,646 by the brokers plaintiff's orders and on plaintiff's account subject to the rules and regulations of the Native Share and Stock Brokers' Association. The plaintiff has admitted that all his transactions with the brokers were subject to the rules and regulations of the Native Share and Stock Brokers' Association. It is argued that as by the rules and usages of the Bombsy Share Market brokers are personally liable to the brokers with whom they transact business and are also personally liable to their constituents they deal with their constituents as principals and not as agents. According to the rules and regulations of the Native Share and Stock Brokers' Association, between the brokers all business is done on the footing that they are acting as principals. Brokers can enter into transactions on their own account, Brokers when they enter into transactions on behalf of a principal do not disclose the name of the principal for whom they are acting. According to the rules of the English Stock Exchange, business is done between members of the Stock Exchange on the footing that they are acting as principals but it has never been decided that a broker on the English Stock Exchange deals with his constituents as principal with principals. It does not follow that because brokers are personally liable to the brokers with whom they transact business in the market they deal with their constituents as principals. Every agent who contracts personally though on behalf of his principal is personally liable and may be sued in his. own name on the contract: see section 230 of the Indian Contract Act. Further, it appears that by the rules and usages of the Stock Exchange, stock brokers аге responsible to their elients in the event of the person with whom they have made bargains for their elients failing to earry An agent, by express contract them out. with his principal or by the usages and rules of the partieular place, market or business in which he is employed, may become personally liable to the prinsipal. Such an agent is called a del credere agent. Further it is in evidence that the broker is bound to sell the shares of his client in the market at the proper rate. He is FAZAL D. ALCANA U. MANGALDAS M. PARVANA.

not entitled to bay his elient's securities from his elient nor can be sell his own securities to his elient without full diselogure and is bound to account for all profits made by him in the course of agency beyond his ordinary remuneration. Mr. Inverarity, in his concluding address, contended that the brokers were the plaintiff's agent to sell and buy shares but that after they had bought and sold the shares they were not agents but principals. He argued that it appeared from what bappened at the time of the settlement that the brokers did not keep the contracts, which they entered into for their clients, alive and they were allowed to do so by the usage of the Stock Exchange and, therefore, they were not agente, but principals. Now it appears that a broker who enters into a contract for sale of a certain number of shares of a certain Company on behalf of his constituent X with brokers M does enter into a contract with the same broker M for the purchase of the same number of shares in the same Company on behalf of another constituent F before the settlement day. The broker, it is contended, thereby cancels the contract of his constituent X with the broker M because at the time of the settlement the brokers who have bought and sold equal number of shares of the same Company pay differences only. During each settlement there are in the ordinary course numerous dealings in the same kind of sesurities and on the settling day there are many brokers who have bargains to complete and some of these brokers may have both bought and sold the same securities. It would sause great delay, inconvenience and expense, if every seller bad to deliver securities to his immediate purchaser and astually transfer to him and receive payment from him when both may have had other dealings in the securities and have bought from or sold to other members who also may have re-sold or re-purchased. To avoid this, the following method is adopted by the brokers who are members of the Native Stock and Share Brokers' Association. The brokers who have bought and sale equal number of shares in the same Companies pay differences only. A broker who wants to take delivery on the settlement day, on behalf of his constituent, calls upon a broker with whom he has an outstanding

contract for purchase of the shares of which he wants to take delivery, even though the broker did not buy from him the shares of his particular constitutent on whose behalf he wants to take delivery. The broker who has to take delivery issues a kapli (known as ticket on the London Stock Exchange) on the first day of the settlement month to the broker with whom he has an ontstanding contract in respect of the shares of which delivery is to be taken. On the kapli the purchasing broker writes the number given to him by the elerk of the Association who gives the printed form of the kapli. The purchasing broker also writes on the kapli the name of the shares, the date, his own name, and the name of broker with whom he has an outstand. ing contract and to whom he passes the kapli. That broker sends that kapli to the broker who has an outstanding contract with him and so on. The kapli is thus eirenlated amongst certified broker with whom there are oustanding contracts till it comes into the hands of the broker who has to deliver shares on behalf of his constituent. The selling broker retains the kapli and informs the purchasing broker about the retention of the kapli. Transfer forms are signed by the constituent of the selling broker a week before the payment day. The selling broker then gives the transfer forms duly signed by his constituent to the purchasing broker who sends the same to his (purchasing broker's) con-The transfer forms are then stituent. signed by the constituent of the purchasing broker. The constituent of the selling broker delivers to the selling broker the share certificates before the payment day or on the morning of the payment day. The selling broker gives to the purchasing broker the share certificates on the payment day. An hour or two thereafter on the same day the purchasing broker pays the selling broker for the shares according to the rate fixed by the Association. Each intermediate broker in the kapli pays or receives from the broker in the kapli with whom he has an outstanding contract the difference betwen the rate fixed by the Association and the rate in the contract between them as the case may be. When the transfer forms are signed by the seller and the buyer, they are not stamped. The purchasing broker, after FIZEL D. ALLANA D. MANGALDAS M. PARVASA.

the share certificates are received by him from the selling broker and after he makes payment, puts the requisite stamp on the shares and lodges the transfer forms and shares with the Company for getting the shares transferred to the name of his constituent. The purchasing broker gets temporary receipts from the Company and hands them over to the purchaser. Under this practice, the ultimate purchaser, i. e., the issuer of the kapli, is substituted as the broker with whom the ultimate seller is to complete the transaction.

I am of opinion that certified brokers of the Bombay Native Share and Stock Brokers' Association are del credere agents of their They are in a fiduciary relation. constituents. ship to their constituents. Their duties are strictly to adhere to the position of agents, to act diligently for their principals, to earry out the instructions of their principals and to make enforceable bargains for them and keep those bargains open. If A, a broker, has bought from B, another broker, a certain number of shares and B has bought from A the same number of shares in the same Company for a certain settlement, they may on the settlement day agree to set off one bargain against the other and so save the necessity of completing both bargains.

I think, on the whole, that in the plaintiff's transactions for Ostober, November, and December 1920, the brokers acted as the plaintiff's agents, and did not deal with the plaintiff as principals with principals.

The next question that arises is, whether if the brokers acted as plaintiff's agents the right, legal and equitable, of the plaintiff in the shares passed to defendant No. 1 (and to defendant No. 1 in other suits) enabling him to get the shares registered in his name in the books of the Company.

The plaintiff authorised the brokers to sell the shares and the brokers sold them for and on account of the plaintiff in the market. The plaintiff gave to the brokers the transfer forms and the share certificates in order that the same might be delivered by the brokers in the market. When the plaintiff delivered the transfer forms and the share certificates to the brokers, he intended to part with his interest in the shares to the transferse. A broker in the Stock Exchange has authority, which arises from his employment, both to make and take payments on behalf of his

The brokers in this case as principals. plaintiff's agents delivered the transfer forms and share certificates in the market and received as the plaintiff's agent the purchase money of the shares. Instead of paying the money to their principal, the plaintiff, the brokers appropriated the same to their own use. It was contended that if the brokers were plaintiff's agents they obtained the share certificates from the plaintiff by cheating, and, therefore, the first defendant acquired no title to the shares. But the principal and not the third party is responsible for the fraud of the agent. Every ast done by an agent on the principal's behalf and within tha scope of his actual authority is binding on the principal with respect to persons dealing with the agent in good faith. The plaintiff having put forward the brokers as their agents in the market to make representations to innocent third parties to the effect that the brokers were authorised to transfer the plaintiff's title in the shares and to receive the purchase price of the shares cannot be heard to say, if those representations have been acted on by the innocent third parties, that the brokers obtained the share certificates by cheating the plaintiff.

Lastly, I have to consider the question of estoppel. When the blank transfer forms and share certificates are delivered under a contract by a registered holder of shares and the boyer sells the shares and delivers the blank transfer forms and shares to a bona fide purchaser for value or where blank transfer forms and the share certificates are delivered by a registered holder of shares to his broker for sale in the market and the broker sells the same as the agent of the registered holder to a bona fide purchaser for value, the bona fide purchaser gets a good title to the shares and can insert his own name in the transfer form and procure himself to be registered as owner. In such eases the question of estoppel does rot arise.

Mr. Taraporevalla has argued that even if there was no valid contract between the plaintiff and the brokers and even if the brokers were not acting as the plaintiff's agents, if the plaintiff signed the transfer forms and delivered the same and the share certificates to the brokers, by that act of his he placed the brokers in a position to give a good title to defendant No. 1, who was a bona fide purchaser for value without notice.

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and that the plaintiff was estopped by the said act of his from asserting any right to the shares. Mr. Inversity for the plaintiff contended that there is no estoppel and has relied on France v. Olark (6). Tayler v. Great Indian Peninsula Railway Co. (7) Hutchison v. Colorado United Mining Company and Hamill v. Lilley (8) and Fox v. Martin (9).

In France v. Olark (6), the registered holder of shares deposited share certificates and blank transfers with O as security for £150. C deposited the certificates and the same transfers etill in blank with Q as security for £250. It was decided that Q could only hold them as against the registered owner as security for £150.

In Taylor v. Great Indian Peninsula Railway Co. (7), the plaintiff who was entitled to some £ 20 shares and some £ 2 shares in a Company directed his broker to sell the latter. The broker obtained forms of transfers stamped sufficiently to pass the £ 20 shares. The plaintiff executed these forms leaving the blanks to be filled in by the broker The broker inserted the deseription of £ 20 shares but left the name of the transferee still in blank and sold the £ 20 shares in fraud of the registered holder. The names of the purchasers were ultimately filled in, they knowing that the transfers had been previously executed in blank. It was held that the registered holder was entitled to the sbares.

In Hutchison v. Colorado United Mining Company and Hamill v. Lilley (8. Hamil, who was the owner of shares, delivered to his son the transfer forms signed in blank and the share certificates to deliver the same to S, an intending purchaser. The son borrowed moneys by pledging the share certificates and the transfer forms in blank. It was held that Hamill was entitled to the shares.

In Fox v. Martin (9), a registered holder of shares instructed a broker to sell them for each and signed a blank transfer which he handed with the share certificates to the broker. The broker desposited the share certificates and the blank transfer with his

(6) (1884) 25 Ch. D. 257; 53 L. J. Ch. 585; 50 L. T. 1; 32 W. R. 466.

(P) (1895) 64 L. J. Oh. 478.

self. It was hald, following France v. Clark (6) that the banker had no title to the shares as against the registered holder of shares,

According to the articles of the Company, the shares in France v. Clark (6), Tayler v.

banker as security for an advance to him.

According to the articles of the Company, the shares in France v. Clark (6), Tayler v. Great Indian Peninsula Railway Co (7), and Hutchison v. Colorado United Mining Company and Hamill v. Lilley (8) were transferable only by deed. Where the constitution of the Company requires transfers to be by deed, transfers in blank are void and give no title to the transferse, nor has the transferse any authority to fill up the blank: see Tayler v. Great Indian Peninsula Railway Co. (7).

No doubt these cases are, therefore, distinguishab'e from the present case, where the articles of the Company do not require a deed for transfer of shares but it appears from the jadgments in the above cited cases and from For v. Martin (9), where the articles of the Company did not require a deed, that the registered holders of shares were not estopped, because the resaipt of the blank transfers signed by third parties affected the mortgagess and the purchasers with notice. Assorting to these cases, a person who takes from another blank transfers of nessed done to stdep ent to teedeer of seads is bound to look to the authority of the person to use such blank transfer forms as his own.

It may be observed that the authority of France v. Clark (6) and Hutchison v. Colorador United Mining Co and Humill v. Lilley (8) is considerably chaken by the speeches of Lorde Watson and Lord Herschell in Colonial Banks v. Caly (1). The House of Lorde in that case decided that there was no estoppole because the acts of the executors of the deciased registered owner in signing and delivering the blank transfers did not a mount to an estoppal, but both Lorde Watson and Herschell said that the same acts on the part of the registered owner himself would have amounted to an estoppal. Lord Watson said (p. 278):

"Had the transfers been executed by John Michael Williams, and the estimates thereafter sent by him to Thomas, Sona and Co, for safe enstody, I should not have hesitated to hold that Blakeway, though acting fraudulently, was neverthelone

^{(7) (1859) 4} De G & J. 559; 28 L. J. Ch. 709; 5 Jur. (n. s.) 1087; 7 W. R. 6:7; 45 E, R. 217; 124 R. R. 389. (8) (1886) 3 T. L. R. 265.

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placed by his act in a position to give a title to an honest purchaser which his employer could not dispute. But that is not the case with which we have to deal."

Lord Herschell said (p. 285):

If in the present ease the transfer had been signed by the registered owner and delivered by him to the brokers, I should have come to the conclusion that the banks had obtained a good title as against him, and that he was estopped by his act from asserting any right to them."

At page 286 he said:

"The case seems to me to differ essentially from that of a transfer signed by the registered owner. He must, presumably, have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he entrusts it in that condition to a third party, I think those dealing with such third party have a right to assume that he has authority to complete a transfer."

These obiter dicta were not followed in Fox v Martin (9) on the ground that France v. Olark (6) was not expressly overruled by the ease of Colonial Bank v. Cad y (1). France v. Clark (6) was followed by Bigham, J., in Samuel Montague and Co. v. Weston, Olevedon and Portishead Light Railways Company (10), where a sub mortgages of Lloyd's bond with blank transfer from Chick and Co. who had only a limited authority to deal with the security was held not entitled to recover amount of the bonds which issued by the defendant Company. It was observed by Bigham, J., in that case that the dictum of Lord Herschell in Colonial Bank v. Oady (1) must be used in connection with the facts of that case and was not intended to conflict in any way with the decision in in France v. Olars (6). The learned Judge further observed that it might be that if a bond with a blank transfer on its back such as an American Railway Bond were handed to any one with the transfer executed by the owner, the owner would be estopped from denying the authority of the person so entrusted to deal with it but that would only be because of the inference in favour to such an authority which would be drawn

from the deposit of bonds in that particular form.

The dicta of Lords Watson and Hersehell were followed in the Irish case of Waterhouse v. Bank of Ireland (11), where some Pennsyl. vania Rail Road Company shares were hand. ed by the plaintiffs, who were the registered owners, to a broker as margin to cover a loan with which the broker was to purchase chares in certain other companies for the plaintiffs. The broker pledged the shares for his general loan account at his bankers. He did not purchase any share for the plaintiffs but sent the contract notes purporting to have done so. The broker absended and the plaintiffs gave notice to the bankers that they were the of the shares. Thereafter the ereawo bankers having filled up the transfers were duly registered in the books of the Company. The bankers claimed to hold the shares as security for the amount advanced by them to the broker. It was held that the plaintiffs, having delivered to the brokers share certifieates with transfer forms signed by them, were estopped from asserting their owner. ship against the defendants who had taken them bona fide for value without notice.

above mentioned obiter dicta were also followed by Pickford, J., now Lord Sterndale, M. R., in Fuller v. Glyn, Mills, Ourrie & Co. (12), where the owner of shares after purchasing them through a broker allowed the certificates, on which were endorsed forms of transfer which were executed by the registered holder of shares, to remain in the hands of the broker and the broker deposited the same with his bankers as security for his account with the bankers, it was held that the owner was estopped from setting up his title against the bankers. See also Hone v. Boyle (13), and the observations of

Fitzgibbon, L. J., at page 173.

The obiter dicta of Lords Watson and Herschell are, in my opinion, at variance Clark (6). Brokers or with France v. bankers dealing with brokers are not put upon enquiry by the mere facts that the share certificates and transfer forms are not in the names of the brokers bringing them but

(18) (1891) 27 L. R. Ir. 187,

^{(11) (1892) 29} L. R. Ir. 384. (12) (1914) 2 K. B. 168: 83 L J. K. B. 764; 110 L. T. 318; 19 Com. Cas. 186; 58 S J. 235; 30 T. L. B.

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are in the names of third parties. According to English Law, where the owner of shares either signs the transfer forms and delivers the same with the certificates to a broker, or where, never having had possession of the blank transfer forms and share certificates but knowing them to be in such condition that a broker can deal with them, he allows them to remain in the broker's posses. sion and thereby enables the broker to part with them to another who takes them upon the faith of the apparent authority of the broker to deal with them, then the true owner is estopped from questioning the title of the person taking upon the faith of the apparent authority of the broker to deal with them.

The law of estoppel is contained in section 115 of the Indian Evidence Act, which is in these terms:—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

It was laid down by their Lordships of the Privy Conneil in Sarat Chunder Dey v. Gopal Chunder Liha (14), that the terms of the Indian Evidence Act did not enest as law in India anything different from the law of England on the subject of estoppel.

I have held that the plaintiff delivered the transfer forms and share certificates to the broker.

In my opinion, even if there was no contract between the plaintiff and the brokers and even if the brokers were not transmitting the plaintiff's title to the shares as the plaintiff's agents, the plaintiff by signing the transfer forms and delivering the same and the share certificates to the brokers placed them in a position to give a title to defendant No. 1, who was a bona file purchaser for value without notice, and is estopped by his act from asserting any right to the shares. The result is that this suit and the

(14) 20 C. 296 (P. C.); 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. a.) 201 (P. C.).

other saits filed by the plaintiff will be dismissed with costs.

J. P. & M. H.

Suit diemissed.

CALCUTTA HIGH COURT.

APPEAL PROM ORIGINAL ORDER No. 54

OF 1920.

June 16, 1920.

Present:—Sir Asutosh Mookerji, Kr.,
Acting Chief Justice, and
Sir Ernest Fletcher, Kr.
JNANENDRA KRISHNA BOSE—

PLAINTIPP - APPELLANT

persus

SINCLAIR MURRAY & Co .-

DEPENDANT—RESPONDENT.

Arbitration Act (IX of 1899), s. 19—Stay of suit

—Action not relating to matters submitted to arbitration.

Before an order can be made to stay a suit under section 19 of the Indian Arbitration Act, it must be established that the suit has been instituted in respect of a matter agreed to be referred to arbitrarion [p. 74°, col. 2.]

A Court will refuse a stay, where the action commenced relates to matters outside the submission. [p. 743, col. 2.]

Appeal against the order of Mr. Justice Buskland, dated the 3rd April 1920.

FACTS appear from the following judg.

BUCKLAND, J .- On the 3rd July 1919, the parties to this application entered into a contract, whereby Messre. J. K. Bose & Co. sold to Messrs. Sinelair Murray & Co., 500 bales of jute upon certain terms which are not material to this application with the exception of the arbitration clause in the emtract. This clause is one with the terms of which this Court is familiar, and provides for disputes arising out of the contract to be referred to the arbitration of the Bengal Chamber of Commerce, J. K. Bose who earried on business under the name of J. K. Bose & Oo., has filed a suit against the applicants, Mesers, Sinclair Marray & Co., for a decree for Rs. 1,500 by way of damages for breach of the contract, for a declaration that it is a nullity, and that it should be eancelled, and for an injune. JNANEHDRA ERISHPA BOSE U. SINCIALE MURRAY & CO.

tion restraining the defendant firm from proceeding with a reference to the arbitration of the Bengel Chamber of Commerce. This application has been made on behalf of Mesers Sinclair Murray & Co., under section 19 of the Indian Arbitration Act to stay that suit. The matters in issue in the suit are matters which the arbitrators are competent to decide, and under section 19 of the Act, I must be satisfied that there is a sufficient reason why the matter should not be referred and secondly, that the applicants at the time when the proceedings were commenced were and still are ready and willing to proceed to arbitration,

It is urged that I should not exercise my discretion in favour of the applicants in the circumstances of this case. There are two ways of regarding this application: there is the rarrow view, strictly in accordance with the section under which I should see whether or not the matter in isene in the suit is one which is within the arbitration elause, and whether the terms of the scotion are otherwise complied with. That view takes no account of the elaim which the applicants desire to refer. The other is the broad view which takes account of the real point of substance, which is the same both in the suit and in the arbitration proceedings, which Messrs. Sinclair Murray & Co, desire should take place with reference to their claim against J. K. Bore. I think that I am entitled to take the latter, because this is not the normal ease for which the section primarily provides. where a party to a submission files a suit and the sole question is whether that slaim should be referred to arbitration or desided by the Court in the suit.

The circumstances of the matter are as follows: On the 3rd July a contrast similar to that between the applicants and J. K. Been was entered into between Messrs. Sinclair Marray & Co., and Messrs. D. L. Miller & Co. The latter were the buyers thereunder. Mesers. D. J. Millar & Co., made a claim in respect of the goods which the applicants received from J. K. Been under their contract with J. K. Been and delivered under their contract with Messre. D. L. Millar & Oo., and an arbitration was held by the Bengal Chamber of Commerce. In that arbitration Messrs, Sinclar Marray & Oo., put forward a number of contentions

which are to be found in an exhibit annexed to the affidavit of J. K. Bose filed on this application, among which were that the goods were delivered in time: that they were of contract quality, and that the Bengal Chamber of Commerce had no jurisdiction. Primarily these contentions were put forward by J. K. Bore in response to Mesers. Sinelair Murray & Co., but the latter adopted them and made them their own. J. K. Bose did so, though he had taken rp the position that he was not a party to the contract under which that arbitration was held and had nothing to do with it, An award was made on the 27th November 1919 in favour of Messrs D, L. Millar & Co, by which Messrs. Sinclair Murray & Co., were directed to pay Rs. 9,625 and costs. Messrs. Sinclair Murray & Co. elaimed that amount from J. K. Bose, and at the end of January last took steps to refer their claim to arbitration. The suit was filed on the 2nd February this year, and I hold, therefore, that at the time when the suit was commenced, Messre. Sinelair Murray & Co. were, and still remain, ready and willing to do all things necessary for the proper senduet of the arbitration. It bas been urged that the order now asked for should not be made in the applicants' favour in view of their attitude, first, because they now suggest that they were merely brokers though the two contracts were entirely distinct. Mr. Bleunt in his affidavit treats his firm's claim as if it were almost a matter of course by reason of Messre. Sinclair Murray & Co. being merely brokers in the transactions. This view I do not agree with. The two contracts are entirely distinct, and Mecere. Sirelair Murray & Co. are camed as principals in each. Another ground urged is that Messre, Sinelair Murray & Co. are bound by what they put forward at the arbitration between Mesers. D. L. Millar & Co. and themselves and they cannot now resile from what they then said. That is a matter which J. K. Bose can urge before the arbitrators and one which the arbitrators should consider. Were this all that I had to emaider, I might have been disposed to refuse this order, but I cannot ignore the plaintiff's attitude. In view of the fact that J. K. Base was ready enough to make submission for Mesere, Sinelair Murray & Co. to place. JNAMENDRA KRISHNA BOSE U, SINCLAIR MURRAY & CO.

hefore the arbitrators when he was not directly involved, while as soon as he was faced with a reference he filed a suit to avoid it, I do not think he is entitled to a very great deal of consideration. This suit, moreover, is one of those which have become more frequent of late in this Court and are filed in order to stiffs arbitration proceedings. The conduct of a plaintiff to such suit is, therefore, a material factor in considering whether or not he should be allowed to proceed with it.

Having regard to all the sireumstances to the fact that the applicant has complied with the section, an order to stay the suit will be made in terms of the prayer of the

petition with sosts.

Messrs. Jackson, H. D. Bose and M. N. Bose, for the Appellant.

Sir A. Chaudhuri and Mr. Amir Ali, for the Respondents.

JUDGMENT.

MOOKERJEE, Acro. C. J.—This is an appeal from the judgment of Mr. Justice Buckland on an application under section 19 of the Indian Arbitration Act, 1899, for stay of a suit.

. It appears that on the 3rd July 1919, the appellant, J. K. Bose, sold certain goods to the respondents, Sinclair Murray & Co. On the same date, there was a sale of the identical goods by Sinelair Murray & Co. to D. L. Millar & Co. Subsequently, disputes arose between Sinelair Murray & Co. and D. L. Millar & Co, with the result that there was a reference to arbitration in terms of the arbitration clause contained in the entract between those parties. This reference resulted in an award for a large sum of money in favour of D. L. Millar & Co. against Sinolair Murray & Co. Sinolair Marray & Co. thereupon claimed to recover from J. K. Bose the sum which they had been made liable to pay to D. L. Millar & Co. On this J. K. Bose instituted the present suit for recovery of a sum of Rs. 1,500 from Sinelair Murray & Co. Sinelair Murray & Co. then applied under section 19 of the Arbitration Act to stay the suit.

Mr. Justice Buckland states in his judgment that towards the end of January 1919, Sinelair Murray & Co. took steps to refer their claim against J. K Bose to arbitration, and that thereupon, on the 22nd February,

the present suit was instituted by J. K. Bose against Sinelair Murray & Co. This, apparently, was a mistake. At the time when the suit was instituted by J. K. Bose against Sinelair Murray & Co. no reference bad been made by the latter to the Bengal Chamber of Commerce Arbitration Tribunal in terms of the arbitration clause contained in the contract between them. That clause was in these terms: "Any dispute arising on or out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce under its rules applicable for the time being for decision, and such decision shall be accepted as final and binding on both the parties to this contract." The object apparently is to force J. K. Bose to have recourse the arbitration clause. Mr. Justice Buckland has beld that under the circumstances of the case the suit should be stayed. We are of opinion that this order cannot be supported.

Section 19 of the Indian Arbiration Act provides that "where any party to a submission to which this Act applies, or any person elaiming under him, commensas any legal proceedings against any other party to the submission, or any person elaiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceed. ings, apply to the Court to stay the proceedings ... " Consequently, before an order eau be made under section 19, it must be established that the suit has been instituted in respect of a matter agreed to be referred. We have read the plaint in the suit instituted by J. K. Bose: and, in view of the order which we propose to make, we shall not discuss its terms. We need only observe at the present stage that from the. plaint it is by no means clear that the elaim of Rs. 1,500 relates to a matter agreed to be referred. That it is essential that the elaim should relate to a matter agreed to be referred, is established by the desision of the House of Lords in Thomas & Co. Limited v. Portsea Steamship Company Limited (1). It is well settled by a long series of eases that the Court will refuse a stay, where the action commenced relates

(1) (1912) App. Cas. 1, 105 L. T. 257, 55 S. J. 615; ; 12 Asp. M. O. 23, 49 So. L. R. 628.

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to matters outside the submission; Smith v. Allen (2), Daunt v. Lazard (3), Lawson v. Wal. lasey Local Poard (4), Swiney v. Ballymena (5), Workman v. Belfast Harbour Commissioners (6). We further find that Sinelair Murray & Co. did not apply to the Court to compel J. K. Bose to give further particulars, so that it might be ascertained what was the real basis of the cause of action alleged by J. K. Bose against them. They did not do so, it is said, because they apprehended that such attempt on their part might be treated as equivalent to taking a step in the proceedings and might thereby disqualify them from having the benefit of section 19. The appellants have argued that the apprehension was really groundless and that mere request to be further informed of the matter alleged against the respondents could not constitute a step in the proceedings. But we need not discuss whether such apprehension was or was not well founded in view of the observations in Ives v. Willans (7) and whether the respon dent would have been affected by the decision in Parker Goines & Co. v. Turpin (8). This much is clear that there is no reason why, for the purposes of section 19, the Court should not compel J. K. Bose to give further particulars, so as to enable the Court to determine, whether the claim of Rs. 1,500 can be treated as a matter agreed to be referred under the contract between J. K. Bose and Sinelair Murray & Co. In these eireumstances, it is impossible for us to uphold the order of Mr. Justice Buckland.

The result is that the appeal is allowed, the order made by Mr. Justice Buckland set aside and the matter remitted to him in order that he may reconsider it and determine, after taking such steps as he may consider necessary to ascertain from the plaintiff the basis of his claim against Sinclair Murray & Co., whether an order should or should not be made under section 19 of the Indian Arbitration Act.

(2) (1862) 3 F. & F. 156.

(3) (1858, 27 L. J. Ex. 399; 114 R. R. 1055.

(4) (1883) 11 Q. B. D. 2/9; 52 L. J. Q. B. 302; 47 L. T. 625.

(5) (1888) 23 L. R. Ir. 123.

(6) (1899) 2 Ir. R. 234; 4 Ir. L. R. 733.

(7) (1894) 2 Ch. 478; 63 L. J. Ch. 521; 7 R. 243; 70

L. T. 674; 42 W. R. 483. (8) (1918) 1 K. B. 358; 87 L. J. K. B. 357; 115 L. 346; 62 S. J. 331. The costs of this appeal will be costs in the proceedings.

The hearing of this matter will be expedited as far as practicable.

FLETCHER, J.—I agree.

B. N.

Appeal allowed;
Oase remitted,

ALLAHABAD HIGH COURT.

OIVIL REVISION No. 1 of 1921.

March 27, 1922.

Present—Mr. Justice Walsh and

Mr. Justice Stuart.

Seth BITHAL DAS—APPLICANT

JIWAN RAM AND OTHERS-OPPOSITE

PARTIES.

Execution—Deposit of decretal amount—Application for refund by sons of decree-holder—Notice to decree-holder—Ex parte order—Payment to sons—Decree-holder's application for refund—Procedure.

A decree-holder applied for restoration of certain sums of money deposited in satisfaction of the decree and paid to his sons under an exparte order after notice to decree-holder. The Court took security from the sons for the repayment of the money and ordered the decree-holder to file a suit within three months to have his title declared:

Held, that the Court had no authority to direct the decree-holder to file a suit nor had it authority to take security for the return of the money and that the application of the decree-holder should have been treated as an application to set aside the exparts order against him. [p. 745, cols. 1 & 2.]

Civil revision against an order of the Subordinate Judge, Aligarb, dated the lat September 1920.

Mr. Uma Shankar Baipai, for the Appli-

Dr. Kailas Nath Katiu and Hon'ble Mr. N. P. Asthana, for the Opposite Parties.

JUDGMENT.—The applicant, Seth Bithal Das, has two sons, Jiwan Ram and Jagan-nath. We have it that a mortgage-deed

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was executed in favour of Bithal Das and his three brothers and that in a subsequent partition the rights under the mortgagedeed were assigned to Bithal Das and a brother called Kanhaiya Lal; that subsequently a suit was brought upon the mortgage-deed and a deeree obtained, half the benefits of which accrued to Kanhaiya Lal's heirs and half to Bithal Das. Sab. sequently, a sum was paid into Court in satisfaction of the whole decree. Half of that sum has been taken away by the heirs of Kanhaiya Lal, and we are in no way concerned with that. With regard to the remaining half, the present dispute has arisen. Jiwan Ram same into Court requesting that 1.6th of the deeretal amount in the hands of the Court should be paid to him. Jagannath same later and requested that 1 6th should be paid tolbim. Their father, Bithal Das, states that he sent many telegrams of protest, but that he was not aware of the date when the applications of his sons would come on for bearing. The sons' applications were heard, Bithal Das being absent and unrepresented. The Court found that the notice which had been issued to him was refused by him, and desided the applications ex parte against him. The order was that 1-6th of the amount in question should be paid to Jiwan Ram and 1-6th to Jaganrath. Disbursement was made accordingly. Then Bithal Das came into Court with an application that his sors should be made to refund the money on the ground that he had received no notice and that they were not entitled to the money. The learned Subordinate Judge took security from them for re-payment of the amount which they had received, and directed Bithal Das to institute a suit within three months to have his title to the amount declared. If he did not institute this suit, the security filed by the some was to be deslared espeelled. This is the matter which has come before us in revision. We agree that the learned Subordinate Judge had no authority to pass these orders. He had no authority to direct Bithal Das to file a suit and he had no authority to take security for the return of the money. The applieation of Bithal Dis was somewhat unfortunately worded but the application should have been dismissed, unless the ex parte order against Bithal Das was set aside.

The application sould be read as an applieation to set saide the ex parte order. Now this is how the case stands. If Bithal Das really refused notice, we see no reason why the previous orders directing disbursement to Jiwan Ram and Jagannath should be interfered with. But if Bithal Das did not receive notice, these orders would be automatically set aside, and the Court as a Court of execution would determine the matter upon its merits, and would either pay the money jointly or separately as the merits of the case required. For the above reasons, we set aside the order demanding. security and the order directing Bithal Das to file a suit, and we send the back to the learned Subordinate Judge or his successor to hear the case an application to set anide out as the ex parts order against Bithal Das. and after determining that matter, to pass on to such other action as his decision may render necessary. In the circumstances of the case we direct the parties to bear their own sosts.

J. P. & N. H.

Order set aside; Oase sent back.

OALOUTTA HIGH COURT.
APPEAL PROM OMIGINAL DECREE No. 311
or 1919.

February 16, 1921,

Present: —Justice Sir Asutosh Mookerjee, Kr.,
and Mr. Justice Buckland.

W. J. REES-DEPENDANT-

Dereus

JOHN YOUNG-PLAINTIPP-

Respondent.

Negligence—Collision—Suit for damages—Weighing of conflicting evidence—Appellate Court, duty of.

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A Court of Appeal should, in order to reverse the decision of the Court below upon a point where there is a conflict of testimony, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. [p. 748, col. 1]

Although the parties to a cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, it should always bear in mind in deciding a point on which there is conflict of oral testimony that it has neither seen nor heard the witnesses and should consequently make due allowance in this respect. [p. 748, cols, 1 & 2.]

Appeal against the decree of the Sabordinate Judge, Second Court, Burdwan, dated the 20th September 19:9.

Babus Dwarka Nath Chuckerbutty and Mrituniou Chatteriee, for the Appellant.

Mr. Langford James and Baba Amb kapada Chaudhuri, for the Respondent.

JUDGMENT.

MOOKERJEE, J .- This is an appeal by the defendant in a suit for damages. The plaint. iff is a Blast Farnace keeper in the Bengal Steel Co.; the defendant Iron and Superintendent of Collieries. On the night of the 9th December 1916 plaintiff was proceeding on his motor cycle from Asansol to Kulti along the Grand Trunk Road, the defendant was driving his motor car in the opposite direction. The ear and the eyele collided with the result that the eyele was damaged and the plaintsustained severe injuries. He was detained in hospital for a considerable time and has become maimed and disfigured for life. The plaintiff asserts that the collision was due to the negligence of the defendant and claims Rs. 10,534 as damages. The enbstance of the case for the plaintiff is set out in the third and fourth paragraphs of the plaint filed on the 6th August 1917. where it is alleged that while the plaintiff was proceeding on his motor sycle along the left eide of the road, he saw two motor cars coming at a great speed from the opposite direction one behind the other. that the plaintiff passed the first motor car whereupon the defendant who was driving Lie car just behind the first ear, without

any warning and contrary to the rules of the road, suddenly and negligently swerved out at a high and dangerous pass to the right in order to pass the first car, with the result that his car dashed into the cycle of the plaintiff. The case for the defendant is set out in the seventh paragraph of his written statement filed on the 1st Ostober 1917, in which it is stated that he had passed the ear in front (which was driven by one Mr. Gibson) as also gentleman (one Mr. Hall) who was coming in a motor oycle evidently in the same direction as the plaintiff, and that thereafter the plaintiff ran into and ecllided with his car. The defendant states that the distance between Mr. Gibson's car and Mr. Hall's eyele was 100 ft .: and that between Mr. Hall's eyele and the plaintiff's eyole was 300 ft. He further adds that at the moment of collision, he was proceeding by his left side of the road, leaving more than half the width of the road for vehicles coming from the opposite direction to pass. In the 8th paragraph of the written statement, the defendant alleges that on enquiry he learnt that the plaintiff had consumed a quantity of spirits at a refreshment room at Asansol which made him negligent, reckless and confused, and accounted for his suddenly running into the ear. The respective allegations, it may be observed, had been formulated by the parties in the source of correspondence antecedent to the suit, namely, on the 19th May 1917, on behalf of the plaintiff and the 19th June 1917, The Subon behalf of the defendant. ordinate Judge has found that the collision was brought about by negligence on the part of the defendant. He has disbelieved the story that the plaintiff was under the influence of liquor, and, unable to control himself, dashed into the car of the defendant. He has also accepted the plaintiff's story that the assident happened at the time when the defendant was trying to pass Mr. Gibson's car. The Sabordinate Judge has accordingly decreed the suit, holding, as regards the measure of damages that the amount claimed was not unreasonable. On the present appeal the judgment of the Sabardinate Jaiga has been attacked on the ground that his conslusions are not supported by the evidence on the

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record and that he has in fact given the plaintiff a decree on a theory inconsistent with the case made in the plaint. It has not been disputed on behalf of the respondent that, as pointed out by Lord Westbury in Behen Ohunder Singh v. Shamachurun Bhutto (1) and recently affirmed by Sir Lawrence Jenkins in Malrata Lakshmi Venkayyamma Row v. Venkatadri Appa Row (2), it is absolutely necessary that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. The fundamental principle that the plaintiff sannot be permitted to follow a line of attack which the defendant had no opportunity to meet is of special importance in collision cases, where the assident happens vary often in an entirely unexpected manner and in an extremely short space of time, thus rendering an accorate observation of the elements of the incident difficult the highest degree. In this class cases, it has consequently been considered specially necessary that the plaintiff, in framing his statement of claim, should set out the sirsumstances of the sollision, so far as they are known to him, with clearness and accuracy to enable his adversary to know the ease he has to meet; he should also state in specific terms the particular acts of negligence which, according to him, caused the collision [see the observation of Lord Chelmsford in Alice (The) and Rosita (The) (3).] We consequently to consider, whether assident took place in the manner described in the plaint.

In the determination of this question, we must remember that assording to the plaintiff he was always on his proper side of the road; the defendant did not seriously challenge this, but asserted that the plaintiff was so intoxicated that he lost all control over himself and ran into the ear. This theory has been negatived by the Subordinate

(1) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur.

Judge, and, in my opinion, no solid foundation was laid for it in the evidence. Immediately after the assident, a medical man was on the epot; no suggestion was made to him by the defendant that the plaintiff was intoxicated; and the information subsequently of liested with much assiduity from the refreshment room is entirely inconclusive. In this Court, no endeavour has been made to controvert the conclusion of the Sabordinate Jadge on this point. The position concequently is that the assertion of the plaintiff that he was on the proper side of the road prastically remains uncontradicted, while the only theory suggested why he should have run into the ear of the defendant has completely broken' down. We pass on next to the case of the defendant. Admittedly, there was another our in front of his our; he did swerve out of what was his proper track with a view to get in front of that ear; to this extent, he did violate the role of the road, He is thus constrained to take up the position that he successfully passed the car in front and managed to get again on the proper of the road before the assident side happened. The burden had of establishing this assertion lies primarily on him. If this allegation is not proved, the assident is explained. Upon the question, whether he had actually passed the car in front of bim and re-gained the proper side of the road, the evidence is conflicting. The plaintiff ascerts that the first oar passed him quite safely and the second car, evidently with the object of passing the first car, swerved out of its way, thereby catching him just when he had passed the first car. His statement is quite precise and he adds that when the rear ear struck him, some portion of it caught his right thigh and some other portion caught his right leg below the knee. Mr. Hall first came up to him, after the assident, and the plaintiff is definite that both the sars had passed Mr. Hall before the sesident. This description is borne out by Mr. Hall. He states that he and the plaintiff left the refreshment room together, but outside the station he went shead. He then wait. ed for the plaintiff to come up to him and was about 100 ft. to . 50 ft. off from the place of accident. He saw the two cars pass him, and immediately after the second car had passed him, it swerved to the right, evidently with the intention of overtaking and passing the

⁽N. 8.) 87; 2 Sar. P. C. J. 200; 20 E. R. 3. (2) 59 Ind, Cas. 767; 40 M. L. J. 144; 19 A. L. J. 97, 88 C. L. J. 17 ; 18 L. W. 256; (1921) M. W. N. 77; 29 M. L. T. 184; 25 C. W. N. 654; 23 Bom. L. R. 713 (P.O.).

^{(3) 1868) 2} P. C. 214; 5 Moore P. C. (N. s.) 800; 28 L. J. Adm, 20; 19 L. T. 753; 16 E. R. 5.8.

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first ear. At that time, the plaintiff was approaching from the opposite direction. He then describes how the plaintiff struck the side of the second ear as the position of the second ear did not give the plaintiff room enough to pass. The witness substantially adhered to this description even after a severe eross-examination. I see no reason to distrust the testimony of Mr. Hall and there is no doubt that he sould see how things happened in the bright moon light as it was the night of the full moon. On the other hand, the defendant asserted that be had passed the ear in front of him and had reached the proper side of the road before the assident happened, and in this version he was supported by his wife who was with him in the ear. There is thus a clear conflict of testimony upon this, the fundamental point in the case, The Subordinate Judge has accepted the version given by the plaintiff. I am unable to say that the story narrated by the defendant should have been preferred: it is to my mind plain that his estimate of the distances between the cars and the eyeles and the speads of the two ears is inaccurate. same remark applies to the evidence of Mr. Gibson. This is precisely the class of cases where a Court of Appeal should, as Lord Kingedown said in Bland v. Ross (4), in order to reverse the decision of the Court below upon a point of this deseription, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. The same view has been emphasised by the Judicial Committee in later collision cases : Alice (The) and Princess Alice (The) (5), Tasmania (The) (6), Rivers Steam Navigation Co. Ltd. v. Hather Steamship Co. Limited (7). No doubt, as was observed in Glannibanta (The) (8), the parties to the cause are entitled, as well on questions of fast as on questions of law, to demand the decision

ences and conclusions, though it should always bear in mind in deciding a point on which there is a conflict of oral testimony that it has neither seen nor beard the witnesses and should sonsequently make due allowance in this respect. In the present ease, we have the sardinal fact that the defendant at one stage took his car to the wrong side of the road which would inevitably lead to an assident if another vehicle eame from the opposite direction before the ear sould be taken again to the proper side of the road. That the car of the defendant did actually get back to the proper side has not, assording to the Subordinate Judge, been established by the evidence, and I do not see adequate grounds to discent from this conclusion.

of the Court of Appeal, and that Court cannot

exense itself from the task of weighing con-

Rieting evidence and drawing its own infer-

I may add that the Subordinate Judge prop. erly declined to draw any inference adverse to the plaintiff merely from the position in which he was found lying on the road immediately after the assident. It is manifestly impossible to re-construct, even in imagination and with any approach to accuracy, the conditions under which the collision took place, solely from the position in which one of the compants of the eyele or car is found after the assident, that position is the resultant of a number of fastors which are absolutely unknown in the case before us. I hold accordingly, in consurrence with the Court below, that the assident was due to the negligence of the defendant.

As regards the quantum of damages, no conclusive reasons have been assigned in support of the contention that the assessment has been excessive; it is certainly neither perverse nor based upon a missonception of the facts of the case.

The result is that the appeal must be dismissed with sosts.

BUCKLAND, J.—On the 9th December 1916 the plaintiff had been spending the evening at Asansol, and at about 11 P. M. he left to return to Kulti, a place about ten miles away where he lived. A Mr. Hall accompanied him, and they both rode motor cycles. The defendant and his wife and child, and a Mr. Gibson and his wife had been spending

^{(4) (1860) 14} Moore P. C 210 at p. 235; 15 E. R. 284; 184 R. R. 43; Lush 224.

^{(5) (1868) 2} P. C. 245; ?8 L. J. Adm. 5; 19 L. T. 678; 17 W. R. 209, 5 Moore P. C. N. s.) 333; 16 E. R. 541.

^{(6) (1890) 15} A. C. 223; 63 L. T. 1; 6 Asp. M. C. 517.

^{(7) 35} Ind. Cas. 193; 20 C. W. N. 1022; (1916) 1 M. W. N. 446; 3. M. L. J. 159; 4 L. W. 176 (P. C.).

^{(8) (1876) 1} P. D. 283; 34 L. T. 934; 24 W. R. 1033; 3 Asp. M. C. 339.

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the same evening at the house of a Mr. Maskey which lies off the road from Asansol along which the plaintiff had to travel. Shortly after 11 P. M., Mr. Mackay's guests left his bouse in two motor cars, the Rece being in one and the Gibsons in another. Very soon after, they had torned into the main road they passed Mr. Hall, who was in front of the plaintiff and was standing by the side of the road waiting for the plaintiff to overtake him. This the plaintiff never did, for within a very short time of the cars passing Mr. Hall the plaintiff's motor cycle and the defendant's ear collided, with the result that the plaintiff was thrown on the road and sustained severe injuries, his motor eyele also being considerably damaged. The plaintiff brought the suit, which has resulted in this appeal, for damages which be has suffered in consequence of the collision which he says was due to the negligence of defendant.

The plaintiff's case is that he had passed one of the cars when the other, which was occupied by the defendant, swerved out into the read in order to pass the first car and in so doing collided with his motor cycle which was on its proper side of the road.

The defendant's ease is that he had already passed the other ear, in pursuance of something that was said before the ears left Mr Mackay's house, and that his car was leading. He denies that he swerved at all and says that "for some reason," as he puts it in one of his letters, the plaintiff turned into his ear, which he says was on his own side of the road.

On the eases as presented by the parties there is, therefore, a direct conflict of evidence as to (1) which of the cars was leading, (2) the position in the road of the defendant's car, (3) whether the plaintiff turned into the defendant's car.

The Subordinate Judge has found that the assident was due to the negligenes of the defendant. His findings as to the relative positions of the two cars are not clear, but he does not assept the allegations of the defendant and his witnesses as to the defendant's car having passed the other and being 200 or 300 feet ahead. He has found that the assident happened to the south of the sentre of the road, which means that the defendant's car was not in its proper track

at the time of the collision. This finding also impliedly regatives the defendant's case that the plaintiff turned into him. In effect the Euberdinate Judge has accepted the evidence of the plaintiff and rejected that of the defendant and of his witnesses.

The plaintiff's ascount of the incident is contained in a very few lines of his evidence. He said :- "When the two motors approached me, the first ear passed me quite safely and the second ear, evidently with the object of passing the first ear, swerved out of its way, and caught me just as I had got past the first car . . . As I passed the first ear the rear care came across the road evidently with the intention of passing the first ear. But when the rear ear struck me, some portion of the rear car eaught my right thigh, some other portion of the ear caught my right leg below the knee. This knocked me on to the side of the car which went past."

I do not propose to examine in detail the evidence of the defendant and of his witness, Gibson, as to their positions at the time of the accident. The Subordinate Judge has not assepted it and I am not prepared to say that he cught to have done so. They both, however, say that when Gibson passed the seems of the accident he was going very slowly; he bimself says be "was simply srawling along, " while the defendant says, Gibson's speed was 4 cr 5 miles an hour. Gibson further says that he did not see how the assident happened. I find it quite impossible to reconcile these statements with the case that the defendant had passed Gibson some way further back and that the cars were proceeding at a distance of 200 or feet apart, at a normal speed, both on their right side of the road when the collision occurred. Were those the facts Mr. Gibson must have seen, if not the assident, at least the plaintiff lying in the road where he had fallen. Nor is his slowing down to 4 or 5 miles an hour in those circumstances explained. On the other hand, the reduced speed would be explained if it was for the purpose of allowing the other ear to pass. If this is the explanation, then it follows that the sollision took place either as the defendant's ear had just passed the other, or as it was passing, or, as it was on the point of passing. The plaintiff

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says he had passed the first car when the other car swerved and the collision took place. Which of the other two alternatives represents the facts is not, in my opinion, very important. It is clear both on the evidence and on the findings of the Sabordinate Judge that the second car was very near, and so near, in my view of the evidence, that the defendant in trying to rass the first ear without satisfying himself that the read was olear and that he could get by, was guilty of negligence which resulted in the collision.

The Sabordidate Judge has some to his conclusion principally on the evidence of the witnesses other than Mr. Hall, whose statements, he says, he has not much referred to, for, he has been accured of having instigated the plaintiff in bringing the suit. He does not say that he has any reason for not believing Mr. Hall, and though his dieregard of that gentleman's evidence emphasises his conviction of the truth of the plaintiff's evidence, I think he has erred on the side of excessive cantion in not taking more into account what Mr. Hall said about the occurrence. Mr. Hall appears at the time to have expressed an opinion adverse to the defendant, but that is not unnatural if his evidence true. Beyond that there is nothing the evidence to justify the accusation which the Subordinate Judge refere, even if that is a justification. Mr. Hall, besides the parties, was the only person who saw the accident. It was a moonlight night and he was at a short distance away. Irrespective of the estimates of the distance given by witnesses, this is proved by the fact that after the collision the defendant pulled up about 20 feet off from where it occurred, spoke a few words to his wife and ran back to where the plaintiff was lying and found Mr. Hall already there attending to the plaintiff. Mr. Hall's statement as to the collision is that the care passed him; then he says: - 'Immediately after the second car passed me it swerved to its right evidently with the intention of overtaking and passing tho first oar . . . plaintiff was approaching when he was about in line with the first car the second car evidently sesing that the road was not clear attempted to get behind the first ear again

but as he was so near the first car that at the time of swerving to the right he could not get back to his left side of the road and did not give Mr. Young room to pase." This is an intelligible account of the occurrence ocrroborating the plaintiff and I see no reason for not accepting it. This account is also corroborated by the defendant's statement of damage done to his The Sabordinate Judge has not accepted the statements of the defendant and of Mr. Gibson as to the defendant's car having gone ahead before reaching the place where Mr. Hall was standing. Not orly is this finding supported by the evidence of Mr. Hail but the evidence generally supports the argument advanced on behalf of the respondent that it was on assunt of Mr. Hall being on the road that the defendant did not overtake and pass Mr. Gibson earlier, but waited till the cars were clear of Mr. Hall.

A great deal has been made on behalf of the appellant of the position in the road in which the plaintiff was found to be lying after the collision. It has been argued that as he lay prastically on the centre line of the road the defendant's car must have been on its proper side or it would have run over him. I find it impossible to draw any inference from this. The colliding vehicles were approaching each other at a speed aggregating between 30 and 40 miles an hour, the plaintiff must have been thrown violently from his machine, contact with the ear projected him in another direction How is it possible to say after he had been thus thrown about that the place where he came to rest gives any presise indication of his position before he

was subjected to these forces?

Though it has not been contended on appeal, and the point has very properly been abandoned, that the plaintiff was under the influence of alcoholic stimulant on the occasion in question, I wish to say a word with regard to the matter. The Subordinate Judge has found that the suggestion is without any basis. Not only do I agree with this finding but the suggestion ought never to have been put forward. It is in evidence that the very day after the acsident the defendant made enquiries at Messas, Kellner and Co.'s refreshment-room at Asansol, yet he said nothing in his letter MUHAMMADI BEGUM U. UMDA BEGUM.

of the 19th June about the plaint iff being the worse for liquor. On the occasion of the accident a Dr. Tomb was present and attended to the plaintiff, but he was not called to support this suggestion. Yet the sherge made in the written statement filed on the let October 1917 and persisted in when the plaintiff was cross-examined, though the defendant and his advisers must have known that there was not a word of truth in it. Such charges, irresponsibly made, may do incalculable barm, and they should be finally laid to rest.

On the question of damages, I can only say that I think that, considering the plaintiff's injuries, the pain and suffering, which he underwent, at one time his life was said to be in danger, his claim extremely moderate, and that I know of no reason for reducing them even by the

smallest coin of the realm.

I agree that this appeal should be dismissed with costs.

N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT. EXECUTION FIRST APPEAL No. 325 OF 1920. March 16, 1922. Present :- Mr. Justice Walsh and Mr. Justice Ryves. Musammat MUHAMMADI BEGUM AND ANOTHER-JUDGMENT DESTORS -OBJECTORS-APPELLANTS versus

Musammat UMDA BEGUM AND AFTER HER DEATH Musammat AFSAR JAHAN BEGUM AND GTHERS-DECARE. HOLDERS-RESPONDENTS.

Execution application-Notice to judgment-debtor -Failure to appear-Decision, ex parte-Objection, that application was time-barred, whether maintainable.

Where notice of an application for execution is issued to the judgment debtor to appear on a given date to decide whether or not the application was barred by time and he fails to appear and the point is decided against him, his failure to oppose the application precludes him afterwards in reising that objection, not on the ground of res judicata but upon the ground of a decision in the very litigation upon the same application, h. L.

Execution first appeal from a decree of the Sabordinate Judge, Bijnor at Moradabad, dated the 13th Sep'ember 1920.

Dr. S. M. Sulaiman and Mr. S. Abu Ali, for the Appellants.

Dr. S. N. Sen and Mr. Ajulhia Nath, for

the Respondents, JUDGMENT .- This is an appeal in exeaution proceedings. A decree was obtained as long ago as the 15th of September 1913 by the respondent, Musammat Umda Begum (the widow of a Muhammadan gentleman), against ber so widow, step-son and step daughter. Various applications were made until we come down to the precent application which was filed on the let of August 1919. The office reported that this application was time-barred. Thereupon the Court issued notice to the parties to appear on a given date to decide whether or not the application was barred by limitation. On the date fixed no one appeared on behalf of the judgment-debtors and the Court held that the application was This was on the 12th of within time. January 1920. Thereupon attachment issued, and on the 9th of April 1920 the judgment debtors took objection to the attachment on the ground, among others, that the application for execution was time-barred. The Court below held, on the evidence, that the notice to the judgmentdebtors to appear on the 12th of January 1920, had been duly served on them, and held that as they had not objected, the order of the Court concluded the matter, and it was no longer open to the judgmentdebtors to contest this decision except by way of appeal. This is the point raised in appeal before us. We find on the evidence that the judgment debtors had notice to appear on the 12th Japuary 1920, and that they knew that the issue then to be desid. ed by the Court was the question of limita. That being so we think that their failure to oppose the application then preeludes them afterwards. It is not a question, in our opinion, of res judicata at all. It was a decision in the very litigation upon the eame application. In our opinion the appeal fails and is dismissed with costs including in this Court fees on the higher scale,

J. P. Apreul dismissed, JOGENDRA MATH CHAKBABARTY U. DINKAR BAM KRISSNA CHETTEL.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE

No. 71 of 1919.

March 24, 1920.

Fresent:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kr.

JOGENDRA NATH CHAKRABARTY

—DEFENDANT No. 1—APPELLANT

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DINKAR RAM KRISHNA CHETTEL PLAINTIPP, AND NAGENDRA NATH OHAKRABARTY—DEPENDANT

No 2-BESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 59, 60— Suit to recover money kept with defendant—Demand, what is—Request for money on account, whether constitutes demand.

The plaintiff from time to time entrusted money with the defendants who were to hold the same for safe custody, and by way of deposit they were at liberty, if they thought it safe and on their own responsibility and risk, to lend the money to others and, in case they did so, they were to pay a certain sum to the plaintiff as interest on the money so lent. The money was payable on demand. The plaintiff on several occasions wrote letters to the defendants for payment and finally addressed a letter through his Solicitor demanding the entire amount in deposit with the defendants. In a suit by the plaintiff brought within three years from the date of the Solicitor's letter for the recovery of the money due from the defendants:

Held, (1) that the suit was governed not by Article 59 but by Article to of Schedule I to the Limitation Act and was not barred by limitation;

[p 754, col. 2.]

(2) that the relation between the plaintiff and the defendants was not that of a lender and a borrower, that the defendants did not take the money for their own benefit and did not agree to pay interest on it themselves; [p 754, col. 2.]

(3) that before the Solicitor's letter there were no demands properly so-called but only requests for money on account and limitation, therefore, did not

run from those dates. p. 754, col 2.,

Article 0 of the First Schedule to the Limitation Act is not limited in its application to claims against bankers only. [p. 754, col. 2.]

Appeal against a decree of the Additional Subordinate Judge, Howrah in Hooghly, dated the 23th of November 1918.

Babus Ram Ohunder Maumdar, Nagendra Nath Ghose and Sisir Kumar Ghosal, for the Appellant.

Babus Dwarka Nath Chukerbutty and Karunamoy Ghose, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff against the

defendants Nos. 1 and 2 to recover a sum of Rs. 19,918.7.0 according to the account given in the schedule annexed to the plaint, The defendants are brothers living in joint. mess, the defendant No. I being the eldest member of the joint family. The plaintiff's case is this: In the year 1896, he came to a place called Fuleswar where the defendants were carrying on business, The plaintiff gradually during his stay at Faleswar became very friendly with the defendants and mutual confidence scon grew From time to time, from the year 1899, he entrusted money with the defend. ants and up to the year 1903, the total smount entrusted to them came up to Ra. 6,700. The terms agreed upon between the parties are said to have been there: The defendants were to keep the money entrusted to them for safe onstody; they were at liberty to employ the same in their money-lending business upon their own responsibility; the money so employed was to carry interest at Re. 1 4 0 per cent. per mensem and the rest of the money was to remain with the defendants as deposit and would carry no interest; interest was to be calculated with quarterly rests; and the money was payable on demand. The plaintiff says that from time to time he received about Rs. 1,400 from the defendants, that subsequently the rate of interest was modified and reduced to 12 annas per cent. per mensem and that, according to the agreement between the parties, the total amount due to the plaint. iff now is the sum elaimed in the plaint. The defendants deny everything except the fact that in 1896 the plaintiff and the defendant No. 1 came to know each other. The plaintiff has filed a number of letters purporting to have been written by the defendant No. 1 and also ascounts submitted to him by that defendant from time to time. If these letters are gennine, they fully make out the case of the plaintiff and show that the defence is a dishonour. able one. The assount, Exhibit 4 (a), and other assounts show that interest and ealculated compound Were interest the rate elaimed in the plaint. That compound interest was agreed upon, also appears from the letter. Exhibit 4, in which Jogendra, the defendant No. 1, says; "it becomes quite hard and impossible to

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realiz). sompound interest of the money from them" that is, the debtors. fact that interest was payable on money lent to others and not on money that remained in deposit with the defendants is also proved by the accounts which show that the defendants divided assounts under two heads-one was called the deposit assount and the other the account of the money lending transaction, and that while interest was saleulated on money lent but no interest was calculated on money that remained in deposit. These letters and accounts exhibited in the case, if genuine, prove the plaintiff's case to the hilt. The only question of fact that we have to consider is, whether these latters and assounts are genuine or not. The plaintiff had considerable difficulty in proving his same as he is a stranger to the place where the transaction took place, being a resident of the Feudatory State of Maurbhanj. The defendants are men of some influence in the locality. The plaintiff fully estisfied the learned Sibordinate Judge by the evidence of some of his witnesses that these letters were written either by or on behalf of the defendants. The letters purport to be signed by Jogendra, the defendant No. 1, but it appears that only Exhibit 2 bears his genuine signature. It is proved, though denied by the defendants themselves, that the accounts and the body of the letters were mostly written by Jotindre, the son of the defendant No. 2, and that the signatures, though they purport to be of the defendant No. 1, are really in the handwriting of the defendant No. 2. Only as regards Exhibit 2, it has been shown that the signature is of the defendant No. 1. It seems to us, even if the other letters were signed not by Jogendra but by his brother, that they were signed on behalf of Jogendre, the defendant No. 1 and at his instance. The learned Subordinate Judge has disbelieved the defence and the evidence of the defendants, and we see no reason to differ from his view. There seems to be no reason why the story told by the plaintiff from the witness-box should not be believed in its entirely. It is difficult to imagine that the plaintiff, who is a strarger to the place, should have consceled a false case and forged a

series of letters and accounts to support it. The defendants say that they are at enmity with a man named Anukul and that it was at his instance that the plaintiff instituted this false suit against them, although his real debtor was the said Annkal and not the defendants. plaintiff swears that he received the letters from time to time and that he replied to them, Some of these letters themselves show that they were written in reply to plaintiff's own letters. There seems to be very little room for doubt that the plaintiff received these letters and that they were written, if not by the defendant No. 1, at least, at his instance. Even the letter, Exhibit 2, which as the learned Subordinate Judge has found bears the signature of the defendant No. 1, shows that the defendants had correspondence with the plaintiff. In that letter, Jogendra asknowledges the resaipt of a letter from the plaintiff and he says that he was trying his best to seeure money but sould not say how far he would succeed. letter alone is suffisient to show that Jogendia's allegation that he had had no dealings with the plaintiff at all, is false. In our opinion, the letters are genuine, and so also the assounts that have been filed by the plaintiff.

It has, however, been contended that the learned Subordinate Judge has not believed the plaintiff in so far as the case against the defendant No. 2 is concerned, and that we should not believe him altogether. This is not quite correct. The learned Subordinate Judge has refused to pass a decree against the defendant No. 2 on grounds which do not appear to us to be quite sound. He says: "An attempt is made to charge him (that is, the defendant No. 2) with liability on the allegation that the brothers were joint in mess and property and that they had joint money-lending business and a joint karbar in paddy. It is true that the brothers are joint in mess and that the ancestral property is joint. There is nothing to show that they had a joint money lending business or that the defendant No. 2 had any interest in the paddy business." The elaim of the plaintiff was not dependent on the brothers carrying on any joint business. His case was that his dealings were with both the brothers, JOGENDRA NATH CHAKRABARTY D. DINKAR RAM KRISHNA CHETTEL.

and, on that basis, he claimed a decree against both of them. It is, however, not necessary to go into the matter further as there is no cross appeal against that part of the decree of the Subordinate Judge which exonerates the defendant No. 2 from liability. The finding of the Subordinate Judge does not affect the substantial truth of story told by the plaintiff.

It has next been argued that the plaintiff is not entitled to any interest after the year 1910. It is urged that the stipulation for the payment of interest was only with reference to the sums that were lent out to others, and that there is nothing to show that after the year 1910, any money was so lent. This contention, in our opinion, is not sound. The account of 1910 shows that there was no money left in deposit with the defendants and that the whole money had been lent out to others. If at any time after 1910 any money came back into the hands of the defendants. that was a matter which was specially within their knowledge and the onus to prove that faet was on the defendants under cestion 1(6 of the Evidence Act and they have failed to discharge that onus. It was next urged that the plaintiff's soit was barred by limitation under Article 60 of the Limita. tion Act. The learned Vakil for the appellant has contended that several demands were made by the plaintiff and that if time is calculated from the dates of any of these demande, the suit not having been instituted within three years of any of these dates must be held to be barred. If any demand was made, it must have been made by letters witten by the plaintiff to the defendants. The deferdants deny that they received any letters. That denial is, no doubt, false. They have not produced the letters and the inference is that if they had been produced they would have gone against them. The plaintiff does not admit that he made any demand such as is contemplated in Article 60 of the Limitation Act except one made on the 20th January 1916 when his Solicitor wrote a letter to the defendants demanding from them a sum of Rs. 18,880 which was said to be due up to the end of December 1915. Calculated from the date of the letters the suit is in time. Plaint. iff, no doubt, speaks of other demands but it appears that those were not demands properly so called but only requests for money on - account. It nowhere appears that before the

Solioitor's letter the plaintiff had demanded the whole of the morey that was due to him. In that view, of the case if Article 60 applies, the claim is not barred by limitation. It however, been argued that Artihas, ele 60 has no application to this case, that the money paid to the defendants was not at all a deposit and that the ease is governed by Article 59 of the Limitation Act. That Article refers to money lent under an agreemnet that it shall be payable on demand. It is argued that this was really money lent to the defendants. We do not take that view. The relations between the plaintiff and the defendants was not that of a lender and a borrower. The defendants did not take the money for their own benefit and did not agree to pay interest on it them. selves. The nature of the arrangement already set out was this: The defendants Ncs. 1 and 2 were to hold the money for safe sustody; and by way of deposit they were at liberty, if they thought it safe and on their own responsibility and risk, to lend the money to others and that, in case they did so, they were to pay a certain sum to the plaintas interest on the morey so lent presumably after realizing such interest from the debtors. It has, however, been urged that Article 60 only applies to cases where money is deposited with Bankers and reliance is placed on the decision of this Court in the CASE of Ishur Chunder Bhaduri V. Jibuu Eumari Libi (1). That was a case of money deposited with a firm of Bankers and Article to was held to apply. That eace is not an authority for the proposition that that Article is limited in its application to elaims against Bankers only. This view is supported by the decision of the Madras High Court in the case of Subramanian Chettiar v. Kadiresan Chattiar (2), where it was held that under Article 60 of the Limitation Act money left in the hands of a trader who is not a Banker will be a deposit in circumstances such as would make it money of a sustomer where the deposites is a Banker and that the word "deposit" in that Article is need in a non-legal sense. In our opinion, therefore, it is not Article 59 but

^{(1) 16} C. 25; 8 Ind Dec. (N. a.) 17. (2) 32 Ind. Cas. 965; 39 M. 1681; 3 L. W. 168: 30 M. L. J. 245; 19 M. L. T. 129; (1916) 1 M. W. N. 186.

Advocate High Count

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Article 60 that applies to the present case and the plaintiff's suit is not barred by limitation.

As regards the question of interest, the learned Subordinate Judge has held that there are no grounds for interfering with the agreement between the parties; and in that view we agree. Although in the beginning the interest was rather high, it afterwards same to be reduced to 12 annas per cent. per month and that cannot be said to be a high rate of interest. It is not a sase where the defendants were under any necessity to take the money from the plaintiff. There is no ease of any undue influence. Very likely the defendants found it profitable to invest the plaintiff's money. That being so, they are bound by the contract which they entered into with the plaintiff.

We accordingly affirm the desision of the learned Subordinate Judge and dismiss the

appeal with costs.

RICHARDSON, J .- I agree.

B. #,

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 744 OF 1917.

Ostober 21, 1921.

Present:—Mr. Justice Broadway and

Mr. Justice Abdul Qadir.

KIRPA RAM—Vander—Plaintiff—

APPELLANT

Dersus

JOWANDA MAL—DEFENDANT—MORTGAGES
AND GHASITA SINGH AND OTHERS—
DEFENDANTS—MORTGAGORS—RESPONDENTS.
Mortgage—Redemption—Improvements—Liability of mortgagor.

A mortgage-deed provided for the payment of costs with interest of re-building the mortgaged house in case the mortgagee chose to re-build it. Shortly after the execution of the mortgage, the mortgagers vacated the mortgaged house at the request of the mortgagee, as the latter wanted to pull it down and re-build it. The mortgagee then pulled down the house and constructed a double-storied building in its stead. Subsequently, the mortgagers sold the house to the plaintiff, and in

the sale deed it was specifically stated that the vendee was to redeem the mortgage and a specific sum was left in deposit with him for the purpose. This sum was to include the principal and interest as well as any amount spent by the mortgages and interest thereon, and the vendee undertook to be responsible for any sum in excess of the sum left in his hands Plaintiff sued to redeem the mortgage on payment of principal and interest:

Held, (1) that the covenant in the mortgage-deed coupled with the subsequent conduct of the mortgagors left no doubt that the re-construction of the house took place with the assent of

mortgagors; [p. 757, col, 1.]

(2) that, therefore, the plaintiff could not redeem the house without paying to the mortgagee the cost of re-construction of the house. [p. 758, col. 1.]

Second appeal from a decree of the Additional District Judge, Gujranwala at Sialkot, dated the 10th February 1917, varying that of the Subordinate Judge, First Class, Gujranwala, dated the 26th June 19:6.

Dr. Nand Lal, for the Appellant. Dr. G. O. Narang, for the Respondents.

JUDGMENT.—Ghasita Singh and Kalu, on the 8th Ostober 1903, mortgaged a half share of a house belonging to them to Devi Ditta Mal, for Rs. 900. Rs. 700 of this was to sarry interest at Rs. 0 10.0 per cent. par mensem, i.e., 7½ per cent. per annum and interest on the remaining Rs. 200 was to be set off against the rent of the house mortgaged. The mortgage-deed contained the following clause:—

"Rharch shikast rekht wa lipai hamare Zimma hai. Agar murtahin kharch karega to
shamil sar i rehn, mai sud ba sharah bala
derenge. Agar murtahin nao tamir karega
to ham sar i lagat, mai sud be sharah bala bar

waqt faqqul rehn decenge."

Subsequent to the mortgage, the mortgages pulled down the building after evicting the mortgagers therefrom, and constructed a double-storied building in its stead. This was done under the impression that the mortgage-deed contained a provision authorising the re-building of the house.

On the 4th November 1913 the mortgagora sold the house, as it then stood, i. e. stood re-built, to Kirpa Ram, for Re. 2,'0), In this sale deed it was specifically stated that the vendes was to redeem the mortgage in favour of Devi Ditta Mal, and a sum of Rs. 1,700 was left in deposit with the vendes for the purpose, This sum was to include

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the principal and interest as well as any amount spent by the mortgagee and interest thereon, and the vendee undertock to be responsible for any sum in excess of the Bs. 1,700.

On the 23rd October 1915, Kirpa Ram, vendee, brought a suit for redemption elaiming to be entitled to redeem the mortgage on payment of Rs. 1,372 8.0 and asking for the issue of a perpetual injunction to the effect that the defendant mortgagee should remove his materials from the site of the house, on the ground that the mortgagee was not competent to build the house in the way he had built it. The original mortgagee was then dead, and his son contested the snit elaiming to be entitled to be reimbursed all sums expended by the mortgagee in connection with the re building of the house as well as the principal and interest thereor, and elaimed a sam of Rs. 7,027 8 0 in all before he could be made to surrender posses. The Trial Court granted the plaintiff a decree for possession by redemption conditional on his paying a sum of Rs. 5,000 to the defendant-mortgagee within six months from the date of the deeree. The claim for perpetual injunction was dismissed. sum of Rs. 5,000 was made up as under :-

Principal mortgage money ... 900

Interest on Rs. 700 at Re. C-. 0 0 per cent, per mensem to date of institution of suit ... 470

Cost of re building the house ... 2,500

Interest at Re. 0 10.0 per cent. per mencem, after a deduction of Re. 370, being the increased rental value of the re-built house, for a period of eight years ... 1,130

Rs. 5,000

Against this decree both parties preferred appeals to the District Judge, the plaintiff claiming to have the amount reduced and the defendant claiming to be entitled to a larger sum. The District Judge came to the conclusion that although under the mortgage deed no power of reconstruction had been conferred, such a power had actually been recognised. He also held that the principles enunciated in section 72 of the Transfer of

Property Act could not be invoked by the defendant mortgagee in the circumstances He held further that the conof the case. duet of the mortgagors clearly showed that the improvements which had been made had been so made with the assent of the mortgagors. This conduct may briefly be summarised as their vacating the premises at the request of the mortgagee in order to enable the mortgages to demolish the existing building and re-build the present one, and further their failure to raise any objection or take any action to the conduct of the mortgages in demolishing and re-building and finally the sale by them of the re-built bonce to the plaintiff five years after the house had been built and the absence in the deed of sale of any assertion that the house had been re built without sarction or against their wishes or had in any way been unauthor zed. He then examined the question as to the actual amount expended by the mortgages and came to the conclusion that the figure fixed on by the Trial Court, vis. Rs. 2,500 was ecrreet. He further ecnsidered that the deduction of Re. 370, on account of an increased rental value resulting from the improvements was not warranted. deares of the Trial Court was, therefore, modified by the addition of this Rs. 370 to the sum of Rs. 5,000 fixed by the First Court.

Against this appellate decree Kirpa Ram has come up to this Court in second appeal challenging the Sinding of the District Judge; and the defendant mortgages has filed cross objections, under Order XLI, rule 22, through Dr. G. C. Narang, in which it is urged that interest should have been allowed to date of redemption and not to date of suit, and further that the cost of re-building had been wrongly fixed by the First Court.

Dr. Nand Lal contended that the learned District Judge erred in holding that the demolition and re building had been carried out with the assent of the mortgagors. He has dwelt at some length on sections 63 and 72 of the Transfer of Property Act, but we do not consider it necessary to discuss all his arguments, as, in our opinion, the construction to be placed on the most-gage deed is that placed on it by the learned District Judge. It seems to us that the parties to the mortgage deed

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elearly contemplated the possibility of the premises being demolished and re-built and that because of that a stipulation was entered in the deed itself to the effect that in the event of the mortgagee erecting any new building the cost thereof, together with interest at the stipulated rate, would be payable at the time of redemp-This covenant coupled with the tion. fact that the mortgagors vacated the premises, soon after the mortgage deed was executed, at the instance of the mortgagee, in order that be might demolish the existing building and build a new one on the site without any protest on their behalf, renders it impossible to doubt that the premises were re-built with the assent of the mortgagors. This view is further fortified by the provision in the deed of sale in favour of Kirpa Ram by the mortgagors in which the mortgagers very earefully provided for the payment of any claims by the mortgagee for improvements made by him, and the fixing of a definite sum, namely, Rs. 1,70) for which alone the mortgagors were held liable. We, therefore, agree with the learned District Judge in holding that the improvements were made with the assent of the mortgagors.

In this view of the ease it is unnecessary for us to diseuss Nathu Piraji v. Umed nal Gadumai (1) and Narayana v. Ohengalamma (2), eited by Mr. Nand Lal. We would note that Arunachella Ohetti v. Sithayi Amm ! (3), referred to by Mr. Nand Lal, was dis sented from by the Allahabad High Court in Rahumatullah Bez v. Yusaaf Ali (1), and, in our opinion, the Madras authority goes too far. We would also refer to Shepard v. Jones (5), in which it was held that a mortgagee is entitled to be re paid his expenditure so far as it has increased the value of the property mortgaged and in such case it is immaterial whether the mortgagor had notise of the expenditure, notice to the mortgagor being only material when the expanditure is unreasonable, for

the purpose of showing that he acquiesced in it. In the present case it is clear that the mortgagors had notice of what the mortgagee was doing, and that he was purporting to act under his mortgage deed; and as we have held above, the mortgagors clearly acquiesced in the conduct of the mortgagee.

Turning now to the amount to which the mortgagee is entitled, it has been urged that it is necessary for the mortgages to prove the amount of his expenditure and we certainly agree with this contention. The evidence on the record, we are told, consists of two estimates, one prepared on behalf of Kirpa Ram and the other cn behalf of Jowanda Mal. The former estimates the cost at Ro. 1,100 and the latter estimates it at Rs. 3,500. The Courts below note that these estimates are clearly biassed. The Trial Court inspected the premises itself and same to the conclusion that, after allowing a sum of Rs. 200 for the materials of the old building, the cost of re building, the house can very fairly be fixed at Rs. 2,500. The learned Distriet Judge has considered this to be the correct estimate and it appears to us that this is a finding on a question of fast, that we, sitting in second appeal, are unable to interfere. At the same time we would note that this sum appears to us, in the eirsumstances, to be as nearly as may be, the cost incurred by the mortgagee, and we hold accordingly.

The new building is said to have been made some eight years prior to suit and inasmuch as the increased value of the premises would increase its rental value as well we consider that the learned District Judge was wrong in not deducting at least Rs. 570 on that account as had been done by the Trial Court.

Turning now to the cross-objections there is some force in Dr. Narang's contention that the interest should be allowed up to the date of redemption. At the same time it seems to us that while on the one hand the mortgages can claim interest on the principal amount decreed from the date of cuit up to date of redemption, Kirpa Ram would be entitled to be given the benefit of an enhanced rental owing to the improved condition of the mortgaged premises, and after a careful consideration

^{(1) 1} lud. Cas. 456; 31 B. 85; 10 Bom. L. R. 768.

^{(2) 10} M. 1; 3 Ind Dec. (N. s.) 751. (3) 19 M. 327; 6 Ind. Dec. (N. s.) 933. (4) 16 Ind. Cas 685; 10 A. L. J. 124.

^{(6) (1882) 21} Ch. D. 469, 47 L. T. 604; 31 W. R.

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it seems to us that the most equitable method of dealing with the case is the one adopted by the Courts below, namely, the fixing of a lump sum to be paid on redemption.

We accordingly accept this appeal and give the plaintiffs a decree for redemption conditional on his paying a sum of Rs. 5,000 within six months of this date. The cross-objections are dismissed, and parties will bear their own costs in this Court.

Z. K.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 206

OF 1920.

July 29, 1921.

Kr., and Mr. Justice Panton.

BARANASHI KOER-JUDGMENT-DEBTOR

APPELLANT

Tersus

BHABADEB CHATTERJEE— RESPONDENT.

Mortgage-decree—Personal decree—Date from which period of limitation runs—Civil Procedure Code (Act V of 1908), s. 48, O. XX, r. 6—Insolvency of judgment-debtor—Application by decree-holder to have his name entered in list of scheduled creditors—Bur of time, whether available after adjudication—Provincial Insolvency Act (III of 1907), s. 24 (2).

Where a mortgage-decree directs that the available proceeds of the sale to be held thereunder be paid in satisfaction of the decretal debt, but that if the amount due is not satisfied by the sale of the mortgaged properties, the balance be realised from the other property and person of the mortgagor, the period of limitation applicable runs not from the date of the sale of the mortgaged properties, but from the date of the decree as fixed by Order XX, rule 6, Civil Procedure Code. [p. 758, col 2.]

A debt barred by the Statute of Limitation is not provable in bankruptcy proceeding. But the bar of time ceases to run (or to further run) after adjudication—as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed. [p. 75%, col. 1.]

In bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy. [p 760, col. 1.]

Appeal against a decision of the District Judge, Bughli, dated the 9th June 1920.

Dr. Dwarka Noth Mitter, Babus Biraj Mohan Majumdar and Khitish Chunder Chuckerbutty, for the Appellant.

Babus Mahendra Nath Ray and Baranachij

JUDGMENT.—This is an appeal from an order made under sub-section 2 of section 24 of the Provincial Insolvency Act of 1967. The events antecedent to the order may be briefly stated.

On the 3rd October 1907 the respondent obtained a decree against the appellant in a mortgage suit. The deerce directed that the available proceeds of the sale to be held thereunder be paid in satisfaction deeretal debt, but that if the of the amount due to the plaintiff was not satisfied by the sale of mortgaged properties, the balance be realised from the other property and person of the defendant. The decree has been excented and the hypothecated properties have been sold, but a large sum is still due under the deeree, In the case of a decree of this character, the period of limitation applicable rurs not from the date of the sale of the mortgaged property, but from the date of the decree as fixed by Order XX, rule 6, Civil Procedure Ocde ; Khulna Loan Co., Limited v. Jnanendra Nath Bose (1). The same prineiple must be applied to test the applieability of section 48, Civil Procedure Ccde, which provides that where an application to execute a decree (not being a decree granting an injunction) has been made, no order for the execution of the same te made upon any freeh deeree stall application presented after the expiration of twelve years from the date of the decree sought to be excented. Consequently, in ite present case, the term of 12 years must be taken to run from the 3rd October 1907.

It appears that on the 22rd June 1918 the appellant made an application under section 6 of the Provincial Insolvency Act 1907, to be adjudged an insolvent. The adjudged an insolvent. The adjudged to the section 16 (1) on the 4th April 1919. The

(1) 45 Ind. Cas. 436; 22 C. W. N. 145 (P. C.).

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of this adjudication order was that under section 16 (2) the whole of the property of the insolvent became vested in the Court and thereafter no ereditor to whom the insolvent was indebted in respect of any debt proveable under the Ast could, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court might impose. Under section 16 (4), a similar consequence followed in respect of all such property as might be acquired by or devolve on the insolvent after the date of the order of adjudication and before his discharge. Under section 16 (c), the adjudication order also related back and took effect from the date of the presentation of the petition on which it was made. On the 21st May 1920 the respondent, as judgment-oreditor of the insolvent, applied under section 24 to have his name entered in the list of scheduled ereditors, and the application was granted on the 9th June 1920. The validity of this order is now questioned on the ground that on the 21st May 1920, when the application under section 24 was made. it had become impossible for the mortgagee deeree holder to apply for execution in the face of the provisions of section 43, Civil Prosedure Code. In our opinion, there is no room for doubt that this contention has been rightly overruled by the District Judge,

It is well-settled that a debt barred by the Statute of Limitation is not provable in bankruptey proceedings. This rule was enunciated by Lord Eldonin Dewdney, Exparts (2) and was re-affirmed by him in Roffey, Exparts (3). But it is equally plain that the bar of time ceases to run (or to further run) after adjudication—as the effect of the bankruptey is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed. This principle is deducible from the provisions of the Pro-

Insolvency Act, 1907, which vinsial make it impossible for a ereditor to take proceedings in execution after the adjudication order has been made and during the pendency of the insolvency proceedings. The rule has been recognised and applied in England in cases of high authority. In Ross, Ex parte; Oeles, In re (4) this principle was enqueiated by Vice. Chancellor Leach; on appeal against his order, Lord Lyndhurst observed that the effect of the commission in bankruptey elearly is to vest the property in the assignee for the benefit of the creditors; thay are, therefore, in fact trustees, and it is an admitted rule that unless debts are already barred by the Statute of Limitations when the trust is ereated, they are not afterwards affected by the lapse of time. The question was again raised in Lancaster Banking Corporation, Ex parte; Westby, In re (5) where Bason, C. J., observed as follows: "The argument founded on the Statute of Limitation as an answer to this elaim is not tenable for a moment. Statute of Limitation has nothing to bankruptey laws. When the with bankruptey ensues, there is an end to the operation of that Statute with reference to debtor and creditor. The debtor's rights are established and the ereditor's rights are established in the bankruptey and the Statute of Limitation has no application at all to such a case or to the principles by which it is governed." This rule has been recognized in later cases amongst others, in Crosley, In re. Munns v. Burn (6), Stock, In re; Amos, Ex parts (7) and Cullwick, In re; Official Receiver, Ex parte (8). It may at first sight appear that in Benton, In re; Bouer v. Ohetwynd (9) View different indicated. MYB that case debts were incurred by bankruptsies bankrupt before his two which occurred in 1890 and 1892. was the donee of a general testamentary

^{(2) (1809) 15} Ves. 479; 38 E. R. 836; 149 R. R. 670. (3) (1815) 19 Ves. 463; 2 Rose 245; 84 E. R. 590.

^{(4) (1825) 2} Gl. & J. 46 and 830.

^{(5) (1978) 10} Ch. D. 776 at p. 785; 48 L. J. Bk. 99; 39 L. T. 678; 27 W. R. 292.

^{(6) (1887) 35} Ch. D. 269; 57 L. T. 298; 35 W. R. 780. (7) (1898) 3 Manson 324; 68 L. J. Q. B. 149; 75 L. T. 422; 45 W. R. 489.

^{(8) (1918) 1} K. B. 646; 87 L, J. K. B. 827; 113 L. T. 31; 84 T. L. R. 843.

^{(9) (1914) 2} Oh. 63 at p. 75; 83 L. J. Ch. 653; 110 L. T. 923; 21 Mauson 8; 53 S. J. 43); 80 T. L. R. 435.

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power of appointment and died in 1911. having exercised the power by his Will but without having obtained his discharge. The Court held that the Statute of Limitations applied and that the creditors who had proved in the bankruptey were barred and not entitled to be paid out of the appointed fund. Channell, J., in delivering the judgment of the Court, stated that cases were quoted beginning with Ross, Ex parte; Coles, In re (4) which showed that in the bankruptoy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptey and of this there can be no boubt, but this is only in the bankruptey. The learned Judge further added as follows: real difficulty in the way of the appellants is the well established rule that if the Statute once begins to run it continues to run whatever happens." No difficulty however arises in the case before us because in the events which have happened the Court is not called make an order for execution of the mortgage decree. Indeed under the provisions of the Provincial Incolvency Act if such application were made it would not have been entertained. Consequently there is no question of the applicability of section 48 and the name of the respondent has been rightly entered in the list of scheduled ereditors because at the time when the adjudication order was made the deer e had not become barred by limitation nor had the right thereunder become extinguished by the application of the rule contained in section 48.

The result is that the order of the District Judge is affirmed and this appeal dismissed with costs—one gold mohur.

B. N.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 67 of 1920.

January 10, 1922.

Present:—Mr. Justice Oldfield and
Mr. Justice Venkatasubba Rao.

JOSEPH NICHOLAS—PLAINTIFF—

APPELLANT

versus

M. R. SIVARAMA AIYAR AND ANOTHER
-DEFENDANTS-RESPONDENTS.

Damages, suit for—Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment, malicious - Reasonable and probable cause—Malice—Inference—Attachment incomplete, effect of—Pleadings—Omission to state how proceedings terminated, effect of.

An action lies for the taking out of a malicious attachment before judgment under Order XXXVIII, rule 5, of the Civil Procedure Code, and the party aggrieved is entitled to compensation for the injury actually sustained even though the attachment was not completed. [p. 761, col 1.]

The absence of reasonable and probable cause for taking legal action in execution or otherwise is itself some evidence from which malice may be inferred. [p. 762, col. 1.]

Where an attachment before judgment is taken out only with the object of securing, for satisfaction of the plaintiff's debt, money in the possession of the defendant, the order must be held to have been obtained not only without reasonable and probable cause but also without any justification and the latter is entitled to substantial damages [p. 763, col. !.]

Where the plaint in an action for damages for illegal attachment fails to set forth how the proceedings terminated, the Court may allow it to be amended by setting forth the necessary particulars. [p. 763 col. 1.]

The termination of proceedings in plaintiff's favour is essential to sustain an action only where a distinct termination in favour of one party or other is possible and not where the proceedings cannot end by their nature in a judicial disposal, as where money is paid to avert the process and settlement reported to Court. [p. 763, col. 2.]

Appeal against a decree of the Court of the Sabordinate Judge, South Malabar at Calient, in Original Suit No. 9 of 1919.

FAOTS appear from the judgment.

Mr. O. Machavan Nair (with him Mr. Krishna Menon), for the Appellant.—The affidavit in support of the defendants' application for attachment before judgment does not show any probable cause for taking out the process. It does not satisfy the requirements of Order XXXVII!, rule 5, Civil Procedure Code. It is only under one of the conditions mentioned in the rule that the writ can be asked. The defendant was approved at plaintiff's transaction with the

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Nedugandi Bank in supersession of himself. From absence of reasonable cause malice may be inferred. The only object of the attachment was to secure the money in the plaintiff's possession. The plaintiff suffered injury because the Amin took out his clothes though the attachment was not completed.

As the proceedings terminated by payment of the amount, it does not affect the plaint-

iff's right of suit.

Mr. C. V. Ananthakrishna Iyer, for the Respondents,—There is no evidence of malice.

The action is unsustainable because the attachment was not in fact effected. The money was paid and settlement was reported. Rima Aiyer v Govinda Pillii (1).

The plaint does not state, as it ought to have that, the proceedings terminated in

plaintiff's favour.

There were facts on which the defendants could reasonably have applied for attachment, e.g., the execution of documents in plaintiff's wife's rame. In any event the claim for Re. 5,000 and odd is excessive. At least, only contemptuous damages could be awarded.

JUDGMENT.- This appeal is against the lower Court's dismissal of the plaintiff's suit for damages in connection with the deferd. ant's application for attachment before judg. ment. The facts are that the attachment before judgment was ordered by the Distriet Munsif of Calient on the 10th February 1919 and that 1st defendant accompanied by an Amin proceeded to the plaintift's shop. The lower Court has dealt at considerable length with what happened there. It is not nessessary to repeat its observations on the evidence. We need only say that there is a preponderance of evidence, including that of an European Sergeant whom we have no reason for distrusting, to the effect that the Amin proceeded so far as to take out the plaintiff's elothes from the shelves of his shop and began to measure them, when the plaintiff who had heard by then of what had happened paid the amount of the elaim. We, therefore, reject the defendante' case on this point, that nothing was done towards making the attachment at all. It is in

respect of this action of the defendants and the Amin at their instance that plaintiff claims damages.

No doubt, there was not, in our opinion, a completed attachment by seizure of any of the plaintiff's property: but that is not material. For the claim, as stated in the plaint, is generally in respect of the acts done and not expressly or exclusively in respect of a completed attachment; and there is, in our opinion, no doubt that the plaint. iff may be entitled to compensation, even though the attachment was not completed, if, notwithstanding that, he sustained injury by what was actually done. No authority has been adduced by the defendants to show that a completed attachment is necessary. In Rama Aiyer v. Gosinda Pillai (1) it was held that a mere prosuring of an order for attachment before judgments did not afford a sause of action for damages. Without expressing any opinion as to the correctness of certain parts of that decision, we can distinguish it from the facts now before us on the ground that they include several acts of the defendants and the Amin, by which injury to the plaintiff has, as we shall show. been established.

That being our conclusion as to the actual occurrence proved, in respect of which the plaintiff elaim, we have now to see whether be has established what, according to the authorities, he must establish, that the defendants acted maliciously and without reasonable and probable cause. Certain heads of proof of this were attempted at the trial, for instance, the plaintiff's refusal to sell to the defendants a pony and Jutka. the institution by the defendants of the snit in which this attachment was made in a Court which would not ordinarily exercise jurisdiction over the plaintiff and, lastly, the fact that the plaintiff had borrowed from Nedungadi Bank at 12 per cent. interest instead of continuing to borrow from the defendants as he had done in the past. In this Court the pony transaction has not been relied on. It is not shown that the defend. ants' choice of the Court in which they brought their suit was in any way unreason. able. The plaintiff's resort to the Nedungadi Bank instead of to the defendants for a loan is explained by the admitted fact that the defendants had refused to advance him more than they had already done, In these

^{(1) 32} Ind. Cas. 448; 89 M. 952; 30 M. L. J. 180; 1916) 1 M. W. N. 156; 3 L. W. 82,

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eireumstances, these items of evidence are useless to establish malice.

This part of the plaintiff's case is, however, far better supported with reference to Exhibit XV filed by the first defendant in order to obtain the conditional attachment, with which we are concerned, since the allegations in it are, in our opinion, not merely unfounded, but such as he could not have possibly supposed himself entitled to make. The absence of reasonable and probable cause for taking legal action in execution or otherwise is, as was decided by the Court of Appeal in Brown v. Hawkes (2), some svidence, from which malice may be inferred; and we may say at once, that in this case with reference to the surrounding eircumstances, we shall be prepared to infer it therefrom. The defend. ants proseeding 919W under Order XXXVIII, rule 5, Civil Procedure Code, and under that provision they had to satisfy the Court that the defendant, with intent to obstruct or delay the execution of the decree that might be passed against him, was about to dispose of the whole or any part of his property. That being the only matter which they could legally present to the consideration of the Court to obtain the order which they desired, it is useless for Mr. Ananthakrishna Aiyar on their behalf to represent to us that there were other facts available to them, on which their application might have been founded and as to the truth of which there can be no doubt. We must confine ourselves to what they, in fact, had to submit to the Court. We find in paragraph 2 of Exhibit XV that the first defendant said, "that the defendant becoming aware of the fact that the aforesaid plaint was being prepared, with the intention of defrauding the ereditors executed (to amend the Court translation in assordance with the agreement of the practitioners before ue) doeuments in respect of the properties belonging to him in the name of his wife and others and borrowed large amount from the Nedungadi Bank on mertgage of his properties. If the defendant receives money and appropriates the same and alienates the properties as aforesaid, there will be no remedy whatever to realise the amount in respect of the decree

that may be passed against him." The substantial allegations here on which the Court was asked to ast was that the plaintiff on becoming aware of the fact that the plaint was being prepared executed documents in respect of the properties belonging to him in the name of his wife. The only matter relied on by Mr. Ananthakrishna Aiyar as in any degree supporting this statement, as it stands, is that the plaintiff had in 1916 purchased some property in his wife's name and that he had subsequently paid for improve. ments to it. The only admissible evidence of payment for improvements to the property is given by plaintiff himself, other evidence being admittedly hearsay. The sixth defendant's witness, no doubt, speaks to the purchase of property by the plaintiff in his wife's name, and it may be true that he did so or that even though he purchased the property in his wife's name, it was intended to be at his own disposal. That, however, is absolutely immaterial, because the charge, in consequence of which the Court was asked to pass the order of attachment, was that he had done this in consequence of his know. ledge that the plaint in the suit was being prepared. The plaint in the suit was, according to Exhibit II, and that is the earliest evidence we have on the point, being prepared on 8th June 1918, that is, long after the only purchase in the plaintiff's wife's name, of which we have any information. In these circumstances, there is nothing to justify the allegation in Exhibit XV and it was, as the plaintiff must have known, clearly untrue. There is also a statement in Exhibit XV that plaintiff, in consequence of his know. ledge of the preparation of the plaint, execut. ed documents in respect of which properties in the names of others also, although there is no evidence whatever and no sort of attempt has been made to justify this. In these circumstances, our finding must be that the affidavit on which the defendants obtained the order of attachment was not merely given in a material particular without reasonable or probable sause but was also known to him to be without any justification at all.

As throwing light on defendants' conduct, there are, further, their relations with the plaintiff. The defendants appear to have lent money to the plaintiff for some time and to have been quite unsuccessful in obtaining re-payment thereof. It is unnecessary to

^{(2) (1891) 2} Q. B. 718; 61 L. J. Q. B. 151; 65 L. T. 108; 55 J. P. 823.

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go through the details which appear in the oral evidence and from correspondence. It is clear that the plaintiff was living from hand to mouth and not paying debte, until he had no alternative but to do so and that the defendants had shown very considerable forbearance. The crisis was evidently reached just before the suit was brought, because the plaintiff succeeded in borrowing from the Nedungadi Bank already referred to at 12 per cent, the sum of Rs. 15,000, and he even promised to use a portion of this in re-paying the defendants. The situation then was that the defendants having no alternative, brought their suit and that they knew that there was in the plaintiff's hands a means by which they could get eatisfaction of their debt, if they only could secure it. It is a fair presumption, which there is nothing to rebut, that the defendants astually did what they did in order to secure for the satisfaction of their own debt the money of which the plaintiff had become possessed. Taking that as their motive, and baying regard also to the unjustifiable character of the allegations in the affidavit, we have no hesitation in finding, differing on this point from the lower Court, that they acted not merely without reasonable and probable cause of setting the law in motion, but also maliciously.

Before dealing with the question of damages, we consider an argument advanced by Mr. Ananthakrishna Aiyar, that the plaintiff had no cause of action, because he did not allege in his plaint that the proceed. ing, by which he was aggrieved, had ended in his favour and because it never in fact did so end. The facts are that the proceeding or the application for and the lower Court's conditional order of attachment under Order XXXVIII, rule 5, same to an end, as the plaintiff paid the amount of the defendant's elaim and the warrant was returned to the Court with the endorsement by the first defendant that "the matter of the plaint having now been settled, there is no necessity for attachment." It does not appear from the record what happened to the suit; but, as the amount of the defendants had been paid, it either has been or should have been dismissed. As regards the failure to mention the result of the proceedings in the plaint, it need only be said that no objection was taken with reference to it at the trial and that, if such an objection were pressed before us in appeal,

we should meet it by allowing an amendment. As regards the more substantial objection that the proceedings are not shown to have terminated in plaintiff's favour and that they sould not be regarded as having so terminat. ed, so long as the order for conditional attachment was not discharged at his instance or otherwise, we observe, first, that it would be quite useless for him to obtain such a discharge, when his creditor himself had informed the Court, as he did by the endorsement on Exhibit XVI and elsewhere, that the attachment need not be proceede l with, because the matter had been settled. On the broad question whether the termination of the proceedings in the plaintiff's favour is essential, there is, no doubt, abundant authority that it is so; but aush authority is applicable only to cases in which a distinct termination in favour of one party or other is possible, and not to a case such as that before us, in which the ings cannot end by their nature in any judicial disposal and in fact have been terminated by an act of the first defendant himself. In support of this distinction we were referred to Gilding v. Eyre (3) and Steward v. Gromett (4). In the former of these cases the facts were very similar to the present and the Court dealt particularly with one feature of the ease, the abandonment of the proceedings by the creditor in consequence of the payment which the debtor, plaintiff, made in order to obtain his release from arrest, holding that nothing arose in favour of the defendant from it. In these circumstances the argument founded on the absence of the termination of the proceedings in the plaintiff's favour must fail.

We have now to settle what damages we shall award. Reference has already been made to the state of the plaintiff's credit and we need not deal with it in greater detail. It is clear that he found it most difficult to obtain funds at any reasonable rate of interest, that there had been other claims against him in the Courts, that he had lost his credit with the defendants at least and that it was possible for him to borrow elsewhere only at 12

^{(8) (1861) 10} C. B. (N. s.) 592; 31 L. J. C. P. 174; 5 L. T. (N. s.) 136; 9 W. R. 946; 142 E. R 594; 7 Jur. (N. s.) 1105; 128 R. R. 847.

^{(4) (1859) 7} C. B. (N. s.) 191; 29 J. J. C. P. 170; 6 Jur. (N. s.) 776; 141 E. R 788; 121 R. R. 451.

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per cent. There is practically no evidence of value as to any detriment to his eredit or position generally owing to the defendants' action. He himself says that customers did not resort to his shop, but it is not possible to connect the falling off in his retail eloth trade with the state of his eredit. He says again and has adduced some evidence that the subscribers to a Chit Fund which he was conducting began to default after this occurrence. The Chit Fand has five hundred subscribers, and it is not, in our experience, unusual for a proportion of the subscribers to such Chit Funds to default. It is not shown by any evidence which we can accept that the default of some fifty subscribers in the present ease is due to what happened on the 10th February 1919. If it had been so, it should have been eavy for the plaintiff to adduce much better evidence by calling some of the defaulting subscribers or producing accounts of the Chit Fund and he has not done either. Lastly, there is the evidence of an apparently respectable gentleman, plaintiff's fifth witness, that the plaintiff's credit had suffered. He, however, gave no details and his general assurances do not seem to us of any affirmative value. In these eirenmetances, we are unable to accept the plaintiff's eleim for the large sum of Rs. 5,250 as damages. At the same time, we are not prepared to grant only contemptuous damages. The facts are, that the plaintiff was put to annoyance and no doubt to some extent to dishonour by this public employment of coercive processes without legitimate necessity and without justification. We think that, in the circumstances. Rs. 50 will be a sufficient compensation for such mental pain and loss of reputation as he may have sustained. We, therefore, allow the appeal, set aside the lower Court's decree and grant the plaintiff a decree for Rs. 50 with costs thereon throughout. The plaintiff will pay the defendants their costs throughout, not on the whole amount in respect of which the suit was filed, but, in the circumstances of the ease, on Rs. 1,500.

M. C. P. & J. P. Apreal allowed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 26 of 1921.
January 31, 1922.

Present: -Sir Norman Macleod, Kr., Chief Justice, and Mr. Justice Coyajee. MAHAMADSAHEB IBRAHIMSAHEB -

DEFENDANT-APPELLANT

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TILOKCHAND ABHEERCHAND MARWAD -PLAINTIFF-RESPONDENT.

Possession under title, continuity of-Presumption -Ejectment, suit for-Plaintiff, duty of-Adverse possession.

In a suit for ejectment, it is for the plaintiff to prove possession prior to the dispossession which he alleges. If it is proved that he has title, and he obtained possession under that title, the general presumption of law is that possession goes with title, and unless the defendant shows that he has been in possession adversely to the plaintiff for more than twelve years, the plaintiff would be entitled to a decree. [p. 765, col. 1]

Second appeal from a decision of the Assistant Judge, Sholapur, in Appeal No. 145 of 1917, reversing a decree passed by the Joint Subordinate Judge at Sholapur, in Civil Suit No. 556 of 1916.

Mr. Gothal: (with him Mr. V. V. Bhadkam. kar), for the Appellant.

Mr. P. B. Shingne, for Respondent No. 1.

JUDGMENT,-The plaintiff filed this enit to recover possession of the two open sites described in the plaint. He alleged dispossession by the defendant unlawfully about three years prior to the suit. The defendant alleged that the plaintiff was not the owner of the plaint property; that he had never been in possession or enjoyment of it; that the defendant had been in posses. sion for many years as owner; that the suit was time barred; and that the cause of action did not accrue in 1913. The main issues were : (1) Does the plaintiff prove that the plots in suit were purchased by him at the austion sale in 1893; and (2) Is it proved that the plaintiff was in possession within twelve years before the suit? The first issue was found by the Trial Court in the affirmative, the second, in the negative. The result was that the suit was dismissed.

In appeal the learned Judge was of opinion that the evidence of the witnesses on both sides was unworthy of credit. But the plaintiff having established his title over the plaint property, he could rely upon

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the presumption that possession goes with the title. There being no satisfastory evidence in rebuttal, the presumption must be

givan effect to.

This raises a question which has often been diseassed in these Courts, and eventually it may have to come up for decision before a Fall Bench. No doubt if the suit comes under Article 142 of the First Schedule of the Indian Limitation Act, time begins to run from the date of the dispossession. but if the plaintiff alleges be is dispossessed within twelve years of the suit, then the question must arise, according to the cirsamstances of each case, how far the plaint. iff has correctly fixed the date of disposes. sion, and how far the onus lies on the defendant to show that that date was wrong. I may refer to Secretary of State for India v. Ohelikani Ram Rao (1) and Kuthali Moothavar v. Feringati Kunharankutty (2) where their Lordships said on the question of the onus probandi in cases where title has been proved :

Standing a title in 'A' the alleged adverse possession of B' must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse pos-

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We take it that the general principle is, as laid down by the Privy Council in Rani Hemanta Kumari Debi v. Mahara; a Jagadindra Nath Roy Bahadur (3), that it is for the plaintiff in a suit for ejectment to prove possession prior to the dispossession which he alleges. At the same time, on this question of evidence the initial fact of the plaintiff's title comes to his aid, with greater or less force according to the circumstances established in evidence. If it is proved that the plaintiff has title and obtained possession under that title, then the general presumption of law is that possession goes with the title.

(1) 35 Ind. Cas. 902; 43 I. A. 192; 18 Bom. L. R. 1007; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 39 M. 617; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 436; 25 C. L. J. 63 (P. C.).

(2) 63 Ind. Cas. 451; 48 I. A. 335 at p. 404; 44 M. 893; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J.

650; 30 M. L. T. 41 (P. C.).

(3) 8 Bon. L. B. 4)0; 10 C. W. N. 63); 3 A. L. J. 333; 1 M. L. T. 135; 16 M. L. J. 272; 33 C. 23 (P. C.).

In Ganapati v. Raghunath (4) the plaintiff sued to have it declared that the land described in the plaint belonged to him and to recover damages from the defendant for wrongfully taking possession of it, and for possession. The learned Chief Justice at page 717* after referring to the evidence with regard to possession, which had been found to be uneatisfactory, said:

"Upon that finding as to the present state of facts and having regard to the statement of the defendant's father to which we have already referred, we have to consider whom the possession of the vacant land must be presumed to have been with, in the absence of direct evidence. Now it is held in the ease that the title to this land was in the plaintiff, and it is held that the defendant has made no permanent use of it inconsistent with its being the plaintiff's land. That being so a case is made out for the application of the presumption stated by their Lordships of the Privy Council in Rungeet Ram Panday v. Goburdhan Ram Fanday (5) that pressession goes with title. No ecutrary presumption adverse to the plaintiff ear, we thick, arise from the wrongful acts of the defendant's father in 1880, which were promptly repudiated was charged in the by him when he

Magistrate's Court." Now a reference to the map in this case would show that the plaint sites [lie adjacent to and appartenant to the shop which was purchased by the plaintiff together with the sites and it certainly would not be necessary for him to preserve evidence that ever since the date of his purchase he was in active possession of those open eites. Possession of those sites would naturally go with the posses. sion of the shop, and when the defendant asserted his right over the open sites he would have to show in the absence of any evidence that these sites seased to appurtenant to the shop, and that he had been in possession adversely against the owner of the shop. Therefore is one of those cases in which the of the plaintiff's title comes to his aid with greater force as far as the evidence goes with regard to the possession of the

^{(4) 4} Ind. Cas. 244; 83 B, 712; 11 Bom L. R. 1087 (5) 20 W, R. 25 (P. C.).

^{*}Page of 88 B.-[Ed.]

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open sites, and eliminating all the oral evidence on both sides as being unsitisfactory, (and naturally, considering the position of these open sites, and the difficulty of proving active user, it would be unsatisfactory), we think the learned Assistant Judge was perfectly right in holding that possession went with the title. Therefore, unless the defendant could show that be had been in possession adversely to the plaintiff for more then twelve years, the plaintiff would be entitled to a decree. The deeres of the lower Appellate Court is varied by eliminating the direction as to past mesne profits. In other respects the deeres is confirmed and the appeal dismissed with sosts.

W. C. A.

Decree varied ; Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 46

OF 1921.

July 28, 1921.

Present: - Justice Sir Asutosh Mockerjee, Kr., and Mr. Justice Panton.

GOPAL KRISHNA NATH-DEFENDANT

-APPELLANT

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HARI NATH KAPURTH-PLAINTIFF
-RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 178, (1) (e)

—Tenancy created by compromise decree—Ejectment,
provision for, legality of—Ralief against forfeiture,
jurisdiction of Court to grant.

Where a valid tenancy is created, and it continues in operation, the tenant can only be ejected therefrom in accordance with the provisions of the Bengal Tenancy Act, notwithstanding that the tenancy was created under a consent decree which provided for the ejectment of the tenant upon a breach of any of its terms, as under section '78 (1) (e) of that Act, nothing contained in any contract between a landlord and a tenant entitles a landlord to eject a tenant otherwise than under the provisions of that Act. [p. 767, col. 1.]

Appeal against the decision of the Additional Judge, Noakhali, dated the 3rd January 1921, affirming that of the Munsif, Lakhmipore, dated the 22nd June 1920.

Babu Subodh Chandra Roy Chowdhury, for the Appellant.

Babu Rames Chandra Sen, for the Respondent.

JUDGMENT,-This is an appeal by a judgment debtor against an order for eject. ment passed in execution of a decree. The decree was made by consent of parties on the 30th September 1919. A petition of compromise was filed on that date and a decree was drawn up on the basis thereof, Most, but not all, of the terms of the petition were incorporated in the decree. Under what eircumstances some of the terms were omitted, does not appear from the record. Under the decree, the plaintiff, now the respondent, settled with the defendant, now the appellant, an os. t raivati interest in 2 annas 5 gandas share of the lands then in dispute, at an annual rent of Rs. 40, and for a period of 9 years from 1326 to 1334 The defendant undertook to execute a registered osat raiyati kabuliyat in favour of the plaintiff within two months from the date of the decree and also to pay rent in accordance with law. The decree further provided that the defendant would pay to the plaintiff a sum of Rs. 150 as rent for the years 1322 to 1325 as also Rs. 5 as cesses making an aggregate of Rs. 165, and that such payment would be made within two months from the date of the decree. In a subsequent slause, it was stated that the defendant would not be able to eat down trees on the lands in suit, and would neither be able to alter their shape in any way nor dig any earth from them or do any act prejudicial to the plaintiff nor be able to transfer them or get any embatitution of GOPAL ERISHNA NATH C. BARI NATH KAPURTH.

names. Then followed the provision that, if the defendants violated any condition of the compromise, they would be ejected from the lands in suit. The decree holder made the present application for ejectment of the defendant on the allegation that the kabuliyat had not been delivered within the period stated nor had the arrears of rent been paid within two months from the date of the deeree. The defendant alleged that the sum had been deposited in Court within the prescribed period and also that the kabuliyat had been transmitted to the decree holder by post. The Courts below have consurrently held that the judgment debter had not complied with the terms of the deeree, and, in this view, have directed that the defendants be forthwith ejected from the land in execution. We are of opinion that this order eannot be maintained.

It is plain that a tenancy was created by virtue of the desree for a period of nine years from 1326 to 1334 B. S. to be held at an annual rent of Rs. 40. The defendants were consequently liable to be ejected only in accordance with the provisions of the Bengal Tenancy Act. As prescribed by subsection (1), clause (e) of section 178 of the Bengal Tenancy Act, nothing in any contract between a landlord and a tenant made before or after the passing of the Act, shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of the Act. No doubt, the terms of the contract between the parties have been incorporated in the decree made by the Court. But, as was pointed out by the Court of Appeal in the ease of Buddersfield Banking Co. v. Lister (1), the real truth of the matter is that a concent order is a mere creature of the agreement, and if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Kay, L. J., "A consent order is only an order of the Court earrying out an agreement between the parties." The same idea was expressed in different terms by Mr, Justice Parke in Wentworth v. Bullen (2), when he said that

contract, and subject to the incidents of a contract because there is superadded the command of the Judge. Consequently, the legality of the provision for ejectment must be tested in the light of the rules formulated in the Bengal Tenancy Act, even though the provision originally appearing in the petition of compromise has been incorporated in the decree. The Court, will not, in such circumstances, assist the decree holder to achieve his illegal purpose in defiance of express statutory prohibition.

Apart from these considerations, it is plain that this is pre-eminently a case in which, assuming that a forfeiture has been insurred, the Court should afford relief against the forfeiture. That it is competent to the Court to grant such relief in execution is elear from the judgment of this Court in the case of Kandarpa Nag v. Banwari Lal Nag (3), where the cases on the subject including the earlier decision in the case of Surendra Nath Banerjee v. Secretary of State for India (4) will be found reviewed. The eircumstance that a consent decree has been passed on the basis of a compromise does not onet the jurisdiction of the Court to grant relief against forfeiture, and the Court must determine whether, on equitable grounds, relief could have been granted against forfeiture, if it had been called upon to enforce the agreement itself. In the present ease, it cannot be maintained that the time mentioned, namely, a period of two months, was of the essence of the contract. Besides, it cannot be disputed that the tenant has substantially peformed what he was required to earry out under the terms of the com. promise. He has deposited the money in Court and the sum may be withdrawn by the decree holder at his choice. The tenant has also transmitted by post the kabuliyat to the landlord. Our attention, however, has been drawn to the fact that the kabuliyat does not incorporate one of the terms originally intended to be inserted therein, namely, the elause which would entitle the tenant to ask for renewal of the lease after the expiry of the prescribed term of 9 years. It has been explained on behalf of the appellant that this

^{(1) (1895) 2} Ch. 273; 61 L, J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.

^{(2) (1829) 9} B. & C. 819; 33 R. R. 853; 9 L. J. (0, 8.) K. B. 88; 169 E. R. 313.

^{(8) 60} Ind, Cna. 864; 83 C. L. J. 244.

^{(4) 57} Ind. Cas. 617; 24 C. W. N. 615

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term was not incorporated because it might erests a difficulty in the registration of the agreement as an under raily ti lease. It is anyhow plain that the omission to insert this term, which would have operated to the benefit of the tenant alone, has not prejudiced the landlord.

In these circumstances, we are of opinion, that a valid tenancy for 9 years was created by the decree, that such tenancy is still in operation, and that the tenant cannot be ejected in execution of the decree.

The result is, that this appeal is allowed, the order of the District Judge is set aside and the application for execution is dismissed with costs, in all the Courts.

We assess the hearing-fee in this Court at one gold mohur.

W. C. A.

Appeal allowed.

BOMBAY HIGH COURT.
CIVIL EXTRAORDINARY APPLICATION NO.
312 OF 1921.

February 6, 1922.

Present: -Sir Norman Maeleod, Kr., Chief Justice, and Mr. Justice Coyajee.
NASARVANJI CAWASJI ARJANI-

DEFENDANT-APPELLANT

versus

SHAHAJADI BEGAM AND OTHERS-

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 2—Tenant obtaining decree against sub-tenant for possession—Suit by landlord against tenant for possession and injunction not to execute decree—Temporary injunction, legality of—Proper remedy.

Plaintiff let a house to defendant on lease which expired on 30th June 1920; defendant sub-let the premises, and as he could not get possession from his sub-tenant he brought a suit and obtained a decree. Plaintiff then filed a suit against defendant claiming possession and that the decree obtained against the sub-tenant was not binding on him, and for an injunction against defendant not to take possession. After the suit was filed he applied for, and was granted a temporary injunction restraining defendant from executing his decree against the sub-tenant:

Held, that plaintiff's suit not being of the nature prescribed in either rule 1 or rule 2 of Order XXXIX of the Civil Procedure Code, the Court had no jurisdiction to restrain defendant from obtaining the benefit of his decree, which had nothing to do with plaintiff's claim, and that plaintiff's proper remedy was to ask for the appointment of a Receiver pending settlement of the dispute between himself and the defendant.

Application against an order passed by the District Judge, Satara, in Missellaneous Appeal No. 7 of 1921, confirming an order passed by the Sabordinate Judge at Wai, in Civil Sait No. 302 of 1921.

Mr. G. N. Thakor, for the Applicant. Mr. A. G. Dessi, for the Opponent.

JUDGMENT.-The present plaintiff were owners of a bungalow at Panebgani which had been let to the defendant on a lease, which the plaintiffs say expired on the 30th Jane 1920. Meanwhile the defendant had sub-let the premises, or part of them, and as he •onld possession from his sub-tenants, a suit had to be filed in which there was a decree in the defendant's favour. The plaintiffs, as owners of the property, filed a suitagainst the defendant elaiming that they were entitled to possession, and that the decree which the defendant had obtained against his sub-tenants was not binding upon them, and for an injunction against possession. the defendant not to take After the suit was filed, an application was made by the plaintiffs for a temporary injunction restraining the defendant from executing his decree against the sub-tenants, The Trial Court granted the injunction, and an appeal against that order was dismissed by the District Judge.

In revision it is urged for the defendant that the Court had no jurisdiction to grant the temporary injunction asked for Order XXXIX, rules i and 2, prescribe in what cases the Court can grant a temporary injunction, and it is quite clear that the plaintiff, suit is not a suit of the nature prescribed in either rule 1 or rule 2. The primary object of the plaintiffs suit is to get prescribed in the property which they claimed as belonging to them, on the ground that the term of the

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defendant's lease had expired, and assordingly possession should be given to the different owner. That is an entirely question from that which had already been desided between the defendant and the sub-tenants. The Court has no jurisdiction to restrain the defendant from seeking to get the benefit of the decree he has obtained, which has nothing whatever to do with the plaintiffs' claim. What the plaintiffs ought to have asked for was the appointment of a Receiver, so that the Court might take charge of the property through its Receiver pending the settlement of the dispute between the plaintiffs and the defendant. The Rule will be made absolute, and the order staying execution and restraining the applicant from executing his dearce set aside with costs throughout.

W, C. A;

Rule made absolute.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 234 of 1921.
March 23, 1922.

Present: -Sir Dawson Miller, Kr.,
Obief Justice, and Mr. Justice Adami.
RASIK BEHARI PRASAD OHOUDHURY
AND OTHERS -- APPELLANTS

TETSUS

HRIDOY NARAYAN AND ANOTHER— RESPONDENTS.

Court-fee—Appeal, second—Cross-objections by appellant in Appellate Court insufficiently stamped—High Court, power of, to order deficiency to be made good before proceeding with second appeal.

Where in a second appeal it is discovered that a memorandum of cross-objections by the appellant in the lower Appellate Court was insufficiently stamped, a High Court has an inherent jurisdiction to insist upon his paying the proper Court-fees throughout the litigation as a condition precedent to proceeding with the appeal, even though he does not appeal from that part of the decree which disallowed his cross-objections [p. 770, col. 2.]

Mr. Janak Kishore, for the Appellants.

Mr. Sambhusaran, Government Advo-

Mr. Sultan Ahmed, Government Advocate, for the Crown.

ORDER .- The question for decision in this case is whether the Court has power to order the appellant who is the plaintiff in this suit to pay a deficit Court fee upon his memorandum of cross objection in the lower Appellate Court before it will entertain his appeal here. The circumstances are a little pesuliar and the question arises in this way. The plaintiff brought a suit against the defendants for a deslaration of his title and recovery of possession in respect of 10 gandas share in certain property. The fee he paid upon his plaint was based upon a valuation of ten times the Government Revenue and the fee actually paid arrived at in that manner Re. 3-12. In the Trial Court the plaintiff specceded as to half his claim, that is to say, he get a decree in respect to 5 gandas only and not 10 gandas. From that decree the defendants appealed contesting the plaintiff's right to recover even 5 gandas. The plaintiff entered a eross objection elaim. ing that he was entitled not only to the 5 gandos under the decree of the Trial Court but that he was entitled to the other 5 gandas also. In respect of his ercss-objection he paid a Court-fee of Rs. 1-14 upon the same basis of calculation as in the Trial Court. The defendants' appeal in the lower Appellate Court succeed. ed and the plaintiff's ercss-objection failed. The result, therefore, was that the plaintiff recovered nothing. From that decision he entered a second appeal in this Court, That appeal, however, was concerned only with what I may call the first 5 gandas or that part of the elaim which was decreed in the Trial Court. As far as the 5 gandas refused by the Trial Court were concerned, the plaintiff did not pursue his appeal in this Court.

Now, when the case came before this Court, the Taxing Officer came to the conclusion that the fee payable by the plaintiff appellant was not a fee based upon ten times the Government Revenue but an advaloren fee. Therefore, he was ordered to pay a deficit upon his memorandum of appeal. It was also found that his plaint in the Trial Court was deficient in the matter of fee and those two fees he has now paid. It was also found by the Taxing Officer that his memorandum of cross objection in the lower Appellate Court was deficient to the

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amount of Rs. 88 2, that is to say, there was a deficiency in respect of property which is no longer the subject of appeal to this Court, and the question for us to determine is, whether before we allow his appeal .o proceed we should insist upon his paying the fee which he ought to have paid in his crossobjection in the lower Appellate Court. It is contended on behalf of the appellant that this Court has not jurisdiction in the matter because the subject-matter of his eross-objection in the lower Appellate Court is not now before the Court, and he relies upon the case of Kerala Varma v. Chadayan Rutti (1). The facts of that case, however, are entirely different from those of the present. What happened in that case was that the plaintiff obtained a desree arrears of rent and possession of certain parcels of land. There were four defendants and be recovered against them all. One of the defendants appealed and during the appeal it was discovered that the plaintiffrespondent had not paid the proper Courtfee on the plaint. His decree was not objected to except by one of the defend. ants who only objected to it in so far as it related to his interest, namely, onefourth of the whole. The District Judge, before whom the appeal came, considered that he was entitled to give the defendant a decree, because the respondent, the plaintiff. not paid the fall had Court-fee the Court below. He made an order that the defendant's appeal should be allowed merely upon that ground. When the matter came before the High Court, it was pointed out that the Court had no jurisdiction over the whole subject matter of the suit as the appeal by the fourth defendant related to one item only, and it seems obvious that as the plaintiff had a vested interest in that part of the decree which had not been appealed from, the Court elearly had no jurisdiction to interfere with that interest merely because one of the defendants appealed against another portion deeree.

Now, the matter so far as this Court is concerned appears to me to depend upon whether or not where there has admittedly been a deficit in the Court-fee in the lower

Appellate Court and the person by whom that deficit was payable appeals to this Coart, this Coart has power to refuse to entertain his appeal until the deficit in the lower Appellate Court has been paid. The question is not one which arises under any particular provision of the Court Fees Act bat it is a matter which, as has been held in this Court, is within the inherent jurisdiction of the Court. In the case of Narain Prasad v. Kameshwar Persad Singh (2) it was laid down by the late Chief Justice and Mr. Justice Jwala Prasad that the plain duty of the Court was to require the appellant to pay a deficiency in the Courtfee in the Court below before they could entertain any appeal arising out of the same suit by that appellant. Now, although it is true that in the present ease the appellant is not appealing from that part of the desree of the lower Appellate Court which disallowed his cross-objection, nevarthiese he was in default, and it is a default arising out of the same suit, and be is now asking this Court to hear his appeal although he in the lower Court did not comply with the provisions of law requiring him to pay a certain Court-fee. There can be no doubt as to his liability in the lower Court and I think that the Court has discretion in the matter to insist upon his paying the proper Court fees throughout the litigation as a condition precedent to allowing him to come before this Court in appeal and ask it to set aside the decree of the lower Appellate Court.

The result is that the appeal will be stayed until the appellant has complied with his obligation to pay the deficit Court fee in the lower Appellate Court which amounts to Re. 88.2. The appellant will be allowed ten days' time within which to pay the Court-fee.

W. C. A.

Aprest stayed.

(2) 43 Ind Cas. 489; 3 P. L. J. 101.

MOTAR MAL O. MUHAMMAD BAKHSH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 757 of 1917.

January 26, 1922.

Present: -Sir Shadi Lal, Kr., Chief Justice,
Justice Sir William Chevis, Kr., Mr. Justice
Scott-Smith, Mr. Justice LeRessignal
and Mr. Justice Broadway.

MOTAN MAL AND OTABBS - DEFENDANTS

-APPELLANTS

versus

MUHAMMAD BAKHSH AND OTHERS,
HEIST AND LEGAL REPRESENTATIVES OF
ALLAH BAKHSH, DECEASED—PLAINTIFFS
AND AHMED KHAN—DEFENDANTS—
RESPONDENTS.

Mortgage-Post diem interest, no stipulation as to-

In the absence of any stipulation, express or implied, in an instrument of mortgage as to the continuance of interest after the due date, the mortgagee is not entitled to interest after the due date but he is entitled to damages to be calculated ordinarily at the covenant rate of interest and for the entire period during which the principal sum has remained unpaid, unless the mortgagee is himself the plaintiff in which case the period is the same as that prescribed by the Statute of Limitation for a suit for the recovery of damages on the footing of the mortgage in his favour. [p. 773, col. 2.]

Per Rossignol, J.—In the case of mortgages comprising a stipulation of conditional sale, a covenant to pay post diem interest up to date of redemption must be implied, unless there are very strong reasons to the contrary. [p. 773, col. 2.]

Second appeal from a decree of the District Judge, Multan, dated the 11th December 1916, varying that of the Senior Subordinate Judge, Multan, dated the 31st May 1916.

Bakhshi Te's Chand and Lala Jagan Nath, for the Appellants.

Lala Moti Sagar, R. S., for the Respondents,

ORDER.

Shadi Lal, C. J.—(January 21, 1922.)—
The propositions of law, which have been formulated by the Division Banch for determination by the Full Beneb, are in the following terms:—

(1) If in an instrument of mortgage there is no stipulation as to the entirument of

interest after the due date and the intention of the parties cannot be deduced from the instrument itself, is the creditor ordinarily entitled to interest at the rate specified in the deed for the entire period during which the mortgage-money remains unpaid?

(2) If he is not so entitled but entitled only to receive post diem damages, should those damages be awarded for the same period and ordinarily at the rate as that specified in the instrument of mortgage.

On the first question we have referred to a large number of decided eases. most of which do not enunciate any principle of law, but determine only the question whether the terms of the particular contract entered into by the parties lead to an inference that they intended that the mortgages should recover interest after the due date. Whether interest rost diem should or should not be allowed is a question which depends upon the interpretation of the instrument of mortgage. If there is an express evenant on the subject one way or the other, then the Court has only to give effect to that ecvenant. The difficulty. however, arises when the deed contains no express stipulation, and the question then is whether an implied signistion to pay interest after the due date can be deduced from the terms of the instrument. : It is elear that for a solution of a problem of this character, which depends upon the partisular terms of each contract, no general rule can be laid down, and it is, therefore, unnesessary to travel through the mass of anthorities which have been cited by the learned Advectates on both sides. On behalf of the mortgagor, we are asked to endorse the rule which appears to have been enunciated in Bulanda v. Futsh Din (1) that if the transaction entered into by the parties is a mortgage by way of conditional sale, then, in the absence of an express stipulation, it must be presumed that interest was not intended to be paid after the due date. There is, however, no valid reason for laying down such a broad proposition, Indeed, there are several eases decided by the Privy

(1) 25 Ind Cas. 504, 57 P. B. 1914; 256 P. L. R. 1914; 177 P. W. R. 1914,

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Council and the High Courts dealing with marigages by way of conditional sale in which interest after the due date has been allowed simply on the strength of an implied argument to that effect, tide, inter alia, Binderi Naik v. Ganga Saran Sahu (2) and Sardar Umrao Singh v. Sardar Thahur Singh (3).

On the other hand, it is urged on behalf of the mortgages that where the mortgages deed contains a covenant for the payment of the principal debt with interest at a certain rate on a certain day and is silent as to the rost diem interest, then in the absence of an express provision to the contrary, a further contract for the continuance of the same rate of interest until actual payment must be implied. There are dicta to that effect in some judgments, but the correct rule, in my opinion, is that the law raises no presumption either in favour of, or against, an intention to pay interest after the due date.

The determination of the question reits entirely upon the interpretation of the intrument, and in this connection no definite rule of construction can be laid down except that the deed must be viewed as a whole and that the Court should, if possible, avoid an interpretation which would, to use the language of their Lordships of the Privy Council in Mathura Das v. Baja Narindar Bahadur (4), asoribe to the parties "an intention that, however payment may be delayed beyond the fixed day, the debt shall earry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the diseretion of a Jury or a Court, and are subject to a different law of prescription." observed by their Lordships, it is more reasonable to "aseribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common, kind and snitable to the ordinary expectations of persons entering into a mort. gage transaction."

If the Court, after taking into consideration all the terms of the instrument in the light of the observation quoted above, reaches the conclusion that there is neither an express nor an implied covenant for payment of interest after the fixed date, then the mortgages cannot recover interest as such after that date.

The mortgages is, however, entitled to damages on assount of the failure of the debtor to pay the debt at the stipulated time. The latter by withholding the money has deprived his ereditor of the interest which he could have earned, and should compensate him for the loss thus caused to The measure of damages would prima facie be the same as the rate of interest stipulated for by the parties, vile Oha mal Das v. Brij Blukin Lal (5). There ie, however, no rule of law making that rate necessarily the measure of damages and the Court has dissration to relass the rate if it is found to be unusual. The discretion is, however, not an arbitrary one, it is a judicial discretion and must proceed upon sound principles, whether or not the stipulated rate is unusual must depend upon various circumstances, c. o., the risk undertaken by the ereditor, the nature of the sesurity offered by the debtor, the stringency or otherwise of the money-market in the locality eto.

The period, for which interest by way of damages for the breash of the contract can be recovered is a matter upon which there is some difference of judicial opinion. It is stated in some cases that this period cannot exceed six years. Now, I am unable to understand the rationale of the rule limiting the right of the mortgages to damages for a period of six years only, even if he happens to be the defendant in the case. The rule of law is beyond doubt that where the mortgagor commits a breach of the contract he is liable to pay damages to the mortgagee, and there is no reason why he should not pay damages for the entire period during which he had withheld the money and prevented the mortgagee from earning interest. So far as the substantive law is concerned, there is no provision confining which could be invoked for

^{(2) 20} A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind Dec. (N. s.) 471 (P. C.).

^{(3) 77} P. R. 1898. (4) 19 A. 89; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 216; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. s.) 25 (P. C.).

^{(5) 17} A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. s.) 652 (P. C.).

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his liability to any period less than the period of his default. It seems to me that the rule allowing damages only for six years owes its origin to the law of limitation, but it is an elementary principle of law that limitation only bars the remedy but

does not extinguish the right.

Now Article 116 of the Second Schedule to the Limitation Ast preseribes a period of six years for a suit to recover damages for the breach of a contract embodied in a registered instrument, and it is, therefore, elear that if the mortgages invokes the assistance of the Court in his capacity as plaintiff, he can recover damages only for the period prescribed by that Article, the rest of his claim being barred by time. If, on the other hand, he happens to be a defendant as in a suit for redemption, there is no valid reason why the Court should award him damages only for six years and should deprive him of his right to recover damages for the remaining period during which the principal sum has been with-As pointed out above, the bar of beld. time applies only to the remedy of the plaintiff, it has no effect whatsoever on the plea of the defendant. In the judgments such as Jawahir Mal v. Raja Shah (6), which curtail the right of the mortgages. defendant in the manner indicated above, I have sought in vain for any reason which would justify this interference with the right which he undoubtedly possesses under the law of contract. It seems to me that there is nothing peculiar about the period of six years and that the sole ground for adopting this period is farnished by the fact that under the Law of Limitation as it stands a mortgages suing for damages on the footing of a registered instrument ean resover damages sustained by him during the preceding eix years only, and that the rest of his elaim would be barred by time. Indeed it is difficult to see why he should get damages even for the entire period of six years, if the mortgage in his favour was by means of an unregistered instrument which could be the case if the principal sum was less than R. 100. 11 appears that the rule of six years was the outcome of the Law of Limitation operating upon the slaim of the mortgagee-plaintiff

(6) 95 P. R. 1902; 21 P. L. R. 190).

and that it has been applied also to the mortgages-defendant, though the reason upon which the rule was founded has no application to the latter.

It is to be observed that the English Law, as exponeded in the recent authorities, recognises no such limitation upon the right of a mortgages defendant. As laid down in Dingle v. Copper. (7), though the mortgages taking proceedings to enforce his security is entitled only to six years' arrears of interest, he may in a redemption action resover all arrears of interest, though they may exceed six years. This principle is reaffirmed in Lloyd, In re. Lloyd v. Lloyd (8).

My reply to the first question, therefore, is that in the absence of a stipulation, express or implied, the mortgages is not entitled to interest after the due date.

To the second question I would return the following answer. The mortgages is entitled to damages to be calculated ordinarily at the entire period during which the principal sum has remained unpaid, unless the mortgages is himself the plaintiff in which ease the period would be the same as that prescribed by the Statute of Limitation for a suit for the recovery of damages on the footing of the mortgage in his favour.

CHEVIS, J.—(January 22, 1922).—I concar. The Law of Limitation limits the time within which a person may seek relief from the Court and thus cartails the rights of a plaintiff. This law has, I consider, often been wrongly applied to cartail the defense of a defendant.

Scorr Smirt, J .- (coneur.

Rossic 1. L. J.—(January 25, 1922).—Ingree with the learned Chief Justice, and would add that in the case of mortgages comprising a stipulation of conditional sale, a covanant to pay post dien interest up to date of redemption must be implied, unless there are very strong reasons to the contrast in such cases, it is the clearly expressed intention of the parties that if there is no redemption on due date, there shall be no redemption

^{(7. (189)) 1} Ch. 728, 68 L. J. Ch. 337, 79 L. T. 6)2, 47 W. R. 279.

^{. (8) (1903)} I Ch 335, 73 L. J. Ch. 79, 87 L. T. 511, 51 W. R. 177, 19 T. L R. 101,

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tion at all, and if owing to waiver or the lashes of the mortgages, the mortgager is competent to enforce redemption after due date, it cannot be supposed that the inaction of the mortgagee was interded by the rarties to afford the mortgagor an advantage not contemplated by the contract.

BROALWAY, J .- I consur with the learned

Chief Justice.

W. C. A.

Answered accordingly.

CALCUTTA HIGH COURT. APPEAL PROY CR G TAL DECREE No. 279 OF 1919.

April 14, 1921.

Tresent :- Justice Sir Asutoch Mookeriee. Kr. and Mr. Justice Buckland. SAROJINI DAS -AFPLICANT-AFPELLANT

tersus

HARIDAS GHOSH-DEFENDANT-RESPONDENT.

Will-Standard of proof-Suspicion-Consideration and analysis of positive evidence on record-Proof of handwriting—Comparison of signatures, value of.

In the case of a Will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tinged with impropriety.

[p 778, col. 1.]

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Wherever a Wili is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. But this suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. p. 716, col. 2.]

In order to prevail against clear and positive evidence the improbability in a Will must be clear, and cogent and must approach very nearly to, if it does not altogether constitute, an impossibility. [p. 778, col. 1.]

A comparison of handwriting is at all times a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the

evidence of experts. [p. 779, col. 1.]

Although from the dissimilarity of signatures a Court may legitimately draw the inference that a particular signature is not genuine because it varied from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine. [p. 779, col. 2]

Appeal against a decree of the District Judge, Hogbli, dated the 10th September, 1919.

Babus Ram Ohandra Morumdar, Manmatha Nath Mukherice, Satindra Nath Mulherjee and Rama Prosad Mookerjee, for the Appellant.

Dr. Dwarka Noth Mitter and Babu Teben. dra Nath Mandal, for the Respondent.

JUDGMENT.

MOCKERJER, J .- The subject matter of the litigation which has resulted in this appeal is the estate left by one Rajanimani alias Rajanibala Dasi, a Hindu lady, who died on the 21st March 1917. She left a son Nitai, a grandson Anil, by a predeceased son, and three married daughters. The relationship of the several members of the family is indicated on the following genealogical table: -

RAJANIMANI, OR RAJANIBALA= M. ABINASH CHANDRA GHOSE

Kalibala Prabhasini Nitai Ranibala Satish Chandra Chandra M. Nagen-M. Krish- M. Satyes-Ghose dra Nath na Chandra war Pal. Ghose. Pal, died 1906=

widow

Sarojini, (Propounder)

Anil Chandra Ghose.

The ease for the appellart is that, three days before her death, Rajanimani made a

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BAROJINI PANI 6. HABIDAS GHOSE,

testamentary disposition of her properties. Oa the 25th August 1917 an application for Probate was lodged in the Court of the District Delegate by the present appellant, Sarojini, the widowed daughter in law of the deceased, but it was returned as object. tion was filed. An application for Latters of Administration with a copy of the Will annex. ed was consequently presented to the District Judge on the 12th Ostober 1917. Objection was thereupon lodged on the 22nd January 1918 by the respondent, Haridas Ghose, on the allegation that he had, on the 28th May 1917, acquired title to the estate left by Rajanimani, by purchase from her son, Nitai Chandra Ghose, who had succeeded thereto as the heir-at-law. Thus emerged the question in controversy between the parties, namely, whether the Will alleged to have been executed by Rajanimani on the 18th March 1917 is or is not genuine. The District Judge has come to the conclusion that the Will propounded was not duly execut. ed. On the present appeal the correctness of this view has been impeached on behalf of the propounder.

The preamble to the Will recites that the testatrix had been in failing health for some time and had some to the residence of his second son-in law, Krichna Chandra Ghose, at Baranagore, in the northern suburbs of Calcutta. The first clause enumerates the relations of the testatrix as set out in the genealogical table. The second clause states that her surviving son, Nitai Chandra Ghose, had taken to evil ways and that she had consequently desided not to leave him any portion of her estate; but that if he left any son or sons of good character, the said grandson or grandsons would, after attainment of majority, be competent to possess and enjoy the property according to the terms of the Will. The third elause gives a description of her properties, namely, two houses in Calentto, one purchased with her own money, the other obtained by virtue of a deed of gift from her mother in law. The fourth clause provides for maintenance allowance to au aunt-in law dependent upon her. The fifth elause gives a monthly allowance to her son Nitai, her grandson Anil and to her three married daughters. The sixth clause provides for the performance of her Sradh from the sale proseeds of her ornaments, the surplus to be taken by her son Nitai. The seventh clause gives one half of her property to her grandson Anil and the other half to the son or sons that might be born of the loins of her son Nitai. The eighth paragraph makes the various sums payable as maintenance a charge on the estate. The ninth contains miscellaneous directions, elause There can be little doubt that the primary object of the testatrix was to keep her property out of the hands of her son who had taken to drink and women at an early age, and had in 1912 perome involved in a shoot. ing case.

There are six attesting witnesses to the Will including the scribe. All of them have been examined. The evidence of Babu Jyotish Chandra Hazra, a Vakil of this Court, who is related to the family and was consulted by the lady as to a possible testa. mentery disposition, has also been recorded. The District Judge has stated that he believ. ed in full the evidence of Babu Jyotish Chandra Harza. That evidence shows that the lady sent for him and requested him to draft a Will, so that Nitai might not be able to destroy the estate. She said that she had two houses in Calcutta and that she wished to leave one-half to the son of his predeceased son and the other half to the son of Nitai, if one should be born. She also desired to provide small monthly annuities for her aunt and her married daughters. Jyotish Babu thereupon told the lady that such a Will, leaving something to an unborn person, was not possible but that as the law might soon be altered by a Bill already introduced into the Council. she could make the Will she desired after the law had been changed. This Bill, as we know, was passed on the 23th Saptember 1916, and was placed on the Statute Book as Ast XV of 1916. Jyolish Baba further stated that he met Krishna Chandra Ghoss, the son-in-law of the lady, after the law had been altered, and told him to inform her that she sould then make the Will she wanted. Sometime afterwards, Krishna Chandra came to the house of Jyotish Babu at Brownipur, told him that the lady was very ill at Bara. nagore and requested him to draft a Will. Jyotish Babu told Krishna Chandra that he was ossupied with examination work and could not afford time to see the lady for the next ten or fifteen days. Upon this evidence, SAROJINI DASI D. HARIDAS GHOSE.

strengthened by that of Dr. Gokul Chandra Dhar, there is no room for doubt that, before September 1916, the lady had intended to make a testamentary disposition of her properties so as to exclude her son from the inheritance, and that she retained such intention as late as the end of February or the beginning of March 1917 after she had removed from her residence in British Chandranagore to the house of her second son in law at Baranagore. The questien has accordingly to be faced, whether she did in fact earry out her intention by means of the document under consideration. Her sonin law, Krishna Chandra Ghose, who holds an important position in a mercantile firm and who takes no benefit under the Will, unless, indeed, the annuity of Rs. 2 a month in favour of his wife can be regarded as such, has been examined and cross-examined at considerable length. He corroborates the parrative of Babu Jyotish Chandra Hezra in every material particular, and adds that his mother in-law had repeatedly expressed a wish to make a Will in view of the conduet and character of her son Nitai. On the refusal of Jyotish Babu, he went to Narayan Chandra Chatterjee, a Pleader of Baranagore, now dead, who expressed his inability to come on the Sunday, on which the Will was made. Thereupon, a neighbour, Adhar Chandra Ghose, a trader in rice, offered to scoure the services of a deed-writer, Nanda Lal Das, who was known to him. Krishna Chandra accordingly took Nanda Lal to his mother in law who gave him instructions about the provisions to be inserted in the Will. Nanda Lal thereupon prepared a draft. which has been produced in these proceedings. It was read over to Rajanimani, and, after she had expressed her approval, Nanda Lal made a fair copy. At this juncture, Rashbibari Mockerjee, the physician who attended upon Rajanimani, same to see her, and, as was quite natural, he was requested to stay and attest the Will, Krishna Chandra also asked a neighbour, Saileswar Sanyal, a trader, to some and attest the Will. It to happened that Jitendra Nath Upadbyay, a Pleader of the Alipore Bar, had just at that time come to Saileswar Sanyal to collect some money due to his brother. Krishna Chandra, seeing him present, and learning that he was a Pleader, pressed him to some and be an attesting witness. The Will was subsequently

executed by the lady, and was attested by Nanda Lal Das, the scribe, Krishna Chandra Ghose, the son-in law of the testatrix, Adhar Chandra Ghose, a local trader, Rashbibari Mookerjee, the physician, Saileswar Sanyal, a neighbour and a trader, and Jitendra Nath Upadbyay, the Pleader. These persons have come forward to pledge their oath that the Will was executed by the lady and was daly attested by them. They are persons of respectability, and no bypothesis has been put forward, except the innate perversity of human nature, to explain why they should all conspire to forge the Will, and to perjure themselves in Court. The version given by them in examination in chief has not been affected by eross examination; on the other hand, their statements are free from material contradictions, and their narratives have the ring of truth about them. These statements are further supported by Sarojini, the widowed daughter-in-law of the testatrix, who was in the room where the doenment was executed; she was subjected to a severe and prolonged cross examination, but with no effect. This mass of testimony bas, however, been summarily brushed aside by the District Judge on grounds of suspicion for which no foundation has been laid in the evidence. No dcubt, as stated by Lord Davey in Tyrrell v. Painton (1), wherever a Will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, the Court ought not to pronoures in fevour of it unless the suspicion is removed. But, as was explained by Jenkins, C. J., in Gores. sur Dutt v. Bissessur Dutt (2), this suspicion must be one inherent in the transaction itself, and not the doubt that may arise from a corflict of testimony which becomes apparent on an investigation of the transcotion. The reasons assigned by the District Judge for his refusal to act upon the testimony of some, at any rate, of the witnesses examined in this case indicate, however, that he has approached the evidence from an entirely erroneous standpoint. Thus, with regard to Nanda Lal Das, the seribe, he notes that he was presured from Serampore,

^{(1) (1894)} P. 151 at p. 159; 6 R. 540; 70 L. T. 453; 42 W. R. 343.

^{(2) 18} Ind. Cas. 577; 89 C. 245; 16 C. W. N. 265,

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aeross the river, and adds that as he has been a Pleader's elerk and writes for people frequenting Courts and Registration Offices, he is a likely hand to be shosen for getting up a deed. There is no foundation laid in the evidence for the imputation thus made against professional deed-writers in general. He next dismisses the evidence of the Doctor Rashbibari Mookerjee with the remark that he does not pay income tax and was prosecuted in a forgery case. This comment is based apparently on a statement made by the witness in the following terms: "there was a criminal ease against me for forging a currency note; there were fourteen accused in the case; only one Phani Bhushan Pan was convicted; all the others including myself were acquitted in the bessions Court; that was seven or eight years ago." The District Judge thus overlocks the elementary principle that where there has been an acquittal, the aquittal is conclusive; Jenkins, C. J., observed in Emperor Noni Gopal (3), on the authority of the decision in Rex. v. Flummer (4), it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establish. ing the innocence of the person to whom it relates. Again, Saileswar Sanyal is discredited because he is a neighbour, while Jitendra Nath Upadbyay is not relied on because te is a chance witness from a The District Judge, bowever, distance. soncedes that the evidence of all these witnesses could be accepted if the Will had been exceuted in the natural way and publicity given to it, though be does not state how the execution was unnatural and how seerecy could have been intended when at least half a dozen strangers were present in the assembly. The District Judge next proceeds to make the general observation that it must be acknowledged that there is no great reluctance in our country in getting up a deed of this kind. There is no trace of evidence in the record to support this remark with regard to the people either of the province in general or of the localities where the lady resided

(8) 10 Ind. Cas. 582; 15 C. W. N. 593; 33 C. 559; 12 Cr. L. J. 288.

or the Will was executed. The Judge then proceeds to rely upon a statement made by Babu Jyotish Chandra Hazra in cross examination to the effect that Kanty Chandra Ghore and Kailash Chandra Ghose, two members of the Ghose family of Chandranagore, had propounded a Will alleged to have been executed by Trailokya Nath Ghose, brother of Kanty Chandra Ghose, that Probate of the Will was refased by the Trial Court, and that during the pendency of an appeal in this Court the matters in difference were settled by a deed of release dated the 9th March 1916. It is difficult to see how this statement is relevant to the present proseedings and how it can be admissible in The resitals in the deed evidence. release are plainly inadmissible, and the document was introduced into evidence for an entirely different purpose, namely, as containing the signature of Rajanibala who had asted as the guardian of her infant grand-son, Anil Chandra, in the transaction. The District Judge plainly should not have allowed his judgment upon the question of the genuineness of the Will now in controversy to be affected in the remotest degree by what took place in connection with the alleged Will of Trailokya Nath Ghose. Moreover, his observation that the Will of Trailokya Nath was designed to cheat his daughters while the present Will is intended to save the estate from the effect of the conduct of a dissolute ecn can only be regarded as embodying whelly misleading analogy. This is followed up by the entirely groundless imputation that a friendly neighbour (Saileswer Sanyal) and a young student (the Pleader Jitendra Nath Upadhyay) would not be averse to belping a minor. In view of these and other remarks made by the District Judge, we see no essape from the conclusion that the adverse opinion formed by him with regard to the Will in dispute is not based upon a consideration and analysis of the positive evidence on the resord. He has in fact adopted the method which has been more than once condemned by the Judicial Committee; Ohotey Norain Singh v. Ratan Koer (5)

^{(4) (1902) 2} K. B. 339; 71 L J. K. B. 805; 66 J. P. 647; 86 L. T. 886; 18 T. L. R. 659; 51 W. R. 137; 20 Cox. C. C 248,

^{(5) 22} I. A. 12; 22 C. 519; 6 Sar. P. C. J. 564; 11 Ind. Dec. (N. s.) 346 (P. C.).

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and Jagrani Koer v. Durga Parshad (6). As was observed by Lord Watson in the first of these sases, in order to prevail against such evidence as has been adduced, the improbability must be elear and eogent and must approach very nearly to, if it did not altogether constitute, an impossibility. This was emphasised by Lord Shaw in the second case, when he added that objection that the wifnesses might have been of a better class is at an end when execution and attestation are proved. comment of this character has no force except upon something of a much higher level than mere suspicion, namely, proof which would thoroughly satisfy the mind of a Court that the witnesses had committed both forgery and perjury. In the case of a Will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous serating of documents of which the opposite ean be said, namely, that they are unnatural, unreasonable or tinged with impropriety. In view of all these circumstances, we cannot attach much weight to the opinion of the Trial Judge who had the advantage of seeing the witnesses and notising their look and manner, as laid down by the Judicial Committee in Shama Charn Kundu Khettromoni Dasi (7), Shunmugaroya Mulaliar v. Manika Mudaliar (8), Bombay Cotton Manufacturing Co. v. Motilal (91. Reg. v. Bertrand (10) and other decisions reviewed in Lalljee Mahoxed v. Dudchni

(6) 22 Ind. Cas. 103; 41 I. A. 76; 36 A. 93; 19 C. L. J. 165; 16 O. C. 386; 12 A. L. J. 125; 26 M. L. J. 153; 15 M. L. T. 125; (1914) M. W. N. 137; 18 C. W. N. 521; 16 Bom. L. R. 141; 1 O. L J. 57 (P. C.).

(7) 27 I. A. 10; 27 C. 521; 2 Bom. L. R. 538; 4 C. W. N. 501; 7 Sar. P. C. J. 638; 14 Ind. Dec. (N. s.) 313.

(8) 3 Ind. Cas 799; 36 I. A. 185; 32 M. 400; 10 C. L. J. 276; 11 Bom. L. R. 1206; 6 M. L. T. 304; 19 M. L. J. 640 (P. C.).

(9) 29 Ind. Cas. 229; 4? I. A. 110; 33 B. 385; 21 C. L. J. 5.8; 19 C. W. N. 617; 17 M. L. T. 408; 28 M. L. J. 593; 17 Bom. L. R. 455; 2 L. W. 521; (1915) M. W. N. 783 (P. C.).

(10) (1-67) 1 P. C. 520 at p. 535; 4 Moore P. C. (N. s.) 460: 33 L J. P. C. 5; 16 L. T. 752; 16 W. R. 9; 10 Cox C. C. 618; 16 E. R. 391.

Jisanji Guedar (11) and Surendra Krishna Mondal v. Ranes Dassi (12).

We may further observe that the evidence adduced by the propounder is practically uncontradicted. We have, on the other side. some evidence as to realisation of rent from the tenants of the houses after the death of the testatrix. On one occasion Nitai and Kiishna jointly demanded rent; that was apparently to meet the expenses of the Sradh ceremony. The tenant, however, did not pay the rent, and he continued to with. hold it when he found there was a dispate as to the title. The only evidence worthy of notice adduced on the side of the caveator is the signature of the testatrix on the release. There may be a controversy as to whether the document was duly proved and received in evidence, but even if we assume that it was really executed by the lady, it does not assist the ease of the eaveator. The District Judge limited himself to the observation that the signature on the Will is firm and not like that of a pale and emaciated lady on the point of death. We have no evidence to show how much vitality the lady possessed three days before her death; but this much is plain that a comparison of the signature on the Will with that on the deed of release is not saleulated to excite suspicion. In this connection, reference may be made to the exposition of the methods of proving handwriting given by Jenkins, C. J., in the ease of Barindra Kumar v. Emperor (13) which was followed in Pulin Behary v. Emperor (14). The ordinary methods of proving handwritings are: (i) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act; (ii) by a comparison of handwriting as provided in section 73 of the Evidence Ast; and (iii) by the admission of the person against whom the document is tendered. A document does not prove itself, nor is

^{(11) 84} Ind. Cas. 807; 43 C. 833; 23 C. L. J. 190; 20 C. W. N. 335.

^{(12) 59} Ind. Cas. 814; 47 C. 104°; 33 C. L. J. 31; 24 C. W. N. 86°.

^{(13) 7} Ind. Cas. 359; 37 C. 487 at p. 502; 14 C. W.

N. 1114; 11 Cr. L. J 45?. (14) 16 Ind. Cas. 257; 15 C. L. J. 517 at p. 593; 16 C. W. N. 1105; 13 Cr. L. J. 609.

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an unproved signature proof of its having by the person whose written signature it purports to bear. In applying 73 of the the provisions of section Evidence Act it is important not to lose sight of its exact terms. It does not sanction the comparison of any two doenments, but requires that the writing with which the comparison is to be made, or the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard or, in other words, the disputed writing, must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person. The seetion does not specifically state by whom comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contract that in that particular connection the Court may make the comparison. A comparison of handwriting is at all times as a mode of proof hazardous and inconslusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the syldenes of experts. In Sceemutty Phoo !se Bibee v. Gobind Chunder Roy (15) it was said by the Court that "a comparison of eignature is a mode of assertaining the truth which ought to be used with very great care and caution." It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment, that the appearances on which they rely are disclosed, and can thus be supported or criticized, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such sheek. And that the aid of an expert may be of value was elearly the opinion of so distinguished a Judge as Mr. Justice Black. barn, who in Reg. v. Harrey (16) refused to allow a comparison to be made without of experts, the help A comparison of writings has consequently been deemed a

mode of ascertaining the truth which ought to be used with very great saution: Nob.n Krishna v. Rassic's Lall (17), Kurallee l'ersaud Misr v. Anantaram Bajra (18) specially if no skilled witness has been salled to make the comparison; Reg v. ti'verlock (19), Reg. v. Harvey (16), Doe d Mudd v. Suckermore (2); Ra endro Nath Holdar v Jogendro Nath Baner. jes (21), Romesh Ohunder Muteri v. Rajani Kant Mukerji (22). We must further bear in mind that, although from the dissimilarity of signatures, a Court may legitimately draw the inference that a particular signature is not genuine because it varies from an admittedly genuine signature, yet, resemblance of two signatures affords no safe foundation that one of them is genuine. Now, it may be sonceded that if two signatures are exactly identical, there is room for suspicion that the one in question may be a copy or careful imitation of the genuine signature. It is a fact well-known and may be readily verified that no two signatures, astually written in the ordinary course of writing them, are precisely alike. The character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent, but the coincidence is seldom known where a genuine signature of a person superposed over another genuine signature of the same person is such fac-simile that one is a perfect match to the other in every respect. There generally diversity in the marks of the pen, the size of the letter, the level of the signature and the space it compies, that stands as a guard over the gennine signature and characterises it as the true signature. But, as was observed by Coleridge, J. in Doe J. Mudd v. Suckermore (20), "the test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general

(17) 10 C. 1017 at p. 1051; 5 Ind Dec. (N. s.) 700. (18) 8 B. L. R. 420 at p. 502; 16 W. R. 16 (P. C.); 2 Sar. P. C. J. 695; 2 Suth P. C. J. 454.

(19) (1894) 2 Q. B. 766; 63 L. J. M. C. 233; 10 R. 431; 72 L. T. 299; 43 W. R. 14; 18 Cox C. C. 104; 58 J. P. 788,

(20) (1886) 5 A. & E. 703 at p. 705; 2 N. and P. 16; 7 L. J. (N. s.) K. B. 3°; W. W. and D. 405; 111 E. R. 1831; 44 R. R. 533.

(21) 14 M. I. A. 67; 7 B. L. R. 216; 15 W. R. P. C. 41; 2 Suth. P. C. J. 422; 2 Sur. P. C. J. 666; 20 E. R. 711.

(22) 21 C. 1; 17 Ind. Jur. 428; 6 Sar. P. C. J. 840; 10 Ind. Dec. (N. s.) 688,

^{(15) 22} W. R. 272.

^{(16) (1869) 11} Cox C, C. [48 at p. 548.

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character of writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is, therefore, itself permanent" Again, as Sir J. Nieboll said in Robson v. Rocke (23), "the best, usually perhaps, the only proper, evidence of handwriting is that of persons who have asquired a previous knowledge of the party's handwriting from seeing him write, and who form their opinion from the general character and manner of this, and not from criticising particular letters." I have compared the two signatures, and the impression left upon my mind by their prevailing character is that they are signatures of the same person, although on one document she signs her name as Rajanibala and in the other as notwithstanding this Rajanimani, Bat, general correspondence of the signatures, justifying a reasonable inference that they were made by the same person, I do not desire to base my conclusion upon the similarity of the signatures, because, as has been well observed, it is not difficult to forge the bandwriting of almost any person so that it may be impossible for even the most acute and experienced Judge to diseriminate between the false and the true. Besides, such reliance upon similarity of signatures is unnecessary in the present case. as there is, in my opinion, a mass of direct and circumstantial evidence which points unmietakably to the genuineness of the Will. After an examination of that evidence and a consideration of the criticisms thereon by the District Judge and by Coursel for the respondent in this Court, I feel no doubt that the Will was duly executed and attested by the testatrix. I may add that it is not necessary here to consider what may be the legal effect of the grant of Probate upon the title set up by the eaveator.

The result is, that the appeal must be allowed, the decree of the District Judge set aside and the application for Letters of Administration with copy of the Will annexed granted to the appellant with costs in both Courts.

BUCKLAND, J .- I agree.

N. H. Appeal allowed.

(23: (1824) 2 Add. 53 at pp. 80, 81; 162 E, R, 215.

PATNA HIGH COURT,
APPEAL FROM APPELLATE DECREE Nos. 709
of 1920.

APPEAL FROM APPELLATTE ORDER No. 32 OF 1921.

Jane 29, 1921.

Present: - Mr. Justice Ross. In No. 709 or 1920.

JITENDRANATH OHATTERJIAND ANDIBER-PLAINTIFFS-ASPELLANTS

ter sus

JHAKU MANDAR AND OTHERS— DEPENDANTS—RESPONDENTS. IN No. 32 OF 1921.

JULGMENT DEBLORS - APPELLANTS

versus

Babu NBIPENDRA NATH CHATTERJI
AND ANOTHER—DECREE HOLDERS—
RESECTIONS.

Civil Procedure Code (Act V of 1908), O. I, r. 9, O. XLI, r. 4—Necessary party, omission of, in appeal, effect of - Lease—Kabuliyat, construction of—Produce rent stipulated—Arrears value, recovery of.

A person who is a necessary party to a suit is also a necessary party to the appeal. [p. 781, col. 1.]

In a suit for the rent of a holding the plaintiffs, four in number, obtained a decree, the decree not being for specific sums in favour of each plaintiff the defendant appealed against the decree but joined only two of the plaintiffs as respondents:

Held, as the two plaintiffs joined as respondents could not have maintained the suit, the appeal was incompetent, and the decree passed therein a nullity. [p 781, col. 2.]

In a Manthika Settlement stipulation as to rent

was as follows :

"We shall in respect of the kamat land deliver to the malik zemindar aforesaid at his place, grains, kalai and jai, two maunds per bigha on the average total 83 maunds 28 seers by way of rent in this way, viz, each year in the month of Pous 50 maunds of Kalai and in the month of Baisakh 38 maunds 28 seers jai (oats)the price approximately is fixed at Rs. 2-1-0 for kalai per maund, and Rs 2-3-0 for jai per maund.....Approximate rent comes to Rs. 185." The price at which the produce was valued was not stipulated to be payable in default of delivery of produce:

Held, that on the true construction of the deed, the clear consequence of the non-delivery of produce as covenanted was that the tenants were liable for the market-value of these crops at the time when

they were deliverable. [p. 782, col. 1.]

Messrs. Sushil Madhab Mullick, N. O. Sinha, B. N. Mitter and S. S. Bose, for the Appellants, in No. 703 of 1920 and for the Respondents in No. 32 of 1921.

Messrs. Naresh Ohandra Roy and S. N. Fose, for the Respondents, in No. 709 of 1920 and Appellants in No. 32 of 1921,

JATINDRANATH CHATTERJI. U. JHAKU MANDER

JUDGMENT.

Ross, J.—This is an appeal by the plaintiffs in a suit in which they claimed Rs. 1.349 on account of rent for 41 bighas 17 kathas of land for the years 1322 to 1325. The land was held by the defendants under a Manhunda Settlement for 3 years from 1310 to 1312 and they have been holding over. The Munsif gave a decree in full but the learned District Judge modified the decree on a construction of the lease.

The first point taken in second appeal is that the appeal to the District Judge was insompetent and his decree a nullity because the suit was brought by four plaintiffs while only two of these were made respondents in the appeal. In support of this contention the esses of Ee,oy Gopal v. Umeth Chandra Bose (1), Dharan; it Naroyan Lingh v. Chandeswar Frosad Narayan Singh (2) and an observation in the judgment of the Privy Council in Rai Chunder Sen v. Ganga Das Seal (3) have been referred to. On the other side has been sited the desision in Upendra Kumar Chakravarty v. Sham Lol Mandal (4). This desision appears to be in ear first with the other authorities and contrary to the general course of decision. It seems plain that a person who is a necessary party to a suit must also be a necessary party to the appeal. The two plaintiffs who were made respondents to the appeal could not have maintained the suit which was a suit for rent for one holding, and the appeal against these two plaintiffs only is, in my opinion, incompetent. It was attempted to support the degree on the ground that the plaintiffs are brothers governed by the Dayabhaga School of Law and that the two who were made respondents are the senior members of the family; but the decree appealed against was not a decree for specific sums in favour of each plaintiff but a single decree in favour of all. The appellants were not entitled to divide the amount of the decree by two and appeal against two of the plaintiffs only in respect of half of the eam deereed.

Reference was also made to Order XLI, rule 4, but that has plainly no application as it provides for an exactly opposite set of cir-

(1) 6 C. W. N. 198.

(2) 11 O, W. N. 501; 5 O. L. J. 393.

(3) 81 C. 497 at p. 483; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71; 14 M. L. J. 147; 8 Sar. P. C. J. 633 (P. C.).

(4) 84 C. 102); 11 C. W. N. 1100; 6 C. L. J. 715.

cometances to the present. I, therefore, hold that the appeal was incompetent and that the decree passed in appeal is a nullity.

The second point is on the merits of the case. It is contended that on the true construction of the kabuliyat the Munsil's decree was right. The Settlement is expressed to be a Manthika Settlement. The stipulation as to rent is as follows:—

"We shall in respect of this kamat land deliver to the Malik esmindar aforesaid at his place, grains, Kalai, and Jai, 2 maunds per bigha on the average, total 83 maunds 28 seers by way of rent in this way, vis., each year in the month of Pous 50 maunds of Kalai and in the month of Baieskh 33 maunds 28 seers Jai (oats)."

The term of the Settlement is then set forth and provision is made for what is to be done in the case of excess or defect in the area under sultivation, the rent being inereased or decreased at the aforesaid rate of 2 maunds of Jai per bigha. Then at the end of the lease the following words occur : "the price approximately is fixed at Rs. 2.4.0 for Kalai per maund, and Rs. 2-3-0 for Jai per maund," and in the Schedule "approximate rent comes to Rs. 185." Various cases have been eited on the construction of leases more or less similar to the present lease and in these eases different views have been taken. As these decisions proceeded on the terms of the contracts which were there being construed, they are not of much assistance in the present case; but it may be noted that in Baneswar Mukherji v. Umesh Chandra Chakra. barti (5) stress was laid in constraing the document on the fact that there was an express provision relating to the delivery of paddy in the month of Pous. A similar provision is found in the present lease. There is no doubt that the lease is a Manhunda lease and the rent payable is rent in kind. There is no provision, as in some of the cases that were cited, that on failure to pay rent in kind, rent at a particular each rate shall be payable. It is contended that the last clause of the lease, which I have already quoted, has this effect. It is not so expressed and, in my opinion, will not bear that interpretation. In the first place this clause is not inserted along with the clause where the rent is set forth but in a different part of the

(5) 7 Ind. Cas. 875, 37 C. 626.

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lease altogether, remote from the clause providing for the payment of rent. In the second place the price at which the produce is valued is not stipulated to be payable in default of delivery of produce. Thirdly in both places where each is mentioned, the word 'approximate ' is used. Now, no one grants a lease at an approximate rent and the fact that the word 'approximate' is used in connection with the terms relating to each is a clear indieation that these terms are not rent or any substitute for rent. The rent is produce deliverable in the month of Pous 50 maunds of Kalai and in the month of Basiak 33 maunds 23 seers of Jai. It seems to me that the clear consequence of non-delivery of produse as covenanted is that the defendants are liable for the market value of these erops at the time when they are deliverable. I hold, therefore, that the District Judge has erred in his construction of this lease and appeal ought to have been that the diemissed.

The result is that the present appeal must be decreed with costs, the decree of the District Judge set aside and the decree of the Munsif restored.

Note — The above judgment was affirmed on appeal under the Letters Patent of the High Court on the 20th December 193',—[Ed.]

J. P. & W. C. A.

Order accordingly.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 31

AND 35 OF 1920.

April 14, 1921.

Present: -Justice Sir Asutosh Mookerjee, Kr., and Mr. Justice Buckland,

PRASANNAMAYI DEBI-

APPELLANT

BAIKUNTHA NATH CHATTORAJ

Will-Standard of proof to establish Will-Burden

of proof-Attesting witnesses, production of-Appel late Court, duty of-Verdict of Judge trying case not to be lightly disregarded.

The standard of proof to establish a Will required by the Indian Statutes is that of the prudent man and not an absolute or conclusive one. The Evidence Act, while thus adopting the requirements of the prudent man as an appropriate concrete standard by which to measure proof, is, at the same time, expressed in terms, which allow full effect to be given to circumstances or conditions of probability or improbability, so that where forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable. [p. 788, col. 1.]

The onus probandi lies in every case upon the party propounding a Will, to satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator: in other words, where a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. But the suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. [p. 788, col. ?.]

Though it is desirable that all the attesting witnesses capable of being called should be examined to remove all suspicion of fraud, it is not absolutely necessary that where there are many attesting witnesses, the absence of every one not called should be specifically explained. [p. 788, col. ?.]

The verdict of a Judge trying the case should not be lightly disregarded by the Appellate Court where the issue is simple and straightforward and the only question is, which set of witnesses is to be believed. But where the determination of the question of genuineness of a Will depends not merely upon the assertions of witnesses but upon surrounding facts and circumstances whose existence is either admitted or indisputably proved, the judgment of the Trying Judge may be vitiated by his failure to test the veracity of the witnesses by reference thereto. Two conflicting view-points have to be reconciled, namely, on the one hand, the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences, and conclusions, and, on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. [p. 759, col. 1.]

Apreal against the decisions of the District Judge, Bankura, dated the 20th February 1920. PRAPARNAMATI DEBI U, BAIKUNTHA NATH.

Mr. T. O. P. Gibbons (Advocate General), Dr Dwarka Nath Mitter, Babus Pramatha Nath Banerice, Rama Fromd Mookeries and Phanindra Nath Das, for the Appellant.

Sir Asutosh Chaudhuri, Babas Karunamoy Bose, Bimala Charan Deb and Navendra Krishna Bose, for the Respondents.

JUDGMENT.

Mookesjas, J .- The subject matter of the litigations which have culminated in these two appeals is the estate left by one Mandakini Debi, a Hindu lady, who died on the 16th September 1918. On the 1st October 1:18 Baikuntha Nath Chattoraj, the surviving brother of her deseased husband, Brahmananda Obattoraj, made an application for Letters of Administration to the estate left by her. On the 28th July 1919 her sister, Prasannamayi, the widow of Rajballabh Chattorai, another brother of her busband, applied for Probate of an unregistered Will alleged to have been excented by her on the 14th September 1918, two days before her death. The relationship of the members of the family is set out in the annexed genealegical table :

MADHUSUDAN CHATTORAJ.

Radhaballav, Brahmanands, Rajballabh, Baikuntha died 1900 died 1918, died 1902, Nath, widow Mandakini widow (Caveator). Asutosh (Testatrix) Frasanna. mayi, Jamini, (Propounder)

By consent of parties, the Administration same evidence. In the Probate proceedings, the District Judge came to the conclusion that the genuireness of the Will had not been established; accordingly, be granted Letters of Administration to the petitioner in the other proceedings. Two appeals have, conrequently, been presented to this Court by Prasannamayi: Appeal No. 31 of 1920 is directed against the refusal of Probate; Appeal No. 35 of 1920 is directed against the grant of Letters of Administration. embetantial point in controversy is the question of genuineness of the Will.

The Will parporte, on the face of it, to have been executed by Mandakini whose name was signed by Natabar Mockerjee, who also signed his own rame as the seribe, and there were in addition seven attesting witnesser. The soribe and four of the attesting witnesses have been examined on behalf of the pro-The Will recites that Brahpourder. manands, the husband of the testatriz, had a brother Pajballay who had token her sister, Prasannamayi, as his second wife. Brahmananda and Rajballabh used to live in joint mess and estate as members of a Hindu family, and since their death, Mandakini and Prasannamayi had likewise lived in joint mess and estate. Rajballay had bequeathed his property to his widow, that is, to her sister Prasannameyi, and in his Will had appointed her husband as excentor. Her husband had taken out Probate Will of his brother and had, out of the income and profits of his own property and of the estate left by his brother, acquired properties in his own name. All these properties he had bequeathed to her and had ap. pointed her cousin (mother's siter's son), Kalibbusan Mcokerjee, as executor. After these resitals, the testatrix proceeded to give directions for the disposal of her estate in five paragraphs. In the first clause, she dedicated a property to goddess, Durga, and appointed Baikuntha Nath (her husband's younger brother) and Asutosh (son of her husband's elder brother) as managers of the property so dedicated. In the second clause, she directed her brother-in-law and nephewin-law to feed Brahmins annually on the occasion of the Durga Paja, for the spiritual benefit of her husband, out of the income of two other properties. In the third elause, she directed Rs. 1,500 to be spent in the and Protate proceedings were tried on the performance of her Sradh ceremony. In the fourth elause, she directed the residue of her estate to vest absolutely in her sister, Prasan. namayi. In the fifth elause, she dirested the expenses of the annual Sradh ceremony of herself and of her husband to be met out of the income of the estate vested in her sister. These directions do not seem unnatural; on the other hand, they constitute the kind of disposition which might well have been made by an elderly Hindu lady in the position of the testatrix. She had no children; her sister had married in the same family as berself, their husbands were brothers who had lived joint in PRASANFAMATI DEBI U. BAIGUNTHA MATH.

mess and estate and separate from their other brothers. Her rearest relations by marriage were her husband's younger brother and elder brother's son. In a family so constitued, it was not surprising that a pious Hindu lady would dedicate some property for the worship of the deity, appoint her brother in law and nephew in law as managers thereof, make provision for her own Sradh ceremony and the annual Sradh seremonies of herself and of her busband, and leave the residue of the estate to the sister whom she dearly loved. These provisions of the Will can in no sense be deemed inofficious or unnatural; on the other hand, they are prima facie reasonable, as they do not disregard the moral claims of the relatives of the testatrix which the ties of kinship suggest; they are consequently not calculated to excite auspicion as to the genuineness of the disposition: Jagrani Kosr v. Durga Parthad (1). We now proceed to consider the evidence as to the actual execution and due attestation of the Will by the testatrix; but before we do so, it is necessary to state the circumstances which led up to the discovery of the Will, for, as will presently their true appear, bearing upon question of genuineness of the Will has not been fully appreciated by the Trial Judge.

As previously stated, the applicant for Letters of Administration presented his petition to the District Judge on the 1st October 1918. On the same date, the District Judge made an order for the appointment of Babu Lalit Mohan Banerjee, a Pleader, as Commissioner to make an inventory of the articles and the iron safe and each to be found in boxes belonging to the deceased, Commissioner went to the residence of the deceased on the following day. Thereupon, Prasannamayi objected to the interference of the Commissioner on the ground that her sieter, Mandakini, had bequeathed all ber properties to her by means of a Will. She further stated that the key of the iron chest in which the moveable properties left by the deceased were kept was not with her, but was with Kalibhushan Mookerjee, the son of her mother's sister, who lived in Pakhanna 14 miles off. She added that she trusted no body

(1) 22 Ind. Cas. 103; 41 I. A. 76; 36 A. 93; 19 C. L. J. 165; 26 M. L. J. 153; 18 C. W. N. 521; 15 M. L. T. 125; 12 A. L. J. 125; (1914) M. W. N. 137; 16 Bom. L. R. 141; 16 O. C. 366; 1 O. L. J. 57 (P. C.).

else and would not open the iron sheet or box till he came. She further declined to show acything as she had got everything in pureuance of the Will. What she stated was reduced to writing by the Commissioner, and, later on in the day, she asserted again that her sister, Mandakini, had bequeathed her property to her by means of a Will. The Commissioner submitted a report to the Court on the following day, in which he explained his inability to make an inventory. On the 3rd October, the District Judge recorded that Prasannamayi claimed the property under a Will, directed her to show cause on the 6th November 1918 why she should not be criminally prosecuted for disobedience of the orders of the Court, and issued instructions that in the meantime the boxes and the safe containing the property, of which an inventory was sought to be made, be kept by the Commissioner in a separate room under seal, the key of the room to remain in the custody of the Commissioner. On the 4th October the Commissioner again went to the residence of the deceased, collected the moveables left by her, made a list thereof and placed them in a separate room which was looked up and sealed by him. The contempt proceed. ings against Prasannamayi dragged on for sometime, but were subsequently abandoned. On the 21st December 1918 a reference to arbitration was made at the instance of the partise, but this also, as might have been anticipated, proved infructuous in the end, as the question of the genuineness of a testamentary instrument cannot be settled by sompromise. Ultimately, the Commissioner again went to the residence of the deseased under the orders of the Court dated the 31st January 1919. He reached the place on Saturday, the 1st February, opened the room on the following day, and made a list of the safes, boxes and other articles as also of their contents. This list was filed in Court on the 3rd February 1919 and contained the following entry :

"IRON CHEST

(1) Unregistered Will of Srimati Mandakini Debi by the pen of Natabar Mookerjee of Pratrasayar, dated 28th Bhadra, 1325 B. S.

(2) Draft of a Will by Srimati Manda. kini Debi. These two are tied in a piece of cloth," PRABANKAMATI DEBI C. BAIKUNTHA NATH.

The list, as expressly stated in the report of the Commissioner dated 3rd February 1919, was prepared by him in the presense of Kalibbushan Mookerjee, Baikuntha Nath Chattoraj (the petitioner) and Baba Upendranath Das, Pleader for Prasannamagi. The articles found in the room were, after the preparation of the list, left there, and the room itself was again looked up and sealed. On the 3rd February 1919, that is, the day after the dissovery of the Will in the iron safe, Prasannamayi made a petition to the arbitrators in which abe resited the previous insidents and prayed that they might send for the Will. On the requisition of the arbitrators, the District Judge directed the Commissioner on the 10th Fabruary to bring the documents and file them in Court. On the 16th February the Commissioner went to the house agair, "brought the unregistered Will and a draft of a Will found in an iron safe" and filed them in Court on the following day, "wrapped in a piece of cloth." It is thus elear that the Will was inside an iron safe which was looked up and placed inside a room, the doors whereof were looked up and sealed by the Commissioner and remained so sealed from 4th Ostober 1918 up till 2nd February 1919. Consequently, the Will must have been in existence as early as the 4th October 1918. It has been boldly suggested, however, that the Will might have been manufactured later and smuggled into the iron safe when the scom, was opened and the safe was unloaked on the 2nd February 1919. But there is manifestly no foundation whatever for this ingenious suggestion which is not based on any evidence in the resord. As already stated, the Commissioner reported to the Court on the 3rd Fabruary 1919, that he had prepared the list of the contents of the room and of the safes and boxes in the presense of Baikuntha Nath Chattoraj, and the list specified in explicit terms "the Will and draft tied in a pisce of eloth," as found among the contents of the iron chest. Baikuntha Nath might have forthwith objected that this was an incorrect statement, and that the Will was smuggled in when the safe was opened by the Commissioner; his omission to take exception at the time is significant, and no weight ean be attached to the much belated after.

thought that the Will might have been surreptitionsly introduced into the safe when it was opened by the Commissioner. Such a suggestion plainly involves a serious charge of carelessness against the Commissioner, and he should, in all fairness, been examined before the sharge sould be entertained. On the other hand, such evidence as there is on the record including the statement of the caveator as to what took place when the Commissioner opened the room and unlocked the safe, indicates that the work was done in the presence of many people, anxiously watching the prozeedings; in such sircumstances, it is improbable in the highest degree that desparate attempt would be made to smuggle in the two dosuments, or, that it made, it should escape detection. We must consequently hold that the Will and the draft were inside the iron safe on the 4th Ostober 1918, when it was placed inside the room which was looked up and sealed by the Commissioner. This constasion, as we shall presently see, is supported by reliable evidence on the record.

Natabar Mookerjee, the god-son of the testatrix and the writer of the Will, has deposed that he used to serve in the Na. karka Colliery, (Post Kotwalgar, District Manbhum) 300 or 400 miles distant from his house which was about 6 miles off from the residence of Mandakini and that he came home in September 1919 to see his wife who was ill and also to negotiate for the marriage of his daughter. On or about the 13th September, he went to see Manda. kini as usual as she was his god-mother and found her ill. Prasannamayi also was ill, and, assording to the witness, both of them probably had an attack of inflaerza. He was told that Mandakini would execate a Will. On his stating that he had no experience in Will drafting, she said that she had a draft prepared by Upendra Baba of Bankura who was her retained Pleader from before. The draft was in a wall-almirah, wrapped up in a rag. The draft showed that Mandakini was willing away in favour of Prasannamayi and Prasannamayi was in her turn willing away in favour of Mandakini. The draft, in fact, was for a mutual Will. Natabar did not approve of the draft, and on the suggestion of Rajendra Narayan Biswas, PRESANNAMAYI DEBI U. BAIKONTHA NATH.

Babu Bhutnath Mandal, a Pleader of the Burdwan Bar, who had some to the village on business was called in. The Pleader examined the draft and distated the Will to Natabar who wrote it out. After the Will had been written out, it was read over and explained to Mandakini by the witness. At her request, he signed her name as execut-Bhutnath Mandal also became ant. witness and he was followed by other attesting witnesses, The Will was then taken to Prasannamayi who was lying bedridden in another room. As she was not able to get up, she asked the witness to take it back to Mandakini. After she had been helped to get up, she went into another room and kept the Will and draft tied up in a rag inside an iron chest. was in this safe that the two documents were found on the 2nd February 1920. this evidence, it is difficult to realise how a doubt could be seriously raised as to the genuineness of the Will. The Court below, however, has not taken a comprehensive view of the case and has looked at every incident with surpicion which appears to us to be groundless. The attempt to break down Natabar Mookerjee in eross-examination was by no means successful. The suggestion was made that he was not present in the village and in the house of Mandakini on the date of execution of the Will. He emphatically repudiated the imputation. If his statement was untrue, he could have been completely contradicted by Janakiballay Hazra, his superior officer in the Colliery where an attendance register was kept; but it is significant that though his name was included in the list of witnesses, effective steps were not taken to serve the writ on him and to place him in the witness-box. The warrant issued against Janaki was not served for want of an identifier, and the application for re-issue of process was renewed at so late a stage of the case, that the District Judge rightly refused to grant it. It is further clear from the evidence of Natabar Mookerjee that subsequent to his return to the Colliery after the execution of the Will, he did not go back to the village for many weeks. A post eard written by him on the 7th November 1918 to Prasannamayi is alleged to have been found on or about the 2nd December 1918 in a window in the house, though it

is not mentioned by Baikuntha in his examination-in-shief. The sontents of this communication, which the witness was never called upon to explain, have been supposed to militate against the theory that Natabar was present when the Will was executed. The letter, however, is eapable of a very different interpretation, and is consistent with the view that when Natabar left Mandakini, her illness had not taken a serious turn (as, indeed, is shown by other evidence on the record) and also that Natabar was not informed of her death for some considerable time. The letter was evidently written on receipt of intimation of news of her death from Prasannamayi, who communicated with him while the proceed. ings for contempt were pending against her. The letter brings out the very important fact that even on the 7th November 1918, Natabar was at the Colliery and thus corroborates his assertion that he did not return to the village till after its date. This also could have been verified or contradicted if the petitioner had secured the attendance of the Colliery officer Janakiballay Hazra and secured the production of the attendance register. It is not enough to suggest doubts as to the veracity of a witness; if the means of contradiction are available to the party who shallenges his truthfulness, these should be produced before the Court. We must consequently take it as established beyond reasonable doubt that Natabar was present at the house of Mandakini on or about the 14th September 1918 took part in the preparation of the Will and did not again return to the village till after the 7th November 1918. This conclusion completely demolishes the theory that the Will was manufactured after the death of Mandakini on the 16th September 1918, for, as has already been shown, the Will was inside the iron safe as early as the 4th October 1918, If Natabar, the scribe of the Will, was 300 or 400 miles away, at the Colliery, from the 15th September 1918 to the 7th Novthe question inevitably ember 1918, arises when and where did he manufacture the Will to be placed inside the iron safe not later than the 4th October 1918. No hypothesis, probable or improbable, has even been suggested as a satisfactory solution of this eracial difficulty in the path of the respondent.

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Apart from this, there is other weighty evidence, besides that of Natabar Mookerjes, to support the genuineness of the Will. The testimony of Baba Upendra Nath Das, a Pleader of long standing of the Bankara Bar, is unimpeachable. He aggerts that he prepared the draft which was subsequently found inside the iron safe along with the Will. There is no inherent improbability in the terms of the draft, which could be used either for a mutual Will or for a Will by one of the sisters in favour of the other. The Trial Judge has summarily discarded the evidence of the Pleader, because he could not remember the date when he made the draft; the suggestion apparently was that he might have prepared it after the death of the testatrix. This is a mere hypothesis, not supported by evidence. The Judge has further sommented adversely upon the cirenmstance that the witness did not produce his assounts; the obvious answer is that he was never called upon to do so, even though he offered, when asked in crossexamination about his assounts, to produce them on the following day. The objecttion that the assounts of Mandakini were not produced is equally fatile; her papers, any, were in the enstody of the iŧ Commissioner no attempt and made to examine them. In our opinion, there is no reason why the evidence of Babu Upendranath Das, so far as it goes, should not be accepted as a perfectly honest and straightforward statement. But if the Pleader is unable to re-eall the exact time when he prepared the draft, the date is fixed with some approach to assuracy by Trailokyanath Karak who was formerly in the service of Mandakini. He swears that he was sent by Mandakini to Babu Upendranath Das to get the draft prepared and that this took place not less than 10 nor more than 30 days before her death. The witness also describes the ineidents connected with the astual execution and attestation of the Will. There is no reason why he should be disbelieved, except the fact that he had been in the service of Mandakini. We need not refer in detail to the evidence of Nagendranath Ghose whose statements do not seem rew acitenimexe-ecore eccaw has ,eldedeng improperly disallowed even after he had parned hostile, [Surendra Kriehna Mondal v.

Kanee Dassi (2)] nor, is it necessary to rely upon Sarendranath Mandal manner is described by the Judge as suspisious. But we do not see adequate reasons for rejecting the testimony of Babu Bhutnath Mandal, a Pleader of the Burdwan Bar. The District Judge was evidently annoyed when it was found difficult to secure his attendance, but the explanation offered by him for his failure to attend punctually has the ring of truth. Apart from this, his evidence in support of the Will was trustworthy and remained unaffected by cross-examination. It may be noted that the Judge considers him unworthy of credit because his professional income as a lawyer is small; but clearly it cannot be affirmed as a general rule that a person is not trustworthy because he is not wealthy, and the Judge himself does not hesitate to believe Kalipada Ray, a witness for the eavestor, though his income as a medical man is equally limited. The position, then, is that there is a large body of respectable syidence in support of the case made by the propounder, and that evidence fits in with the two eardinal points that the Will must have been in existence as early as the 4th Ostober 1918, and that no hypothesis has been propounded to show that the Will could have been manufactured after the 15th September and before Ostober 1918. As against this evidence, the caveator produced a physician Kalipadda Ray, who asserted that he was approached in January or February, 1919, with a request that he should for a consideration of Rs. 400 become witness to a Will executed by Mandakini, and a deed-writer Anantalal Ghosb, who alleged that he had been invited in the middle of November 1918 to forge a Will by Mandakini for a bribe of Me. 200. These witnesses are obviously unreliable, and their statements must be deemed untrue when it is remembered that, at the dates spoken to by them, the Will was inside the iron safe. The other witnesses give evidence of a negative character which does not neutralise that adduced by the petitioner. The adverse

^{(2) 59} Ind. Cas. 814; 47 C. 1043 at p. 1075; 88 C. L. J. 34 24 C. W. N. 860.

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comments made upon the evidence of Prasannameyi are really not justified; there is nothing to show that she knew that the Will which had been taken to her and returned, was deposited in the iron safe; it is further not shown that she obtained the key of the safe after the death of her eister or that, if she had the key, she ever opened it and examined the contents; she may have heard of the matter during her illness, but it is not improbable that as stated by her in her petition to the arbitrators on the 3rd February 1919, it may have escaped her memory. In these eireumstances, we are clearly of opinion that the Dietriet Judge has arrived at an erroncous conclusion on the question of the genuineness of the Will. His judgment shows that his opinion is not based upon a careful analysis of the evidence and has been influenced by unfounded suspicior. As was pointed out by Jenkine, C. J., in Gopessur Dutt v. Bisiessur Dutt (3), the standard of proof to establish a Will required by the Indian Statutes is that of the prudent man and not an absolute or. conclusive one. The Indian Evidence Act, while thus adopting the requirements of the prudent man as an appropriate ocnerete standard by which to measure proof, is, at the same time, expressed in terms, which allow full effect to be given to circumstances or conditions of probability or improbability, so that where, as in this case, forgery comes in question in a civil suit, the presumption against missondust is not without its due weight as a circumstarce of improbability, though the standard of preced to the exclusion of all reasonable doubt required in a criminal case may not te applicable: Cooper v. Slade (4), Devine v. Wilson (5). If the evidence is tested from the point of view just indicated it leaves no room for escape from the conelusion that the Will was in fact excented by Mandakini.

The only other question which could possibly arise would be that of her testamentary sapacity. On this part of the eace, however, Sir Asntosh Chaudhari

(3) 13 Ind. Cas. 577; 39 C. 245; 16 C. W. N. 265. (41 (1858) 6 H. L. C. 746 at p. 772; 27 L. J. Q. B. 449; 4 Jur. (N. s.) 791; 6 W. R. 461; 10 E. R. 1485; 108 R. R. 292.

(5) (1855) 10 Mco. P. C. E0? at p. 531; 14 E. R 591;

110 R. R. 83.

conceded that if it was found that the Will had teer, in fact, executed by Mandakini, be could not centend that she had not at the time a scund disposing mind. No doubt as pointed out by the Judicial Committee in Earry v. Butlin (6) the onus probandi lies in every case upon the party propound. Will to satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator; in other words, as stated by Lord Davey in Tyrrell v. Fainton (7), wherever a Will is prepared under eireumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court enght not to pronource in favour of it unless the suspicion is removed. The suspicion to which allusion is thus made must be one inherent in the transaction itself and not the doubt that may arise from a scuffict of testimony which becomes apparent on an investigation of the transaction. Considered in the light of these principles, the question of testamentary espacity is free from difficulty. The evidence adduced by the propounder affords everwhelming proof that the testatrix was in full possession of her mental faculties when she executed the Will, and this is borne out even by the evidence of Bijayebandra Ghose, Jaminibbushan Chattoraj and Bipinbihari Mandal called by the eaveator. We have further the important fact that the Will was executed according to a draft prepared at the instance of Mandakini some time before her illness and there is nothing to indicate that Prasanna. mayi ir fluereed the disposition in her favour. Some stress was laid, not unnaturally, on the circumstance that all the attesting witnesses were not salled; but though it is desirable that all the attesting witnesses capable of being salled should be examined to remove all suspicion of fraud, it is not absolutely necessary that where, as here, there are many attesting witnesses, the absence of every one not called should be specifically explained; Surendra Krishna Mondal v. Rance Dassi (2).

It has been finally urged that the Court

(6) (1838) 2 Moo, P. C. 480 at p. 482; 43 R. R. 123; 12 E. R. 1089; 4 S. E C. (o. s.) 175, affirming 1 Curt. 614; 163 E. R. 215.

(7) (1894) P. 151; 6 R. 540; 70 L. T. 453; 42 W. R.

843.

RHEYCHAND DARYANOMAL D. MERGHOMAL CHUHARMAL.

should be slow to interfere with the findings of fact of the Trial Judge who saw and heard the witnesses and had an opportunity of noting their demeanour. This is a salutory rule and it may be conceded that as pointed out by the Judicial Committee in Bombay Ootton Manufacturing Co. v. Motilal (8), the verdict of a Judge trying the case should not be lightly disregarded where the issue is simple and straightforward and the only question is which set of witnesses is to be believed. The case before us is of a different description. Here the determination of the question of genuineness depends not merely upon assertions of witnesses but upon surrounding facts and eireamstances whose existence is either admitted or indisputably proved, and the judgment of the District Judge is, in our opinion, vitiated by his failure to test the veracity of the witnesses by reference The desitions reviewed in Lall ee Mahomed v. Dadabhai Jivanji Gustar (9), and Surendra Krishna Mondal v. Rance Dassi (2), show that two corflicting view-points have to be reconciled, namely, on the one hand the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences and conclusions, and on the other hand the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. have kept in view these considerations and have arrived at the conclusion that the opinion of the District Judge on the question of the genuineness of the Will sannot be supported on a right appreciation of the evidence.

The result is that the appeals must be allowed and the Will admitted to Probate. The application for Probate is granted while the application for Letters of Administration is dismissed. The appellant will have costs in both Courts in the two proseedings.

BUCKLAND, J .- I agree.

B. N.

Appeals allowed,

(8, 29 Ind. Cas. 229; 89 B. 38; 21 C. L. J. 528; 42 I. A. 110, 19 C. W. N. 617; 17 M. L. T. 408; 28 M. L. J. 593; 17 Bom. L. R. 45; 2 L. W. 521; (1915) M. W. N. 786 (P. C.).

9).81 Ind. Cas 817: 43 0. 93) at p 817; 23 0, La

L 190, 20 Q. W. N. 835.

SIND JUDICIAL COMMISSIONES'S COURT.

REVISION APPLICATIONS NOS. 70 AND 71 or 1917. July 3, 1920.

Present: -Mr. Kinsaid, J. C., and Mr. Kennedy, A. J. C.

KHEMOHAND DARYANOMAL-PLAINTIPE - APPLICANT

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MENGHOMAL CHUHARMAL -DEFENDANT-RESPONDENT.

Provincial Small Cause Courts Act (IX of 1837), 8, 25-Civil Procedure Code (Act V of 1903), O. IX, r. 8-Dismissal of suit for default-Revision.

It is entirely within the discretion of the Judge deciding a case to wait for the appearance of the plaintiff's Pleader but if he does not do so and dismisses the case in default, a High Court will not interfere with his discretion. [p. 790, col. 1.]

Application for revision against the order of the First Class Sab-Jadge, Hyderabad.

Mr. Fatehchand Assudamil, for the Ap. pellant.

Mr. Tabilran Maniram, for the Respond. ent.

JUDGMENT .- The fasts of these two Ravision Applications Nos. 70 and 71 are simple and undisputed,

The plaintiff, who is the present applicant, filed a suit for Rs. 226 in the Court of the First Class Subordinate Judge, Hyder. abad, in the exercise of Small Cause Court Jarisdistion. The defendant in his written statement admitted that R1. 136-5-6 were due to the plaintiff but he went on to arge that owing to non-delivery of the goods. namely, split and unsplit wood, within the stipulated period the defendant had insurred a loss of Rs. 73.9.0. The defendant, therefore, declared himself ready to pay not Rs. 135.5.6 but Rs. 62.12.6. Oa this counter-claim he paid the Court-fee stamps. The ease was fixed for hearing on the 6th of September 1917. It is alleged that the plaintiff's Pleader went to the First Olass Subordinate Judge's Court bat found him busy. As the Pleader had a case on the same day in the Sassions Judge's Court he went there leaving his eleck behind, Some time later, the plaintiff's case was called out and the elerk went to call the JOWAD BUSSAIN U. GENDA SINGH.

plaintiff's Pleader. The latter, it is said, was engaged in arguing the case before the Sessions Judge. At any rate, he did not go to the Court of the First Class Subordinate Judge until some 15 or 20 minutes later. By that time, however, the learned First Class Subordinate Judge had already dismissed the case for default with costs.

The plaintiff by his Pleader made an application to restore his suit file. On the 21st September 1917, the learned First Class Subordinate Judge dismissed the application. Against this order of dismissal of the learned Subordinate Judge, the plaintiff has filed these two applications. In the one, he has asked this Court to restore his case to the First Class Sub-Judge's file (No. 70). In No. 71 he has urged that in view of the defendant's admission in his written statement, he should awarded been 8 deeree have Rs. 136-5-6.

As regards Application No. 70, we do not think that we should be justified in interfering with the learned Sabordinate Jadge's discretion. It is no doubt true that this is a revision application, not under section 115 of the Civil Procedure Code. but under section 25 of Act IX of 1887. But even section 25 of Act IX of 1887 lays down that the High Court can only vary the order of the Judge of the Court of Small Causes if that order has not been made according to law. Now under Order IX, rule 8, the duty laid on the Court to dismiss a suit when the plaintiff does not appear is peremptory. The words are: "The Court shall make an order that the suit is dismissed." It has been urged by the learned Pleader that the Judge might have waited for the Pleader to come. The answer is that it is a matter entirely within the discretion of the learned Judge and we do not propose to interfere with it. At the same time we do express our disapproval of a Pleader's conduct who takes such little care of his elient's ease that he does not even ask a brother Pleader to apply for a short adjournment during his absence.

As regards the Application No. 71, we think that the application should be granted. Mr. Tabilram for the opponent has frankly admitted that as regards Rs. 62-12-6 the Judge should have awarded to the plaintiff a decree. The question, therefore, resolves

itself into this, whether the plaintiff should be given a decree for Rs. 136.5.6 or Rs. 62-12-6. Mr. Tahilram has relied on section 115 of the Civil Procedure Code and bas urged that as the Trial Judge refused to allow the Rs. 73.90, that was a finding of fact which we cannot disturb. But this was a counter claim by the defendant and it was for the defendant to prove it just as much as if he had been a plaint. iff, and as if he had filed a plaint. As the learned Pleader, Mr. Fetheband, contends, the defendant is no more entitled to recover a counter claim merely on a written state. ment than a plaintiff is entitled to recover his claim merely on his plaint. As the defendant did not lead any evidence to prove his counter-elaim, we must dismiss it, and we direct that a decree should be granted to the plaintiff for Rs. 135.5.6 only. We grant costs in the lower Court to the extent of Rs. 136.5.6 and we grant interest at 6 per cent, on Rs. 136.5.6 from the date of suit to the date of payment,

We dismiss Application No. 70 with costs and we grant Application No. 71 with costs.

W. C. A.

No. 70 dismissed and No. 71 granted.

PATNA HIGH COURT.

APPEAL FAOM ORIGINAL DECREE No. 139 or
1919.

March 22, 1922.

Present:—Mr. Justice Das and

Mr. Justice Adami.

Saivid JOWAD HUSSAIN—DEPENDANT.

APPELLANT

versus

Babu GENDAN SINGH AND OTHERS -PLAINTIPPS.

Musammat KHODAIZTUL KOBRA

AND OTHERS—DEPENDANTS—RESPONDENTS.

Mortgage suit—Preliminary decree—Appeal dismissed

—Final decree, application for - Limitation—Limitation

Act (IX of 19(8), Sch. I, Art. 181.

Where in a mortgage suit there is an appeal from the preliminary decree, the right to apply for a final decree under Article 181 to Schedule I of the Limitation Act accrues on the date of the decree or order of the Appellate Court, even though

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the Appellate Court does no more than dismiss the appeal. [p. 792, col. 2.]

Abdul Majid v Jawahir Lal, 23 Ind. Cas. 649; 26 A. 350; 12 A. L. J. 624; 6 Bom. L. R. 395; 18 C. W. N. 903; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 455; 16 M. L. T. 41; 1 L. W. 433 (P. C.), referred to.

Appeal from a decision of the Subordinate

Judge, Gays.

Mesers. Sultan Ahmad, S. M. Tahir and Busan Jan, for the Appellant.

Mesers. Hasan Imam and A. B. Mukharii, for the Respondents.

JUDGMENT,

Das, J .- The material facts are all stated with precision in the judgment of the Court below; and, as I agree with the conclusion at which the learned Sabordinate Judge has arrived, it is unnecessary to recapitulate these facts. The learned Counsel for the appellants contends that the right to apply assended to the plaintiffs on the 22nd August 1915, the date fixed for payment of the mortgage-money by the preliminary decree passed by the Court of first instance, and that as the respondents did not apply for a final decree until the 22 ad of Fabruary 1919, the application presented on that date was barred under the provision of Article 181, First Schedule, of the Limitation Act. The learned Counsel for the respondents, on the other hand, maintains that as there was an appeal to the High Court by his elients from the decree of the Court of first instance and that as that appeal was disposed of on the 21st May 1917, the right to apply accrued to the respondents on the 21st May 1917, and the application was not ascordingly barred by limitation. To this, the learned Conneel for the appellants replies that, as the desres of the High Court did nothing more than dismiss the appeal with costs, time bagan to run from the 22nd August 1915.

I confess that the question is not free from difficulties. It is conceded that Article 181 of the Limitation Act applies; and I think that if is a matter for regret that there are no provisions in the Limitation Act which would govern applications for a final decree analogous to those contained in the third column of Article 182 of the Limitation Act. It is conceded that if the Appellate Court at all varies the decree of the primary Court, time would begin to true from the date of the decree of the

Appellate Court, and not from the decree of the Court of first instance; but it is entended that if the Appellate Court dismisses the appeal without extending the time for payment fixed by the decree of the primary Court, time would begin run from the date so fixed. It seems to me that, if the argument be a good one, it is possible for a mortgagor to defeat the mortgages by earrying an appeal from one Appellate Court to another, and ultimately suffering the appeal to be dismissed. But the mere fast that the argument have that result is no ground for holding that it is a bad one; but it is a ground hoping that the Ligislature may find it possible to deal with the subject by providing a period of limitation for applications for final decrees in mortgage astions, and the time from which such pariod would begin to run on principles analogous to those contained in the third column of Article 182 of the Limitation Act. Though not strictly pertinent to this subject, I may point out that, under Artiele 132 of the Limitation Act, the period of three years limited for an application for the execution of a degree or order begins to run from the date of the decree or order, unless, there has been an appeal, in which case the time begins to ran from the decree or order of the Appellate Court or the withdrawal of the appeal. But where there is an appeal, and the appeal is dismissed for want of prosecution. since the order dismissing the appeal neither adopts nor confirms the decision appealed from nor is it an order passed on the withdrawal of the appeal, time begins to run from the date of the deeree or order appealed against, as in the opinion of the Jadicial Committee, the appealing must be regarded in the circumstaness as being in the same position as if he had not appealed at all. See Abdul Marid v. Jawahir Lul (1). This obviously puts the decree-holder at a great disadvantage, where the appeal is by the judgment. debtor. If the matters are at all reson-

(1) 23 Ind. Cas 649; 86 A 350; 12 A. L. J, 624; 16 Bom. L. R. 895; 18 C. W. N. 963 19 C. L. J. 636; 27 M. L. J. 17; '1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 488 (P. O)

[*See Righo Prasid Singh v. Jalunandan Prasad Singh, 69 Ind. Oas. 816; 61P. L. J. 27; 2 P. L. T. 28; (1921; Pat. 81.—Ed.] JOWAD BUISAIM C. GENDA SINGE.

sidered by the Legislature, and applications for firal decrees in mortgage actions are put on the same footing as applications for execution of decrees, then the case where a mortgager or a judgment-detter carries an appeal to the Appellate Court and then suffers the appeal to be dismissed for want of presecution ought not to be

overlooked by the Legislature. The question which has been argued before us is not free from difficulties; but it is difficult to resist the argument em pleyed by Banrerjee, J., in the case of Ga, adhar Singh v. Kishen Jiwan Lal (2), upon which the learned Subordinate Judge relied. In giving effect to the arguments advanced on behalf of the mortgagees, that learned Judge said as follows:-"It seems to me that this role," that is to say the 5th rule of Order XXXIV, the rule regulat. ing applications for firal decrees in mortgage actions, "contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become sorelusive between the parties. When an arreal has been preferred, it is the deoree of the Appellate Court which is the final dearee oacre." The decision in tha the Judicial Committee in the care of Abdul Mojid v. Jawahir Lal (1), was relied on by Mr. Justice Banerice. The facts of that ease were these: by the prelimitary deeree passed by the Court of first instance, 12th of August 1890 was fixed for payment of the mortgage-money. An appeal was taken from that decree to the High Court, and that appeal was dismissed on the 5th of April 1883. The merigager obtained leave to appeal to the Judicial Committee, but did not prosecute his appeal, and on the 13th of May 1901, the appeal was dismissed for want of prosecution. On the 11th of June 1909, the mortgages applied to the Subordinate Judge for an order absolute to sell the mortgaged prop-The Judicial Committee came to erties. the conclusion that the application was barred under section 179 of the Limitation Act of 1877 at the expiry of three years from the date of the decree of the High Court, and, therefore, before the passing

of the Code of Civil Procedure of 1908. and that, as the right had once been barred, no provision of the Code of 1903 could operate to revive it. With this portion of the judgment of the Judicial Committee, we are not concerned, except in so far as it held that, before the passing of the Code of 1908, an application for an order absolute to sell the mortgaged properties was regarded as an application for execution of the preliminary decree, for, on no other bypothesis could Article 179 of the Limitation Act of 1871 be ragard. ed as applicable to such an application. The Judicial Committee, however, held that the time for making such an application began to run from the 8th of April 1893, the date of the decision of the High Court dismissing the appeal. Mr. Justice Banerji took the desision of the Judicial Committee in the case cited to establish that, when an appeal has been preferred, it is the desree of the Appellate Court which is the final decree in the case. But it may be pointed out that, on the hypothesis that Article 179 of the old Limitation Act was applicable to such an application, under the express provision of Article 179 time would begin to run from "the date of the final deerse or order of the Appellate Court;" and it is doubtful whether we can apply a decision under Article 179 of the old Limitation Act to a case under Article 181 of the new Limitiation Act, except by analogy. All that Article 181 condescends to tell us is that limitation begins to run from the date "when the right to apply accrues." The question is when does the right to apply accrue? Under Article 179 of the old Limitation Act, it accrued on the date of the final deeree or order of the Appellate Court. This provision is not to be found in Article 181: But peither is there any thing in Article 181 to contradict the view that the right to apply accraes on the date of the firal decree or order of the Appellate Court, where there is an appeal from the decision of the Court of first instance. Now the essential character of an application which follows a preliminary decree sale remains the same, though the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code and the

(2) 42 lnd, Cas, 53; 39 A. 651; 15 A. L. J. 734.

BRUPENDBA NABAIN SIEGH U. MADAR BOX.

order passed on such an application is now salled a deeree for sale and not an order for sale. The shange effected by the Code of 1908 was a change in procedure so as to shut out such contentions as used to be raised that such applications were not under the provisions of the Civil Procedure Code. Neither the Civil Procedure Code of 1908 nor the Limitation Act of 1903 has answered the question, when the right to make the application assrues. That being so, we are, I think, entitled by analogy, to apply the provision of Article 179, third column, answering the question, when the right to apply accrues. As I have said before, the question is not free from difficulty; but, on the whole, I think, with great respect, that the view of Banerjee, J., in the case I have cited is right,

I must dismiss this appeal with costs.

ADAMI, J .- I agree.

J. P. Appeal dismisse?.

CALCUTTA HIGH COURT.

APPEAL FROM OSIGINAL DECERE No. 206

CP 1919.

August 23, 1921.

Present: -Sir Asutosh Mookerjee, Kr., and Mr. Justice Panton.

Raja BHUPENDRA NARAIN SINGH BAHADUR AND OTHERS—DEFENDANTS— APPEGLANDS

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MADAR BUX SHEIKH AND OTHER !-- PLAINTIPP!-- RESPONDENTS.

Palni Regulation (VIII of 1819), ss. 8, 10—Patni sale for arrears of rent—Notice, contents of—Zemindar's responsibility—Non-conformity with requirements of Patni Regulation—Sale, validity of.

Section 10 of the Patni Regulation contemplates a self-contained notice, which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Jaistha following if the amount claimed be not paid before that date but also a statement of the lots proposed to be sold in the order in which the sale will be held. [p. 791, col. 1.]

Collector, like the patition to him containing a

specification of the arrears, must contain specification of the balances that may be due to the zemindar concerned from all the painidars under him and a copy or extract of such part of the notice as may apply to an individual defaulter shall be sent by the zemindar to be similarly published at the Cutchery or at the principal town or village upon the land of the defaulter. [p 794, col 1.]

The zemindar is exclusively answerable for the observance of the forms prescribed in section 8, clause (2) of the Patni Regulation [p. 794, cols. 1 & 2.]

Strict conformity with the requirements of the Patni Regulation in respect of the contents and service of the potice mentioned in sections 8 and 10 of the Regulation is essential to secure a valid putni sale. [p. 795, col 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 24th July 1919.

Sir Asutosh Chaudhri, Babun Preo Sankar Majumdar, Phanindra Lal Matra, Astaranjan Ghose and Pramatha Nath Baner ee, for Defendant No. 1—Appellant.

Pabus Mahendra Nat's Ray, Mohini Moham Ohakrabarti, Hari Narain Chowdhry and Bireswar Bagchi, for the Plaintiff, Respondent.

Babu Manmotha Nat's Roy, for Defendant

No. 2, Respondent.

Babu Surendra Nath Ghosal, for Dafendant No. 3, Respondent.

JUDGMENT.—This is an appeal by the semindar defendant in a suit commenced on the 12th April 1915 under section 14 of Regulation VIII of 1819 for reversal of the sale of a patni taluk held under the Regulation on the 15th May 1914. The validity of the sale was attacked on a variety of grounds. One of these grounds was that the requirements of section 8 of the Regulation had not been fulfilled; and this was formulated in the ninth issue in the fullowing terms:

"Were the Astom petition, notice, istahar and all the proceedings connected therewith, good and valid according to law and were notice and istahar duly served."

The District Judge has answered this question in favour of the putnidar and has, for this reason, set aside the sale as invalid. On the present appeal by the semindar, the conclusions of the District Judge have been assailed as erroneous.

Section 3, clause (2) of the Patni Regulation requires the cominair to present a position to the Collector containing a specification of any balance due to him or appoint tolandare.

BRUPENDRA MARAIN SINGH U. MADAR BUX.

This petition must be stuck up in some conspieuous part of the Collector's Cutcheri with a notice that if the amount elaimed be not paid before the 1st Jaistha following, the tenure of the defaulter will on that day be sold by public sale in liquidation. This must be read with section 10, which provides that at the time of sale, the notice previously stuck up in the Cutchery shall be taken down and the lots be called up successively in the order in which they may be found in that notice. This makes it plain that section contemplates a self-contained notice, which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Jaietha if the amount elaimed be not paid before that date, but also a statement of the lots proposed sold in the order in which the sale will be held. This conclusion is confirmed by an important provision contained in section 8. clause (2) which is expressed in the following terms: "A similar notice shall be stuck up at the Sadar Outshery of the semindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him cent, to be similarly published at the Cutchery, or at the principal town or village upon the land of the defaulter." This leaves no room for doubt that the notice to be stuck up in the Cutchery of the Collector, like the petition, must contain specification of the balances that may be due to the reminiar conserned from all the painidars under him and that a copy or extract of such part of the notice as may apply to an individual defaulter stall be sent by the cem ndar to be similarly published at the Cutchery or at the principal town or village upon the land of the de-There can thus be no serious confaulter. troversy as to the correctness of the view adopted by this Court in the case of Bejoy Krishna v. Lakshmi Narain (1), regarding the contents of the notice which is required to be stuck up in the Cutchery of the Collector under section 8 and to be taken down at the time of the sale under section 10, so that the lots may be called up suscessively in the order in which they may be found in that notice.

We have now to judge by this test, whether the zemindar who is exclusively answerable for the observance of the forms prescribed

(1) 54 Ind. Cas. 736; 50 C. L. J. 433; 47 C. 337; 24 C. W. N. 972.

in section 8, clause (2), has established that the statutory requirements were sarried out. The notice which has been produced (Exhibit P) obviously does not fulfil the requirements of the Regulation; it does not contain a specification of the balances due from all the patnidars; it mentions only the patni, now in suit, though the oral evidence makes it clear that "there were about forty Astam eases in which the Raja of Nashipore was interested." The zemindar has consequently been driven to bring forward oral evidence to establish that another notice, showing all the defaulting patnidars and the balances due from each of them was stuck up as required by the Regulation. Sailajaprased Sengupta deposes that while he was Jamanabis in the service of the Maharaja of Nashipore, a notice used to be drawn up showing all defaulting patnidars in two parts-one was published in the Sadar Cutchery of the zemindar and the other was sent to the Raj Pleader, Sasibhushan Chaudhuri, at Birbhum. The Pleader, who is also the am mukhtear of the semindar, has been examined. He asserts stuck up in the Collectorate two notices of As:am sales, one, of the mal. and the other, of the debutter mahal. The District Judge has not accepted this assertion, and after eareful consideration of all the eirenmetances, we are unable to disagree with him. The memory of the witness as to the time when the alleged notices were put up is elearly at fault. He asserts that he saw stuck up on the notice-board of the Collector the notice (Exhibit P) before the 12th or 13th Baisak, and he fortifies this statement by the further assertion that he examined the board between the 10th and the 13th. This must be incorrect, because the peop, who stuck up the notices, did not receive them for publication till the 14th Baisak. Apart from this, no explanation is forthcoming why notices in respect of indivdual patnis should be stuck up, though not required by the Regulation, and complete actices as required by the Regulation should be subsequently stuck up. Besides, it is a matter for legitimate comment that while the notice (Exhibit P) was stock up by the Collectorate peon in the discharge of his nenal duties, the alleged comprehensive notice was put up by the am-muktear. It does seem strange that a private individual should stick up the proper notice as required by the Regulation, while the inappropriate motion

BRUPANDRA NARAIN SINGH U. MADAR BUX.

is stack up by the officer concerned. evidence also shows that notice-board is in a glass case, that there are iron-safes and chests about a cubit below the place where the notices are hang, and that a sentry "armed with gun" walks up and down by that place. An attempt by a stranger to stick up notice on a notice-board so placed could not fail to attract attention, and independent evidence might be expected of the endeavour made by the witness to comply with the requirements of the Statute. is finally the significant fact that the notices alleged to have been stack up by the witness on the notice board of the Collector were not found on the records, which contained, however, the notice (Exhibit P). In these circumstances, we are not prepared as a Court of Appeal to pronounce the opinion that the view taken by the Trial Court is erronsous. But even if it were conceded that the requisite notice had been put up by the am-muitear as alleged by him, there is no evidence to show that it was taken down at the time of the sale as required by section 10 and that the lots were called up successively in the order in which they stood in that notice. Indeed, the notice does not appear to have been seen by any one except the am multear. In this connec. tior, we must take the statement of Upendranath Sadhu, who was the revenue Perhkar of the Ocllector at the time, that the Maharaja of Nashipore always has a separate petition for each tenure. witness was present with the Collector when the paini was sold and so also was the am-muktear of the zemindar. The witness asserts that the am muktear filed before the Collector a list of arrears and the Muffasil notice, that the witness read them to the Collector who signed them and then the sale took place. To the same effect is the testimony of Anantalal Ghosal, another assistant in the Collectorate who was present at the sale. The evidence of Surendra Mohan Kar, who was the Naib Nazir of the Collectorate at the time, does not afford the slightest indication that the notice alleged to have been put up by the am-muttear had ever been stuck up or seen by anybody or taken down at the time of the sale. He asserts that on the 27th April, that is, the 14th Baisakh,

the records of the Astam case were made over to Sheikh Amin the peon (since deceased) for publication, that the witness himself went later and found that the resords were hung up in the proper place that they remained there till the day of sale, and that on that day the records were brought down and arranged by the witness and sent to the revenue Peshkar with reports of service by the peon. The witness added that from the time of publication until they were returned to the Munshikhana, they remained in charge of the Nazir (who has died sinse) and that he himself had never notised any record short when the record was brought down. If the additional notice, alleged to have been put up by the am-muktear himself, had been on the notice board when the records were brought down on the day of eale and arranged by this witness, it could hardly have escaped his notice. a review of the evidence relevant to this question, we bold, in consurrence with the District Jadge, that the cemindar has not discharged the burden, which the law imposes upon him, to establish that a notice fulfilling the requirements of section 8 was stuck up in some conspicuous part of the Cutchery of the Collector; the only notice which is shown to have been stuck up does not satisfy the statutory requirements. This by itself is fatal to the sale; for, as repeatedly emphasised by this Court as also by the Judicial Committee, strict conformity with the requirements of the Regulation in respect of the contents and service of the notice mentioned in sestions 8 and 10 is essential to sesure a valid sale; Maharajah of Burdwan v. Tarasun lari Debi (2), Maharani of Burdwan v. Krishna Kamini Dasi (3), Ahsanulla Khan Bahadoor v. Huri Ohurn Mosoomdar (4), sfirmed in Ahsanulla Khan Bahadur v. Haricharan Mozumdar (5), Hurro Doyal Roy V. Mahomed Gasi Chowdhry (6), Rajnarain Mitra v. Ananta Lal (7).

(3) 14 I. A, 80; 14 C. 365; 11 Ind. Jur. 275; 4 Sar. . P. O. J. 772; 7 Ind. Dec. (N. s.) 242 (P. C.).

(4) 17 O. 474; 8 Ind Dec. (N. s.) 855.

(5: 19 I. A. 191; 20 C. 86; 6 Sar. P. C. J. 252; 1C Ind. Dec. (N. 8) 58 (P. C.).

(6) 19 C. 649; 9 Ind. Dec. (N. .) 938. (7) 19 C. 703; 9 Ind. Dec. (N. s.) 911,

^{(2) 10} I. A. 19; 9 C. 619; 13 C. L. R. 34; 4 Sar. P. C. J. 414; 7 Ind. Jur. 212; 4 Ind. Dec. (N. s.) 1031 (P. C.).

In the matter of Arbitration between Jainarain Babulal and Maraindas Janinal.

In view of our conclusion on this point, it is not necessary to investigate whether there was due service of the notices at the Sadar Cutsbery of the cemindar and at the Catchery or at the principal town or village upon the land of the defaulter. The District Judge has hell that the temindar has failed to prove by satisfactory evidence that those notices were really or properly published. His eriticisms on the evidence may, in some places, seem unduly searching, but it is needless for us to embark upon a review of his conclusion based upon an apprecia. tion shirfly of oral testimony, as, in our opinion, the sale must be cancelled on the ground already stated.

The result is that the decree made by the District Judge is affirmed and this appeal dismissed with costs.

B. N.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

JUDICIAL MISCELLANEOUS No. 72 OF 1921. September 25, 1921.

Pres:nt:—Mr. Raymond, A. J. O.
In the matter of Arbitration between The
FIBM OF JAI NARAIN BABULAL
RESPONDENT No. 1

FIRM OF NARAINDAS JANIMAL RESPONDENT NO. 2.

Civil Procedure Code (Act V of 1908), ss. 10, 11, scope of—Arbitration Act (IX of 1899)—Reference to arbitration—Award—Suit to set aside award filed—Stay of award proceedings.

Sections 10 and 11 of the Civil Procedure Code are concerned with the law of procedure and the mere user of the word "suit" in section 10 does not restrict its applicability to suits alone but the section can be extended to civil miscellaneous proceedings by virtue of section 14', Civil Procedure Code, if it is otherwise applicable. [p. 798, col. 1.]

Once an award is made, there is no equitable reason for staying proceedings under it because a suit is filed to set it aside. [p. 799, col. 1.]

An order under section 151, Civil Procedure Code is to be made when the ends of justice require it or to frustrate an abuse of the process of the Court, and where in an application to stay proceedings under an award neither of the conditions prevail

there should be no stay. [p. 799, col. 2.]

Parties entered into contract of sale of certain bales of cloth with the usual clause as to reference to arbitration of any disputes arising between the parties. Certain disputes arose and one party called upon the other party to join them in referring to arbitration and name their arbitrator. The other party failed to do so The first party nominated arbitrators, one on their own behalf and the other on behalf of the second party. Poth the parties were present before the arbitrators who, after hearing them, made the award. The arbitrators then filed their award in the Sind Judicial Commissioner's Court and notices were issued to the parties to show cause why the award should not be filed. Objections were filed. The other party Lad filed a sait previous to the award at Delhi for a declaration that there was no contract between the parties and an appeal was pending in that case in the Lahore High Court, After the award the second party filed another suit against the first party in the Sub-Judge's Court at Delhi questioning the validity of the arbitration proceedings. An application was filed in the Sind Judicial Commissioner's Court that pending the appeal in the Lahore High Court and the suit in the Sub-Judge's Court, Delhi the hearing of the petition to file the award be stayed under section 10 of the Civil Procedure Code:

Held, that section 10 of the Civil Frocedure Code did not apply to the case as the parties in the proceedings sought to be stayed were not identical with those in the Delhi suits and as the Delhi Court was not competent to grant the relief claimed in the

application. [p. 799, col. 1.]

Mr. Rupchent Billaram, for Respondent No. 1.

Mr. Kimatrai Bhojraj, for Respondent No. 2.

application JUDGMENT,—This is an Procedure Civil section 10. nnder Code, read with scotion 141, Civil Prosedure Code for stay of proceedings in Judisial Missellaneous No. 72 of 1921 which is a petition under section 11, clause (2) of Act IX of 189) for filing an award. discussing the legal aspect of the applieations it is necessary to set out all the eiroumstances that have led to it.

The firm of Jai Narain Babulal alleged that the firm of Naraindas Janimal of Delbi had entered into a contract with them for the parchase of several bales of

In the matter of Arbitration between JAINARAIN BABULAL AND NARAINDAS JANIMAL.

white mulls under various indents, which contained the usual reference clause to arbitration in the event of any disputes between the parties. Certain disputes did arise and the firm Jai Narain Babulal ealled upon Naraindas Janilal to join them in referring them to arbitration and to name their arbitrator, and, as the latter failed to do so, they executed a reference on the 1st July 1920 in favour of two European merchants as arbitrators, nominating one on behalf of themselves and one on behalf of Naraindas Janimal. Both the parties were present before the arbitrators who, after hearing them, made their award on the 20th January 1921 for the payment of a sum of Rs. 48,000 odd to Jai Narain Babulal by Naraindas Janimal. On 17th February 1921 the arbitrators filed the award in this Court, and usual notice was issued to Naraindas Janimal to show sause why the award should not be filed. have filed their objections to it which have not yet been considered.

Now, Naraindae Janimal were undoubt. edly aware that Jai Narain Babulal contemplated a reference of the disputes between them to arbitration, and evidently with the view of fore-stalling them, filed a suit against them on the 8th August 1919 in the Court of the First Class Sub Judge, Delhi, for a declaration that there was no contract between the parties, and that, even if there was one, it was vitiated by fraud and misrepresentation, and hence Jai Narain Babulal could not enforce the arbitration clause and should be restrained from doing so. This suit was dismissed on a preliminary point on the 28th January 1920. An appeal was filed against the order of dismissal in the Lahore High Court and has been admitted to hearing. An application for temporary injunction restraining reference to arbitration had been presented and granted by the Sub Judge but was dissharged by High Court.

On the 22nd January 1921, shortly after the award, Naraindae Janimal filed a second suit in the Court of the Sub Judge of Delhi against Jai Narain Babulal questioning the validity of the arbitration proceedings as the matters involved were already the subject of a pending suit and prayed

that the award be set aside and cancelled. This suit has not been disposed off.

It is contended on behalf of Naraindas Janiram that as there is an appeal
pending in the Lahore High, Court arising
out of the suit for a declaration that it
be held that there was no contract between the parties and consequently the
arbritation clause was not enforceable, and,
secondly, as there is a suit pending in
the Court of the Sub-Judge seeking to
set aside the award, the hearing of the
petition to file the award in this Court
should be stayed, as it directly and substantially covers the same ground, and
the same parties are concerned therein.

Admittedly, the first suit was filed in the Court of the Sub Judge, Dehli, before the reference to arbitration, and the second after the passing of the award. Further, it is well established that the word "suit" in section 10, Civil Procedure Code includes an appeal, and, therefore, as an appeal is pending against the first suit and has been admitted to regular hearing, there can be no bar to the applicability of section 10, if it is otherwise applicable.

The first question is as to the applicability of section 10 to proceedings to file an award under the Indian Arbitration Act.

There is no doubt that a petition presented in Court for the filing of an award is to be reekoned as a missellaneous judicial proceeding and not as a suit. The award does not sulminate in a deeree, though it is enforceable as if it were a decree and may be executed as if it were a decree, Now section 10. Oivil Procedure Code, refers to the stay of "suits" and it has been contended that this section is inapplicable in the present ease as what is sought to be stayed is not a suit bat a missellaneous proceeding. To this argument, however, applicant's Counsel has retorted that, even if the word "suit" be construed in its strict technical sense, section 141, Civil Proeedure Code, applies to miscellaneous proecedings the procedure provided in the Court in regard to suits so far as it can be made applicable. Mr. Rupchand challenged the applicability of section 141, Civil Procedure Code, to section 10, Civil In the matter of Arbitration between JAINABAIN BABULAL AND NARAINDAS JANIMAL.

Procedure Code on the ground that both sections 10 and 11, Civil Procedure Code, are not concerned with procedure but with substantive law. In my opinion this is rather a bold assertion. Both sections 1) and 11 belong to the domain of adjective law. Section 10 bars the trial by one Court of matters which are on process of adjudication by another Court and is an application to pending suits of the principle of res judicata. The rule in section relates to matters sub judice and that in section 11 to matters which have passed into rem judicatom. Now, as said in Casperz on Estoppel and Res udicata "the rules of res judicata are rules of procedure which is but the machinery of the law after all the enannel and means whereby law is administered and justice reached," and in Sita Ram v. Amir Begam (1) it was said, the plea of resjudicata as a bar to an action belongs to the provision of adjective laws." In my opinion both sections 10. and 11, Civil Procedure Code, are concerned with the law of procedure, and the mere user of the word "suit" in the former section does not restrict its applicability to suits alone but the section could be extended to sivil miscellaneous proceedings by virtue of section 141, Civil Procedure Code, if it is otherwise applicable.

Now, one of the essential conditions to attract the applicability of section 10 is, that the same party must be concerned in both the proseedings or the parties under any of them claim, litigating whom under the same title. The application before me is one by the arbitrators to file an award, the parties in the suits at Delhi being respondents one and two respectively. The arbitrators have no interest in the Delhi suits which are to be fought out as between Jai Narain Babulal and Naraindas Janimal. Prima facie, therefore, the parties in the two proceedings are not identical. To meet this aspect of the case, Mr. Kimatrai has taken up a very ingenione point which, so far as I can see, is res integra. He contends that under the Indian Arbitration Act it is not the Court that files an award but the arbitrator does so under section 11 of the Act and unless it is limited or set aside it becomes

(1) 8 A. 324; A. W. N. (1886) 101; 5 Ind. Dec. (N. s.)

forceable as if it were a decree of the Court under section 14. Though on the presentation of an award in Court and the issue of a notice to the parties concerned to show cause why the award should not be filed, the application is described one for the filing of an award, yet the real point for decision by the Court is not whether the award should be filed but whether it should be remitted to the arbitrators or set aside on good grounds shown. Hence, when objestions are lodged to an award, the sonfliet is confined exclusively to the two parties whether the objections are to be upheld, and the arbitrator is a mera figurehead. Therefore, says Mr. Kimatrai, the parties in the proceedings before me are identical with the parties in the Dalhi suits. Now, under rule 7 of the rules framed by this Court under section 20 of the Arbitration Act, and which is virtually the ipsissima verba of rule & of the rules framed by the Bombay High Court, upon any application under the Act the Judge shall direct notice to be given to all persons specified in the petition requiring them to show cause within the time specified in the notice why the relief sought should not be granted; and if no sufficient cause be shown the Judge shall pass such order as the eircumstances of the case may require. Section 15 of the Indian Arbitration Act states that, "an award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the re consideration of the arbitrators or umpire, or sets it aside), be enforceable as if it were a decree of the Court." Now, it is obvious that though the filing of the award is the act of the arbitrators, the award does not become enforceable as if it were a decree of the Court immediately on its presentation to the Court. The Court allows an opportunity to the parties adversely affected by it to move to have it set aside or remitted to the arbitrators, and if, within the period allowed, no application is made to the Court for either of these purposes, the award is enforceable as if it were a decree of the Court. The objections to an award, therefore, cannot be dissociated from the petition to file the award. Further, I do not think it correct to say that on objections being lodged against an award, the disputes are relegated only to the parGHAPOR KHAN U. PRAG NARATAN.

ties concerned in the result of the award. The arbitrator is as much interested in his award being upheld as the party in whose favour it is made; in fast, in view of the nature of the objections that can be raised to an award under the Indian Arbitration Act, the dispute substantially converges between the arbitrator and the party prejudicially affected by it. I cannot, therefore, agree with Mr. Kimatrai's view that on objections being filed to an award they are to be considered divorced from the petition to file the award, and that the only parties concerned are those that referred their disputes to arbitration. I am, therefore, of opinion that the parties in the proceedings sought to be stayed are not identical with those, in the Delhi suits. Another essential condition to render section 10 applicable is that the Court wherein the suit has been previously instituted has jurisdiction to grant the relief elaimed. As I have remarked above, both the suits filed by Naraindas Janimal were in the Court of the First Olass Sab-Judge, Delbi. I have described the nature of the two suits. The proceedings before me are concerned with an application under the Indian Arbitration Act, and that the award should be set aside. (Section 14 of this Aet) on the ground of misconduct on the part of the arbitrators, and that the award has been improperly prosured. Admittedly, the First Class Sub-Judge has no jurisdiction under the Indian Arbitration Act either to consider an application for filing an award or any objections to its being filed. It is, therefore, not competent for that Court to grant the relief elaimed in the application before me. It is probable that in the second suit filed in the Delhi Court, the award will be attacked inter alia on the ground of its having been improperly procured and it may be contended that it should be set aside on the ground of missonduct on the part of the arbitrators. But this suit was filed only after the award was passed though prior to the petition for filing it in the Court. Once an award is made I see no equitable reason for chesking its legitimate consequences because a suit has been filed to set it aside. And a party who has obtained an award in his favour under the Indian Arbitration Act is not to he deterred from reaping the fruits of his sussess, unless by an order of the Court he

is prevented from executing it. Farther, it must be remembered that the jurisdiction of a Court in setting aside an award is limited. Arbitrators are judges both of law and facts and an erroneous decision by them is not by itself sufficient ground for setting aside an award, whereas in a suit an award may be attacked on grounds which are not open under the Indian Arbitration Act.

It was finally argued that this Court should exercise its inherent powers under section 151, Civil Procedure Code, and stay the present proceedings. Practically, the only ground put forward for invoking the aid of this section is that both the parties are residents of Delhi and it would be highly inconvenient for members of the firm of Naraindas Janimal to some to Karachi for the purposes of the application. One of the members of this firm did attend before the aribtrators, who held their sittings in Karachi and in view of the number of the references to arbitration, in which the firm was interested. he must have attended on more than one An order under section 151 OSCASSIOD. is to be made when the ends of justice require it or to frustrate an abuse of the prosess of the Court, neither of which conditions prevail in the present case.

I reject the application under section 10 with costs on the applicants. By consent of the respective parties, this order governs similar applications in Miscellaneous Judicial Nos. 67 to 74.

J. P. & M. H.

Application rejected,

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 174 or 1921. July 29, 1921.

Present:—Mr. Daniels, J. C. GHAFUR KHAN—DEFENDANT—

Lala PRAG NARAYAN—PLAINTIPP
—RESPONDENT.

Possession of land, suit for—Trees, removal of ancillary prayer for—Limitation Act (IX of 1903), Sch. I, Art. 142.

BUN LIFE ASSURANCE CO., OF CANADA D. CORPORATION OF MADRAS.

A suit for possession of land coupled with an ancillary prayer for the removal of the trees planted on it is governed by Article 142, Schedule I to the Limitation Act.

Badal v. Babu Nageshwar Bakhsh Singh, 52 Ind. Cas 858; 6 O. L. J. 329 and Musharf Ali v. Iftkhar Husain, 10 A. 614; A. W. N. (1888) 257; 6 Ind. Dec. (N. s.) 427, distinguished from.

Appeal from a decree of the Subordinate Judge, Unao, dated the 22nd March 1921, up-holding that of the Munsif, Purwa, dated the 27th November 1920.

Mr. Maheshwar Prasad Asthana, for the Appellant.

JUDGMENT .- This is a second appeal for the possession of plots Nos. 21 and 82 in Mauza Kudra in the Purwa Tabeil of the Unao District on the allegations that the land was formerly grove, that it ceased to be grove and ensheated to the Zemindar some thirty years ago and that the defendants have taken unlawful possession by planting new trees in the year 1915. The lower Appellate Court has found that the land did cease to be a grove and did escheat to the Zemindar, that the plaintiff has been in possession of it within limitation and that all the trees, for the removal of which the plaintiff asks, were planted within twelve years of the suit, The finding that the land ceased to be grove is strongly supported by the entry of the last Settlement which the lower Appellate Court has disenseed, and is not now open to attack. The main ground of appeal has been that the suit is governed by Article 129 of the Limitation Act, and the learned Pleader for the appellant has referred to a desision of a Judge of this Court printed as Badal v. Babu Nageshwar Bakhsh Singh (1) in support of his view. That case purported to follow the decision in Musharf Ali v. Iftkhar Husain (2), but the latter ease was not at all parallel to that now before me. It was purely a elaim for removal of trees on waste land belonging to the Zamindar and the defend. ants had no right in the land of any sort whatever. Here the suit was, on the face of it, one for resovery of possession of immoveable property governed by Article 142 of the Limitation Act. Trees being things permanently attached to the earth are immove-

(1) 52 Ind. Cas. 858; 6 O. L. J. 329. (2) 10 A. 634; A. W. N. (1898) 257; 6 Ind. Dec. (N. s.) 427.

able property under the definition given in section 3 of the General Clauses Ast for the purpose of the Limitation Act. The answer. ing defendant, Ghafur Khan, (the other defendants have admitted the plaintiff's elaim) in his written statement, paragraph 14, elaimed to have been in adverse proprietary possession of the grove for more than twelve years and he said the same in his oral statement. It may be that he only elaims possession in the character of a grove. holder. Nevertheless, he did set up adverse proprietary possession in answer to the claim; The prayer for removal of the recently planted trees is merely ausillary to the elaim for possession. It appears to me, therefore, that the Court below has rightly applied Article 142.

The appellant also relies on the fact that a Commissioner who was appointed to examine the spot reported one of the new trees to have been planted about thirteen years ago. The lower Appellate Court has considered this report and has come to the conclusion that the tree is not so old as alleged and that all the new trees were planted within twelve years. The decree of the lower Appellate Court must, therefore, be upheld and I dismiss the appeal. I make no order as to costs as the respondent has not been respresented.

J. P.

Appeal dismissed,

MADRAS HIGH COURT.
REFERRED CASE No. 7 of 1921.
January 11, 1922.

Present:—Justice Sir William Ayling, Kr.,
and Mr. Justice Venkatasubba Bao.
THE SUN LIFE ASSURANCE
COMPANY OF CANADA—APPELLANT)

versus

THE CORPORATION OF MADRAS-

Madras City Municipal Act. (IV of 1919), Sch. IV, rr. 7, 17—Case stated for opinion of High Court—High Court, whether bound to give opinion on points of law other than comprised in reference—Life Assurance Companies Act (VI of 1912), s. 8—

BUN LIFE ASSURANCE CO. OF CANADA U. CORPORATION OF MADRAS.

Income Tax. Act (VII of 1918), rules under-Income, taxable.

. When's case is stated to the High Court under rule 17 of Schedule IV to the Madras City Municipal Act (IV of 1919), that Court is not bound to give a decision on questions of law involved in the suit other than those comprised in the reference. [p. 803, col. 2.]

Mylapore Hindu Permanent Fund Limited v. Corporation of Madras, 31 M. 408; 18 M. L. J. 349; 3

M. L. T. 400, explained

Under the rules made under the Income Tax Act read in conjunction with section 8 of the Indian Life Assurance Companies Act (VI of 1912), the taxable income of a Life Insurance Company, which makes default in getting an actuarial valuation once in five years, is regarded as the aggregate of the interest, dividends and rents received by it during the previous year. [p. 807, col. 1.]

The onus lies on the Company to show that such income did not exceed hs. 26,000 in the year previous to the year of taxation to entitle it to the benefit of the proviso to rule 7 to Schedule IV of the Madras City Municipal Act. [p. 808, col. 1.]

Oase referred under rule 17, Schedule IV of the Madras City Municipal Act of 1919, by the Court of Small Causes, Madras, in Missellaneous Petition No. 61 of 1921 on its file for the decision of the High Court in respect of the following questions, vis ,

I. What is meant by the "gross income" of a Life Assurance Company for purposes of taxation under rule 7, Schedule IV of the

Madras City Municipal Act?

Il. Is it sufficient compliance with the provisions of the Act for the Life Assurance Company to show that its gross income could not have exceeded Rs. 25,000 in the year immediately preceding the year of taxation for the purpose of obtaining the benefit of the proviso? (It is deslared entitled to that benefit when it shows that its gross income received in or from the city has not exceeded Rs. 25,000).

III. Can payments of premia made in the first instance to sub-agents of the Company in the Mofussil and remitted by them to Madras be treated as part of the gross income of the Company received "in or from

the City of Madras?"

This case coming on for hearing on the 6th and 7th of December 1921, upon perusing the Letter of Reference and judgment of the lower Court and the material records in the ease and upon hearing the arguments of Mesers. T. R. Veniatarama Bastri and A. V. Seekayya, for the Appellant, and the Advocate

General, and Mr. P. Doraiswamy Aiyangare for the Respondent, and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

Avers, J .- I have had the advantage of perusing the judgment which my learned brother is about to deliver, and I agree in the

answers proposed by him to be given.

VESKATASCHE R. R.O. J .- The Chief Judgs of the Court of Small Causes has, under rule 17 of Schedule IV to Madrae Act IV of 1919. (the City Municipal Act), referred eartain questions for our decision.

Bafore stating the questions that have been so referred, I propose to set forth the facts

that have led up to this reference.

The Sun Life Assurance Company of Canada has its head office at Montreal. Quebec, and a branch office for India at Bombay, The Company has an agent at Madras who maintains an office and has clerks under him. This office, it is admitted. is not a branch office of the Sun Life Assur. anse Company, but is merely a local agency. There appears to have been a finding to this effect in a suit in the Court of Small Ouases. Madras, to which the Sun Life Assurance Company was a party, a finding which was accepted by the High Court.

Section 110 of the City Manieipal Act provides that every incorporated Company transacting business within the City shall pay; by way of lisense-fee "a half-yearly tax on ite paid up espital on the scale shown in the taxation roles in Schedule IV," and the Explanation to that sestion adds that "whenever a Company has an office, agent or firm to represent it for the purpose of transacting business in the city, such Company shall be deemed to transact business in the city." Under rule 7 of the Taxation Rules contained in Schedule IV of the Ast, the assessment is made to depend in the first instance upon the paid-up capital of the Company. (Class A) If such capital is over twenty lakhs of rupees, the half-yearly tax will be Rs. 1,000. (Class B) If it is more than ten but less than twenty lakhs of rupees, the assess, ment leviable is R1. 50) for the half year, There is, however, an important provise to this rule which shifts the basis of taxation in certain esses from the paid up capital to the "gross insome" of the Company. It is

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provided that "any Company, the head office or a branch or principal office of which is not in the city and which shows that its gross income received in or from the city has not, in the year immediately preceding the year of taxation, exceeded Rs. 25,000 shall pay only Rs. 125" for the half year.

The Starding Committee of the Corporation of Madrae, on the ground that this was a Company with a paid up eapital of more than ten lakes of rupees and less than twenty lakes of rupees, confirmed the assessment levied by the Revenue Officer, and placing the Company in the second or "B" Class fixed the assessment at Rs. 50C.

From this order an appeal was filed by the Company under rule 15 of Part V of Schedule IV to Madras Act IV of 1919 to the Court of Small Causes at Madras. The learned Chief Judge of that Court found that the gross income of the Company was considerably less than Rs. 25,000, that the Company discharged the onus that lay upon it under the proviso referred to above, and he held that the Company was liable to be assessed on that has and fixed the assessment at Rs. 125 for the half year. He delivered judgment on the 31st March 1921.

On the 11th April 1921, the Corporation of Madras applied to the Court of Small Causes that a case might be stated for a decision of the High Court on certain points; and on the 14th April 1921 the Company similarly applied that a case might be stated for a decision on certain other points.

The learned Chief Judge observes: "I have been asked to refer several points but consider the following questions of law to be of sufficient public interest for invoking the decision" of their Lordships the Judges of the High Court.

I. What is meant by the "gross income" of a Life Assurance Company for purposes of taxation under rule 7, Schedule IV of the Madras City Municipal Act?

II. Is it sufficient compliance with the provisions of the Act for the Life Assurance Company to show that its gross income could not have exceeded Re. 25,000 in the year immediately preceding the year of taxation for the purpose of obtaining the benefit of the proviso? (It is declared entitled to that benefit when it shows that its gross income

received in or from the city has not exceed. ed Re. 25,000).

III. Can payments of premia made in the first instance to sub-agents of the Company in the Mofuseil and remitted by them to. Madras be treated as part of the gross income of the Company "received in or from the City of Madras?"

Mr. Venkatarama Sastri on behalf of the Company ecnterded before us that it was open to him to argue on this reference the whole care and that he was not to be confined to the points specifically referred to us by the learned Chief Judge. His clients in their application to the Small Cause Court under rule 17 had asked that two further 'questions of law' might be 'stated for the decision of the High Court.' The Chief Judge presumably did not consider it necessary to refer them for our decision.

Rule 17 consists of two parts :-

(a) "The Small Cause Court may, if it thinks fit, state a case for the decision of the High Court."

(b) "The Court shall state a ease whenever a question of law is involved if either the Commissioner or the appellant applies in

writing in that behalf." It seems unreasonable to hold that because a doubt is entertained on a particular question of law which leads to an application being made under rule 17 and to a care being stated, the High Court is bound to consider and decide all the questions of law involved in the care. In other words, it may be that the party applying, finding that the Judge does not accept his contention on a particular question of law out of several that arise in the case, applies, under rule 17, for a case being stated; does it follow that, the moment a case is stated to the High Court, either party is at liberty to argue before the High Court all the points of law that arise in the case and request its decision on all of them? The party who is dissatisfied with the terms of reference may have other remedies open to him; and I express no opinion on this point. The question before us is :- Is the High Court bound to decide questions other than the questions referred to it for desision? I am inclined to think that it is not. If the view contended for by the learned Vakil is correct, it will be open to either of the parties to ask the High Court to arrive at a decision

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upon the facts of the case, and, if necessary, to revise the findings of fact of the Small Cause Court, although the application to that Court under rule 17 was due to the existence of a question of law on which the party applying and the Judge held opposite views. It will searcely be disputed that this is a result not in the least contemplated by the Legislature, and I do not think that there is anything in the terms of rule 17 to compel us to accept the contention which will lead to this extremely undesirable and unforeseen result.

It may be useful to refer to some analogous provisions of the Civil Procedure Code. Section 113 provides: "Sabject to such conditions and limitations as may be pressribed, any Court may state a sass and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit."

Order XLVI, rules 1, 2 and 3 contain an amplification of section 113.

Rule 1 says that "when any question of law or usage arises on which the Court entertains a reasonable doubt, the Court may draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the desision of the High Court."

Rule 2 contemplates a decree being passed or order being made contingent upon the decision of the High Court on the point referred.

Rule 3 provides that "the High Court shall decide the point so referred and shall transmit a copy of its judgment to the Court by which the reference was made, an! such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the . decision of the High Court,"

These provisions clearly contemplate the following paragraph :ease being argued only in regard to the point referred and the decision being given also on the point so referred.

I may in passing refer to section 69 of the Presidency Small Cause Courts Act XV of 1882, which also is substantially to the same offeet.

Hindu Permanent Fund Limited v. poration of Madras (1). It is a desision upon

The learned Vakil has relied on Mylapore sections 176 and 177 of the Madras Munici-

pal Act III of 1904, which correspond to rule 17 under discussion. The wording of the sections of the old Act and rule 17 is almost identical, and any slight difference that may exist is immaterial. I am, however, nuable to agree that Mylapore Hindu Permanent Fund Limited v. Corporation of Madras (1) supports the contention put forward. It does not decide that when a case is stated, the High Court is bound to deside every question of law arising in it. In the opening paragraph of the judgment, the question referred is stated, and the judgment proceeds to say: "the law hardly contemplates a reference in such general and abstract terms. It only enables the Magis. trates to state a case on any appeal before them, and refer the same for the desision of the Righ Court; that is, to state all the matters necessary for the decision of the particular case before them on appeal and to refer the ease so stated for decision."

This is an authority for the proposition that the High Court is not bound to answer an abstract and general question of law; the terms of reference must show how the question of law propounded affects the particular case on hand, and the High Court will answer it only so far as it bears on the particular case. The question referred for the decision of the High Court in Mylapore Hindu Permanent Fund Limited v. Corporation of Madras (1). is, "Does the word 'eapital' used in Schedula V of the Municipal Act III of 1904 mean exclusively nominal capital or does it also include paid-up capital and, if so, should it be taken to mean paid-up eapital exclusively." The learned Judges, however, decided the question with reference to the facts of the ease and their answer is contained in the

Oar desision, therefore, is that, with reference to the Hylapore Hindu Permanent Fund (Limited), the word capital in Schedule V of the Madras Municipal Act III of 1904 means paid-up capital,"

I, therefore, have no hestitation in hold. ing that we are not bound to give a desision on the questions involved in the suit other than the questions referred to us by the Ohief Judge of the Court of Small Causes.

To deal with the questions referred to us, it would be necessary to describe very . briefly the main principles underlying the saleulations on the basis of which premis for .

^{(1) 31} M, 408; 18 M. L, J, 849; 3 M. L. T. 400.

SIN LIFE ASSURANCE CO. OF CANADA v. CORPOSATION OF MADRAS.

assurances are fixed and illustrating by a concrete example how the premiums arrived at, besides being sufficient to meet the liabilities incurred, enable Life Assurance Companies to earn a profit. A statement of these principles would necessarily lead to a consideration of the sources of surplus or profit with which alone we are concerned.

Before it is possible for a Company to fix the premium it must receive in return for an undertaking to pay a specified amount at death, it is necessary for the Company to know when the life or lives insured will terminate. The tables based upon observations of a large number of lives give the information required and are known as Mortality Tables. We take the following

from a treatise on Life Assurance.

"The fundamental facts which a Mertality Table supplies us with are the numbers living at each age from the earliest to the latest year included in the Table, and the numbers dying in each year. From these two series of facts all the information in regard to mortality that is required for Life Assurance can be obtained. Let us suppose now that there are 10,000 people, all at the age of 40, who wish to arrange for a payment of £ 100 to the executors of such of them as may die before reaching the age of 41. The Mortality Table informs us that 103 of these people will die during the year, and as the death of each person involves the payment of £ 100, the sum of £ 10,300 will be required to meet the claims arising cut of these 103 deaths. It is, therefore, necessary for each of the 10,000 persons to pay £103 cr £ 1.0.7 in order to secure the payment of £ 100 to their executors, should death cecur within the year. This leaves out of account any benefit that may be obtained by interest earned upon the £ 10,200 before being required for the payment of the elaime, and takes no notice of the necessary expenses of transacting the business, but it shows clearly the use of the Mortality Table. If we had no experience to guide us as to the number of people who would die within the year, we might either charge too large an amount for the assurance, or we might charge too small a sum, and not bave enough money available to meet the elaims when they became due. In the instance just given, the £ 100 is the sum

assured, the £ 1'03 paid to secure the sum assured in the event of death is called the premium, and a policy of this nature is called a Term Policy for one year. The premiums paid by those who did not die were used in paying the claims arising from the deaths that occurred, and the value received by the survivors for the premiums of £ 1'03 was the certainty of their beirs receiving £ 100 should the assured die."

It would be next necessary to indicate the part played by interest in the subject. of Life Assurance. The rate of interest is indeed a very important factor affecting Assurance, £ 100 carning £ 3 per annum will amount in 50 years to £ 438; at 6 per cent. to £1,842. The inform. ation necessary is obtained from Interest Tables which are prepared and on the basis of which calculations are made by Life Assurance Companies. It is important to know not merely what £100 will amount to at a given rate of interest in a certain number of years but also how much must now be lent or invested so that in a certain number of years it will at a given rate of interest increase to £ 100. This is called the present value of £ 100 due so many years hence at such a rate per cent.

With the aid of Mortality and Interest Tables the Companies are in a position to combine the result of Mortality and Interest and to have regard to them in fixing their premia. Going back to the illustration already given, we shall have to examine how the results obtained from Interest Tables affect it.

I shall again quote from the book already referred to. "Let ue now re-consider the example, given in the chapter on Mortality, of 10,000 people aged 40, who wish to arrange for a payment of £ 100 to the executors of such of them as may die before reaching the age of 41. We find from the Mortality Table that 133 of them will die and that, therefore, £ 10,300 will be required at the end of the year to meet the claims arising out of these 103 deaths. On turning to the table showing the amount of £ 1 at the ond of one year at 3 per cent. we find it is £ 1'03 and the amount of £ 10,000 is, therefore, £ 10,300; so it is only necessary for

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the 10,000 people affecting the assurance to pay this amount, pro rati between them at the commencement of the year. Thus the premium that each would have to pay would be £ 1 instead of the £ 1'03 which we saw would have been necessary when leaving interest out of the question."

The premium ascertained in this manner is the net or the pure premium; and in order to arrive at the office premium which is what a policy holder has to pay, an amount is added to the net premium known techni-

cally as the "loading."

"In the case of policies which do not participate in profits, the loading only has to be sufficient to cover the expenses and such margin as may be considered necessary for contingencies, such as the death rate being in excess of that provided for by the Mortality Table or the rate of interest carned on the funds of the Company being less than the rate of interest assumed in calculating the premium rates."

"In the case of policies that participate in profits, the loading is increased in order to provide, not merely for the expenses incurred, but for the bonness or profits that will be added to the policies in the future"—(See also Encyclorælia

Britanoies, Volume XIII, page 173'.

The addition of loading is thus made to make provision for the expenses of the management of the business and for ther to provide against adverse fluctuations both in regard to mortality and in regard to interest.

In dealing with the subjects of mortality, interest and loading, I have indicated the

main sources of surplus or profit.

A favourable mortality means that the policy holders live longer than according to the Mortality Table it was expected they would live. Their deaths are bound to some some day, but the longer duration of their lives implies the receipt by the Assurance Company of a larger number of premiums, and involves a longer time during which interest can accumulate on the funds, which are larger in amount owing to the claims not having to be paid so soon as the Mortality Table contemplates."

How does interest form a source of surplan? The originally assumed rate of interest in making the calculations may have been 3 per cent. but the interest actually earned may amount to 4 per cent, and the difference constitutes the surplus.

Smaller expenses than the additions (loading) made to the net premiums constitute the third cause of a surplus.

These are considered the chief sources of surplus or profit—(1) a lighter or more favourable mortality than that assumed, (2) a higher yield of interest than that calculated upon, and (3) smaller expenses than the additions made to the net premiums. Of the three, the two latter sources are considered more important. (Vile Life Assurance by S. G. Leigh, page 55.)

A certain amount of profit is obtained from policies that are surrendered or that

lapse.

It seems to be generally agreed that it is questionable after making all allowances whether the indirect loss to the Company from surrenders does not nearly or quite balance the direct gain, and it is stated that the best offices much prefer the policies remaining on their books to their being surrendered.

It seems also to be assumed that though policies that lapse may result in a profit, they cannot as a general rule be regarded as a very appreciable source of surplus.

Having made these observations in regard to the general principles that regulate the profit of a Life Assurance Company, I shall proceed to examine the conclusion of the learned Chief Judge. He, no doubt, ignored in his judgment all sources of surplus other than interest. But, in my opinion, his finding has not been affected in substance by this omission.

Under the City Municipal Act of 1919 the Company has to show that in the year immediately preceding the year of taxation its gross income did not exceed Rs. 25,000, before the Company can claim the berefit of the proviso. We have it on record that the total premia received from the whole of the Presidency of Madras amounted to Rs. 4,13,550. It has also been found that the avarage rate of interest earned during the year by the Company on the net invasted ledger assets was 5°68 per cent.

It has been pointed out that even if, for the sake of argument it should be assumed

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that the average rate realised by the Sun Life Assurance Company was 6 per cent. and that the whole interest realised represented the profit of the Company, in order to be able to earn Rs. 25,000 per annum, the Sun Life Assurance Company of Canada should have received premia from the City of Madras alone amounting to Rs. 4,16,666 10.8. We have seen that its receipts for the whole Presidency amounted to only Re. 4,13,550. A portion of the interest earned has to be returned to the policy-holders, as the calculations I have adverted to above, which form the basis of the premia fixed, elearly indicate. The profit earned by the Company on this head can only be the difference between the figures calculated on the basis of the rate of interest assumed and the rate of interest actually carned. The Sun Life Assurance Company in fixing its premia, having assumed a rate of $3\frac{1}{2}$ per cent. (the rate assumed by this Company in its interest calculations, is, we are informed, 21 per cent.), its profit from the source of interest sculd only be the amount which represents the difference between the two srms calculated at 5'68 per cent. and 32 per cent. or 2.18 per cent. The learned Chief Judge for the purposes of his judgment assumed that the Company is liable to be assessed with reference to the total amount of interest earned by it, that is "interest at 5.68 per cent." upon the premia received. The amount arrived at falls short of Rs. 25,000 and the learned Chief Judge holds that the Company is entitled to the benefit of the proviso. The question to be determined would be, therefore, - oculd the profits of the Company in any event exceed the total interest earned upon the premia? We have seen that a slight variation in the rate of interest does produce an enormous difference in the interest carned, and I have pointed out that interest forms one of the three chief scurees of surplus or profit.

The difficulty in dealing with this care arises from the fact that, under the Municipal Act of 1919, the Company must state its gross income received in the year preceding the year of taxation. It is said that it is impracticable to make an annual actuarial valuation and that it is extremely difficult to make such a valuation with reference to any particular city or area in

the case of a Life Assurance Company operating in different parts of the world. The Company in a petition addressed to the Commissioner of the Corporation of Madras in connection with this assessment gives the following extract from Young on Insurance: "but a valuation is in no sense a stocktaking" in the enstomery acceptation of that term. * * The two operations are essentially distinguished from each other and differ ex toto. In the ordinary stock taking the trader is concerned with the value of his articles at the current prices of the period, and his results are obtained by a mechanical arithmetical process competent to average intelligence. In a valuation, however, the probable future requires to be earefully serutinized and gauged in the light of the experience acquired both as regards the rate of mortality likely to be exhibited among the members, the rate of interest at which the accumulated fund and prospective premiums can probably be soundly and profitably invested, and the adequacy of the loading reserved for anticipated demands. And it is to be noted that this provision is not limited to the ensuing valuation period only, but necessarily extends to the entire possible duration of the whole of the exist. ing contracts, comprising a range of time of thirty years and upwarde."

The rules made by the Governor in Conneil under the Ircome Tax Act VII of 1918 (in virtue of the power conferred by section 43, sub section 1 of the said Act) proceed on the basis of a periodical actuarial valuation for assessing to income-tax Life Assurance Companies. If the periodical actuarial valuation has been made within 5 years previous to the year in which the assessment has to be made, then the income shall be determined with reference to the average net profits disclosed by the last preceding valuation. If the periodical actuarial valuation has been made more than 5 years previous to the year of assessment, the taxable income shall be determined with reference to interest, dividends and rents received by the Company during the previous year, that is to say, with reference to returns upon investments." (See p. 59 of the Ireome Tax Manual-Madras, 1919).

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I have used the word "Interest" in this judgment as a compendious term meaning "interest, dividend and rent".

The Indian Life Assurance Companies Act VI of 1912 directs every Life Assurance Company to make periodical investigations including actuarial valuations ones in five years unless the instrument constituting the Company directs investigations to be made at shorter intervals (vide section 8 of the Act).

Reading, therefore, the rules made under the Income Tax Act in conjunction with this provision of Act V1 of 1912, we arrive at this result, namely, that in default of there being an actuarial valuation within five years of the year in question, the taxable income is to be regarded as the aggregate of the interest, dividends and rents reserved by the Company during the previous year.

I think that we shall be justified in deducing from this that it was intended to make the Company that is in default pay the maximum amount of tax and that this object is accomplished by making the Company pay a tax upon the entire amount of the yield produced by its investments.

It may be said that there is no fixed rale in regard to the amount of profits that can be earned by a Life Assurance Compuny; but surely experts conversant with matters pertaining to Life Assurance must beable to say that in view of competition among the conserns it would no' be possible for a Company of standing to earn profits beyond a certain limit. We take it that the rules framed under the Income Tax Act contain an indication that the interest &. from investments constitute the maximum of profits. In the very nature of things it is impossible to state the income for a particular period of a Life Assurance Company with accuracy; and the most eareful salsulation can only be regarded as an estimate. I find the following passage in an historical review of Life Assurance by Andres. "In the year 1870 the average rate of interest earned by the funds of life offices, after deducting income tax, was 4'471 per cent. which declined to 3'771 per cent. in the year 1899, but has since increased to nearly 4 per cent. after deducting incometax, and from the increased skill and attention brought to bear upon the quastion factory yield, there is little doubt that the number of life offices now obtaining a net average yield of at least 4 per cent. will be rapidly increased. At the same time an affort is being made to persuade the Government to mete out what is no more than justice to Assurance Office, transacting life business only, by legislation which will enable them to be assessed for income tax on the basis of average annual profit, in lieu of the present very unfair method of assessment on interest revenue."

I may also quote here a passage from Insurance Guide and Hand-book by Andras— Volume I, page 219:

"During the last few years attempts have been made by Life Insurance Companies to obtain a revision of the basis of taxation, but so far without any definite success, although the Government seem disposed to view the matter favourably,"

The grievance from which relief is sought is, of course, that those Companies which are purely, or mainly, life offices, as distinguished from "composite" concerns, are assessed on their interest from investments in lieu of on their profits.

It is hardly necessary for me to point out here that the interest earned by an office on its life fund is not profit in any sense of the word, but rather the "raw material" of the business. It is not difficult to imagine a case in which a Company might be in receipt of, and taxed upon, a very large income from interest, in spite of the fact that it was earning no profit at all. Indeed, it might even be totally insolvent, on account of the low average rate of interest earned, or of the heavy rates of mortality or expenses experienced."

The idea underlying the above passages is that assessment to tax on the basis of yield from investments entails a hardship upon Life Assurance Companies.

In the present case applying this test which, from the point of view of a Life Assurance Company, is a most unfavourable test to apply, the gross income falls short of R., 25,000. We may observe in passing that Rs. 4,13,550 is the total of the premia received from the whole of the Madras Presidency and not merely from the City of Madras.

On the materials that have been placed before us I am unable to say that the learned Chief Judge is wrong in his view on what I

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think is really a question of fact, that the profits of the Company cannot in any event exceed Rs. 25,000. We have not been referred to any works on the subject of Life Assurance or to any judicial pronouncements which tend to show that a different conclusion is possible.

In the judgment of the learned Chief Judge it is assumed that the Standing Committee of the Corporation of Madras was of the opinion that the amounts received as premia constituted the gross income of the Company. A large portion of the judgment is devoted to a criticism of this view, and the learned Vakil for the Corporation seems to have conseded before the Small Cause Court that he could not support that extreme view; and the learned Advocate General who appeared before us for the Corporation did not put forward that contention on behalf of his clients.

Dealing with the questions that have been referred to us for our decision, I think it is sufficient to say in answer to questions Nos. I and 2 that the Sun Life Assurance Company has discharged the onus that lay upon it under the proviso to role 7 of the taxation rules, by showing that its income could not have exceeded Rs. 25,000, and the circumstance that the Company has not been able to state positively what its actual gross income was would not disentitle it to the benefit conferred under the said proviso.

In regard to question No. 3 the learned Chief Judge has held that the Act refers not merely to income received from the Oity of Madras, but also to the income received in the City. The contention of the Company on this point was that in addition to the principal Agency at Madras there were numerous sub-agencies in the Mofassil and that when the Mofassil policy holders paid their premia to the sabagents who remitted the moneys to Madras, these amounts should not be taken into account in making the assessment. On the facts I have stated above it would be unnecessary to deal with this question because on the assumption that the interest upon the premia collected in the whole of the Presidency constituted the income of the Company such interest amounted to less than Rs. 25,000. The point involved in this question is merely of academic interest, and I may in this connection once again refer to Mylapore Hindu Permanent Fund Limited v. Corporation at Madras (1). It may be

inferred from it that the Court was unwilling to answer an abstract question of law and I am similarly of the opinion that unless a decision of the question is necessary for the determination of the case before it, the Court must decline to answer the question referred to it. We do not, therefore, propose to give our decision on question No. 3.

M. C P.

Reference answered.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 167 or 1916.

November 12, 1920.

Present:—Mr. Raymond, A. J. C.

CHOITHRAM MANGHANMAL—

PLAINTIFF

tersus

Partition, suit for - Plaintiff not entitled to share - Defendant, whether can get his share partitioned.

In a partition suit it is the right of every defendant to ask to have his own share divided off and given to him and he is qua his claim to a share on partition in the position of a plaintiff. [p 809, col. 2.]

But where the plaintiff is held to have no share in the property sought to be partitioned, there is no partition suit before the Court and the maxim cessante ratione, cessat ipsa lex applies and the defendant has no right to ask the Court to inquire into and determine his share in any part of the property, that is sought to be divided. [p. 810, col. 2.]

Mr. Kimatrai Bhoiray, for the Plaintiff, Mr. Rurchand Billaram, for Defendants

Nos. 1 and 2.

Mr. Isardas Utharam, for Defendant No. 3.

Mr. Kalumal Pahlumal, for Defendant No. 4.

JUDGMENT.—An interesting point has arisen in this case but to its right appreciation it is necessary to set out the material facts.

On the 12th April 1916 Choithram filed a suit for partition of joint ansestral property, moveable and immoveable, against his paternal uncles, Lalchand and Ramumal, plaintiff claiming one third share in the property. The property sought to be partitioned sonsisted of (1) a plot of land with buildings thereon situated

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in old town quarter, (2) a plot in Lyari Quarter on a temporary lease, (3) a garden bearing Survey Numbers 92, 95, 96, (4) another garden bearing Survey Numbers 452, 454, (5) cash and ornaments in the possession of the defendants, Lalehand and Ramumal, and (6) the stock in trade, accets and outstandings of a Flour Mill busicess.

In his plaint, the plaintiff stated that during his minority, defendant No. 1, Lalshand, who was the manager of the joint family, in conjunction with defendant No. 2, his brother, on the pretence of effecting an equitable distribution of the property, indused the plaintiff's mother to execute a releasedeed which purported to extinguish plaint. iff's rights in the property in consideration of plaintiff ressiving Rs. 2,200 each and ornaments and elothes worth Rs. 200. Plaintiff having attained his majority, now sought to set acide this deed as being fraudulent and illegal and grosely unfair to him as he valued his share in the property at something over Rs. 12,000.

Amongst other defenses, defendants Nos. 1 and 2 contended that the release deed was a genuine dosument and had been seted upon and that the plaintiff had validly released all his interest in the joint family property and was not entitled to claim pertition. Defendants also alleged that the joint family owned only five eighteenth share in Survey Numbers 92, 95, 96 (Item No. 3) and valued at Bs. 200 to 305 and that the other so sharers were the sons of Sajan, Molumal Dewanmal and Obellamal Dewanmal. With regard to the garden Survey Numbers 452 and 454, it was arged that the family owned eleven. seventy-two chare valued at Rs. 200 to Rs. 300 and that the other co-sharers were Samanmal Hemanmal, Motumal Dewanmal and Chellamal Dewanmal, and that these persons were necessary parties to the suit. On the 6th July 1916, Mr. Isardas applied that Basarmal, son of Motumal for bimself and as next friend of his minor brothers, Chatu and Dhaman, be brought on the record as parties to the suit, and as Mr. Kimatrai for the plaintiff raised no objection without admitting that they were necessary parties, they were ordered to be joined as co-defendants, on the 7th July 1916. On the same day Mr. Kimatrai asked that Mohamed and Iso. sons of Sajan, and Chellomal Dewanmal and Samapmal Hemanmal be joined as parties and they were ordered to be joined and the plaint was amended assordingly. On the 20th July 1916 Mr. Kimatrai applied to the Court that as some of the newly added defendants were dead and some had no present interest in the property, he should be permitted to file an amended plaint. The amendment prayed for was granted and a farther amended plaint was filed wherein the defendants were shown, in addition to defendants Nos. 1 and 2, Basarmal, Chatto and Dhaman, sons of Motumal and Khatao, son of Chellamal, who had also applied that he be made party to the suit. Khatao is since dead and his minor son through his mother as his guardian is now on the resord.

Admittedly defendants Nos. 3 and 4 slaim an interest only in the garden properties in the suit (Item Nos. 3 and 4.

On the 12th February 1919, plaintiff and defendants Nos. 1 and 2 only referred all the matters in difference between them to the arbitration of their Pleaders by reference filed in Court and an award was made on the 23th March 1919.

Objections were filed to the award on the ground, inter alia, that the award was invalid and had in law as the reference was not signed by all the parties interested in the suit. I upheld the objection and set aside the award. The case then proseeded to a hearing and there were several hearings when,on the 2nd Novem. ber 1920, plaintiff and defendants Nos. 1 and 2 filed an application under Order XXIII. rule 3, Oivil Procedure Code and asken for a desree in terms of the compromise between them. As a result of the compromise, they desire that all further proseedings in this case should sease. The position taken up by the defendants Nos. 8 and 4 may be formulated as follows: "They say that it is the right of every defendant in a partition suit to have his share allotted to him, and that a defendant claiming a share on partition is qua that elaim in the position of a plaintiff, and that though plaintiff is unwilling to prosecute his partition suit, yet they should not be driven to further litigation but their rights should be determined in the present suit." No doubt it is the right of every defendant in a partition suit to ask to have his own share divided off and given to him and he is qua his elaim to a share on partition in the position of CHOITHRAM MANGHANMAL &. LALCHAND.

a plaintiff, but is this rule applicable to the present ease?

Plaintiff, though he filed a suit for partition, had a formidable difficulty to overcome before the Court sould consider his right to any share in the family property. The release deed had to be set aside and had the plaintiff failed in his attempt to do so, his prayer for a partition could not be considered. If the plaintiff were non-suited on the ground that the relase deed was binding on him, sculd defendants in the suit contend that the Court should enquire and determine their rights in the property and allot to them their respective shares therein? I am much impressed with the reasoning of Chandavarkar, J, in the case of Ashidbai v. Abdulla (1) (remarks at pages 291-292) where he observes: "But all the eases in which this rule (which I have just referred to) has been adopted by this Court will, on examination, be found to be cases in each of which the plaintiff suing for partition succeeded in proving his right to it and the decree passed in favour of the defendants followed as a natural result of, or enrollary to, the decree in favour of the plaintiff," and again, "But where the ease of the plaintiff fails on the preliminary ground that he has no right to a share at all and that a suit for partition is not maintainable at his instance, the reason of the rule fails to apply. There is nothing on which a defendant's right to have his share ascertained and awarded in that suit can rest. The defendant was brought in for determining the share of the plaintiff, if any. If the plaintiff is found to have no share at all, there is no suit for partition, and consequently for determining the defendant's share." In the compromise arrived at between the parties in this suit, it is stated that the release deed is valid and binding on the plaintiff and a decree is sought for in terms of it. Plaintiff's suit for partition must, therefore, fail. It may be that the plaintiff has agreed to be bound by the release deed because by the terms of the compromise he obtains a decree against defendants Nos. 1 and 2 for sum of Rs. 4,500, but whatever be the motive underlying the transaction, his suit for partition is no longer maintainable on his own admission that the releasedeed is binding upon him, why should then the Court enquire as to what shares defendants Nos. 3 and 4 are entitled to? It was in order to determine the share of the plaintiff in the family property that defendants Nos. 3 and 4 were joined as parties to the suit, but now that by virtue of the sompromise decree, plaintiff is to have no share in the family property, there is no partition suit before this Court, and, therefore, the maxim is applicable "cessants ratione, cessating lex."

I would also refer to a passage in Gour's Hinda Code, 684. "Where the plaintiff's title to partition is denied, the first thing he must do is to prove it. If he is proved to have no share at all, there is no suit for partition and consequently no necessity to determine the defendant's share." I have perused the authorities eited by Mr. Isardas, particularly Edulji Muncher.i v. Vullebhoy Khanbhoy (2) and Broen. dra Kumar Das v. Gobinda Mohan Das (3) which are the nearest approach to the case before me, but both are clearly distinguish. able, both were partnership suits and the plaintiff's right as a partner to a dissolution of the partnership and the taking of partnership accounts was not shallenged.

I, therefore, hold that the defendants Nos. 3 and 4 have no right in this suit to ask the Court to exquire into and determine their share in any part of the property that is sought to be divided.

In this view of the case it is unnecessary to determine whether defendants Nos. 3 and 4 were necessary parties to the suit, for the result, in my opinion, will still be the same.

Let there be a decree in terms of the compromise between plaintiff and defendants Nos. 1 and 2. The suit is dismissed against defendants Nos. 3 and 4. Parties to bear their own costs.

J. P. Order accordinly.

 ^{(2) 7} B. 167; 7 Ind, Jur. 372; 4 Ind. Dec. (N. s.) 112.
 (3) 34 Ind. Cas. 186; 20 C. W. N. 752 at p. 755.

MARAHOHAN PODDAR U. SUDARSAN PODDAR.

CALOUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECARE No. 194

OF 1917.

March 19, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kr., and Mr. Justice Walmsley.

HARAMOHAN PODDAR AND ANOTHER—
DEFENDANTS NOS. 2 AND 3—APPELLANTS

SUDARSAN PODDAR - PLAINTIFFS -- AND)
OTHERS DEPENDANTS -- RESPONDENTS.

Partnership, dissolution of—Continuing partnership, Buit for account—Limitation Act (IX of 1908), Sch. I, Art. 108, applicability of—Stoppage of business or supply of capital, effect of —Minor admitted to his deceased father's share in partnership, liability of.

Article 106 of the Limitation Act applies to a dissolved partnership, for limitation cannot apply as between partners so long as the partnership

continues. [p. 812, col. 1.]

Under section 253 of the Contract Act, partners may agree that on the death of any of them his nominee or legal representative shall be entitled to take his place. Whether in a particular case there has or has not been such an agreement, may be proved by an express declaration to that effect or may be determined from the conduct of the parties. [p. 811, col. 2; p. 812, col. 1.]

Neither stoppage of business nor refusal of a partner to supply capital whenever the demand is made on him can be treated as dissolution of the firm. The question whether there has been abandonment by a partner is a matter of inference to be drawn from the facts of each case. [p 812, col. 2;

p. 8:3, col. 1.]

An infant inheriting his father's share in a partnership business cannot be made personally liable for any obligation of the firm but his share only is liable, and as regards the personal liability of his father he is liable only to the extent of the assets inherited by him. [p. 818, cols. 1 & ?.]

Appeal against a decree of the Subordinate Judge, Fifth Court, Dacca, dated the 30th March 1917.

Dr. Sarat Chandra Basak and Baba Gopal Chandra Das, for Defendants Nos. 2 and 3, Appellants.

Babus Gunada Charan Sen, Prakash Chandra Pakrashi and Pramatha Nath Banerjee, for the Plaintiff Respondent.

Baba Rajendra Chandra Guha, for Defendant No. 1-Respondent.

JUDGMENT.—The suit, which has given rise to this appeal, was brought by the plaintiff-respondent for dissolution of a partnership, for winding up its business, for taking the assonuts and for incidental

reliefs. The case for the plaintiff is that there were two sets of partners, called respectively espitalist partners and Gomasta partners. The first class included the plaintiff, the first defendant and the father of the second and third defendants, who were to provide the sapital, receive a share of the profits and bear the losses in stated proportions. The second class included the remaining six defendants who were to receive specified stares of the profits as remuneration for their labour, but had no concern with the losses. The busicers was carried on in rice, jute and other articles and also included morey lending. The firm was started in 1899 and the first defendant has ever since seted as the menaging partner. According to the plaintiff, the business has not been properly managed for some time past and in its present condition, can no longer be carried on profitably. He accordingly prays that the partnership may be dissolved, the business wound up and the accounts adjusted. The defendants have resisted the elaim on a variety of grounds which reed not be enumerated in detail for our present purpose; it is sufficient to state that they have sought to defeat the action on the plea of limitation; their allegation in substance is that the partnership was, in fast and in law, dissolved long before the institution of the suit. The Subordinate Judge has overruled the contentions of the defendants and has made a preliminary decree. That decree has been assailed before us on grounds which may be formulated under three heads, namely, first, that the suit is barred by limitation; secondly, that no personal liability can be imposed upon the infant representatives of one of the original partners and thirdly, that no decree should have been made at this stage in favour of the plaitiff, entitling him to resover the espital supplied by him.

As regards the first point, the second and third defendants, who are the appellants before this Court, have contended that the suit is barred under Article 106 of the Schedule to the Indian Limitation Act. That Article provides that a suit for an account and a share of the profits of a dissolved partnership must be instituted within three years from the

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date of the dissolution. It is plain that the section applies only to a dissolved partnership. The reason is obvious: it is an elementary principle that limitation cannot apply as between partners so long as the partnership continues. [Foster v. Hodgson (1)]: it is different after there has been a termination of the partnership or discontinuance of it (Noyes v. Orawley (2), Knox v. Gue (3)]. The defendants have consequently argued that the partnership was dissolved before the commencement of the suit. This contention has been based on a three-fold ground. It has been contended, in the first place, that under clause (10) section 253 of the Indian Contrast Act. the partnership was dissolved by the death of one of the original partners, namely, the father of the second and third defendants, in February or March, 1909; in this view, the present suit, instituted on the 8th September 1913, would be barred by limitation under Article 106. In our opinion, this contention is not wellfounded. No noubt, elause (10) of section 2.3 provides that a partnership, whether entered into for a fixed term or not, is dissolved by the death of any partner. But this rule is subject to the important qualification embodied in the opening words of the section, namely, "in the absence of any contract to the contrary." Partners may accordingly agree that on the death of any of them, his nominee or legal representative shall be entitled to take his place. Whether in a partienlar case there has or has not been such an agreement, may be proved by an express declaration to that effect or may be determined from the conduct of the parties. This is clear from the decision in Gokul Krishna Das v. Shashi Mukhi Dasi (4). which was applied in Raghumull v. Luchmondas (5), the judgment of the latter case has subsequently been affirmed by the Judicial Committee. Now, in the case

before us, it has been found by the Sub. ordinate Judge that, on the death of the father of the second and third defendante, the latter stepped into his place, they were accepted by the other members, without question, as partners in a continu. ing firm and in that character contributed eapital and withdrew sums of money from time to time. The second defendant, indeed, admitted on the 17th March 1916 in the course of his deposition in another suit, that on his father's death he and his brother became malits of the firm. In these circumstances, it is now impossible for them to maintain, even with a show of plausibility, that the partnership was dissolved on the death of their father. It has been contended in the second place that the partnership was dissolved so far back as 1906 by the retirement of one of the Gomasta partners, and reliance has been placed upon clause (7) of section 353 which if from any provides that, whatsover, any member of a partnership ceases to be sc, the partnership is dissolved as between all the other members. This, as in the case of clause (10), is subject to any agreement to the contrary, which may be established by proof of express declaration or may be inferred from conduct. Now, there can be no doubt that notwithstanding the retirement of Gomastas, the partnership in this case has been carried on as a continuing firm. This is obviously natural; the Gomastas were no doubt called partners, but they were essentially officers of the firm. They were paid, not a fixed salary, but a share of the profits by way of remuneration; the manifest object was to stimulate their industry and it is significant that they had no concern with the losses. It would be clearly reasonable to hold that the parties never inteded that the retirement of one or other of persons in such position should lead to the dissolution of the partnership. In the third place, the contention has been put forward that the partnership was dissolved, as the business was stopped and the partners refused to advance further sums on the espital account. There is plainly no force in this contention. Neither stoppage of business nor refusal of a partner to make further advances can be treated as dissolution of the firm. The

(1) (1812) 19 Ves. 180 at 183; 34 E. R. 485.

^{(2) (1878) 10} Ch. D. 31; 48 L. J. Ch. 112; 39 L. T. 267; 27 W. R. 109.

^{(3) (1872) 5} H. L. 056 at p 674; 42 L. J. Ch 234.

^{(4) 13} Ind Cas. 23; 16 C. W. N. 299; 15 C. L. J.

^{(5, 38} Ind, Cas 275; 20 C. W. N. 708.

HARAKOHAN PODDAR U. BODALBAN PODDAR.

Subordinate Judge has found upon the evidence-and his finding has not been successfully displaced that the business of the firm, in some of the departments at least, was carried on to a date only a few months prior to the institution of the The business of the firm included money-lending, and regular arrangements were undoubtedly in existence for the collection of the dues in 1912, if not in 1913. It is further plain that refusal by a partner to supply espital whenever the demand is made on him is not sonelusive proof of his intention to retire within the meaning of clause (8) of section 253. The question, whether there has been abandon. ment by a partner is a matter of inference to be drawn from the facts of each case. Moung Tha Huyin v. Mah Thein Myah (6), Sudarsanam Maistri v, Narasimhulu Maistri (7). In the present case, we can find to indiestion of an intention to retire or abandon on the part of any of the partners. We hold accordingly that the partnership was not dissolved before the institution of the suit which is ecusequently not barred under Article 106. If Article 120 is held applicable, the suit is plainly not barred, as the right to sue for dissolution of a continu. ing partnership exists so long as the partnership continues. The first ground orged in support of the appeal sannot consequently be maintained.

As regards the second point, it has been urged that no personal liability can be imposed upon the infant representatives of Janaki Nath Poddar, one of the original partners. This contention is clearly wellfounded. Section 217 of the Indian Contract Act provides that a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of a partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm, is liable for the obligations of the firm, Consequently, the right of the minor to elaim a certain proportion of the divisible income and ultimately to re-claim a estain proportion of eapital at the proper

(7) 25 M. 149 at p. 164; 11 M. L. J. 353.

times, if and whenever it is found that there is profit to divide and surplus may be made distribute, to assots available for the benefit of the ereditors of the firm. But the position is incontrovertible that the infant, who is admitted to the benefits of the partnership, cannot be made personally liable for any obligation of the firm. Sanyasi Charan Mandal v. Asu. tosh Ghosh (8), Khetra Mohan Poddor v. Aswini Rumar Saha (9). It is not necessary at the present stage to consider the effact of section 243 which defines the liability of a minor partner on attainment of majority, unless he gives public notice of his repudiation of the partnership. This provision seems to place the creditors of the firm in a more favourable position than in England, Goode v. Harrison (10). In the present case, at the time of the death of Janaki Nath Pcddar, both his sons were infants; one of these, Hara Mohan, attained majority subsequently and the other, Bhuban Mohan, was a minor at the date of the institution of the suit. It is plain that the liability of these appellants has to be considered in three stages. As regards the personal liability of Janaki Nath Poddar at the time of his death, the appellants, as his sons, can be made liable only to the extent of the assets inherited by them. As regards liability for transactions of the firm since the death of Janahi Nath Poddar, the appellants are not personally liable up to the date of attainment of majority of the elder brother, Hara Mohan Poddar. For transactions since that date, Hara Mohan would be personally liable, but his brother Bhuban Mohan would not be so liable, as he contipued to be a minor. These distinctions must be borne in mind when the accounts are taken. The second ground must consequently prevail,

As regards the third point, it has been argued that no decree should have been made in favour of the plaintiff so as to entitle him to recover the capital contributed, even before the accounts are taken. There is no force in this contention in the special circumstances of this case. The

^{(6) 27} I. A. 180; 28 J. 58; 5 C. W. N. 114, 7 Sar. P. C. J. 776 (P. C.).

^{(8; 26} Ind. Cas. 886; 42 C. 225.

^{(9) 45} Ind. Cas, 667: 22 C. W. N. 438.

^{(10) (1821) 5} B. & Ald. 147.orp. 157; 24 R. B. 307 at p. 314; 100 E. B. 1147.

BACECHA LAL U. HASAN EHAN.

Subordinate Judge has found that the first defendant has withdrawn the capital in respect of his share and the share of the father of the second and third defendants. The Subordinate Judge has further stated that as soon as difficulties arose in conduct. ing the business of the firm, the first defendant, who was the managing partner, "acted treacherously towards the plaintiff and left him to his fate." In these circumstances, it is only just that the plaintiff should be placed in the same position as the other capitalist partners. In addition to this, the amount advanced by the plaintiff has already been investigated and determined, and no serious endeavour has been made to convince us that the amount has been erroneously calculated; it would thus be an idle fromality to leave the matter open for fruitless discussion. third ground must consequently be overruled as wholly unsubstantial.

We may add that in the course of argument, an objection was taken to the order for the production of account books, but we were satisfied that the direction given by the Subordinate Judge was not open to All account books must be eriticism. produced by the parties who have posses. sion of or control over them. If a party disobeys the order made in this behalf, the Court has ample power to enforce its order. We were also invited to consider the effect of the alleged misappropriation by the Gomasta partners; but this is a question which cannot be usefully discussed till the accounts have been taken and the facts ascertained. It was also suggested that the plaintiff can ultimately obtain a decree, only according to his share, and that the share of the first defendant should be treated separately from that of the ap-These prayers are reasonable and may be borne in mind when the final deeree is drawn up.

The result is that this appeal is allowed only in part and the decree modified by addition of the declaration of the liability of the appellants as stated above. As the appeal has failed to a large extent, the appellants will pay the plaintiff-respondent the costs in this Court, but the hearing fee will be assessed at three-fourths of the prescribed amount.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAL No. 1133 OF 1920. April 3, 1923.

Present :- Mr. Justice Stuart, BACHOHA LAL-DEFENDANT-APPELLANT tersus.

HASAN KHAN-PLAINTIPE-RESPONDENT.

Burden of proof-Contract-Minority, plea of-Plaintif, onus on-Admission by executant at time of execution that he was major, value of.

When the validity of a contract is questioned or the ground that the executant was a minor, it is for the plaintiff to establish by prima facie evidence that the contract was valid and entered into by a person who was competent to do so. [p. 814, col. 2; p. 815, col. 1

Gaya Din v. Dulari, 2 Ind. Cas. 839; 6 A. L. J. 693,

followed

An admission by an executant at the time that he executed the deed that he was major is sufficient prima facie evidence of his majority. [p. 815, col. 1.

Gaya Din v. Dulari, 2 Ind. Cas. 839; 6 A. L. J. 693, followed.

Second appeal against a degree of the District Judge, Cawppore, dated the 7th July 1920.

Messrs. Gulcari Lal and G. Agarwala, for the Appellant.

Mr. M. A. Acie for Dr. S. M. Sulaiman, for

the Respondent.

JUDGMENT .- The plaintiff bought a house from Chhedi Lal and Bachcha Lal. Mubin is in possession of a room of that He refused house. to recognise plaintiff's title to the house on ground that he was holding the room from Bacheha Lal and that Bacheha Lal was a minor at the time the deed of sale was executed. The Trial Court held that the burden of proof to show that Bacheha Lal was not a minor at the time that the deed of sale was executed was on the plaintiff, and that as he produced no evidence, his suit for the ejectment of Mubin must fail. The lower Appellate Court found that the burden of proof was on Mubin and that as his evidence to prove that Bachcha Lal was a minor was insufficient to satisfy the Court, the suit must succeed. Bachcha Lal appeals here.

I do not assept the view of either of the Courts below. The law on the subject is laid down elearly in Gaya Din v. Dulari (1). When the validity of a contract is questioned on the ground that the exe-

(1) 2 Ind, Cas. 839; 6 A. L. J. 693,

DOLA KHETAJI VAHIVATDAR O. BALYA KANGO PATEL.

entant is a minor, it is for the plaintiff to establish by prima facie evidence that the contract was valid and entered into by a person who was competent to do The Trial Court is quite right upon that point; but, where the Trial Court went astray was in saying that the plaintiff had produced no evidence. According to the entry in the deed of sale, Bachcha Lal had himselt admitted at the time of the execution of the deed that he had just attained majority. He said that he had been a minor under a guardian appointed by the Court but that he had majority; he executed the deed himself. As was decided in Gaya Din v. Dulari (1), such evidence is sufficient paima facie evidence to establish Bachcha Lal's majority at the time that the deed was executed. It has been brought to my notice that in the case of Ranhoya Lal v. Girdhari Lal (2), it was held that a statement made by a defendant not in the document, the subject of suit, but in a separate proceeding, that on a certain date he was of a certain age, was not sufficient to shift the burden of proof. But the desision in that case does not go in any way against my view. The weight of the evidence will be different in every case. Here I find that the distinct admission of Bashsha Lal at the time that he executed the deed that he was major at that time, is sufficient prima facie evidence of his majority. Against this is the evidence which he called to prove his minority. That evidence the learned District Judge finds to be unconvincing and insufficient. I agree with the learned Distriet Judge upon that point. The case then stands as follows:-It is proved that Bacheha Lai was a major at the time of the execution of the deed of sale. The deed of sale is thus a good and valid deed of sale. Mubin can base no claim to oscupation of any portion of the house on the authority of Basheha Lal. The appeal, therefore, fails and is dismissed with costs which will include fees on the higher seale.

J, P.

Appeal dismissed,

(2) 18 Ind. Cas. 956; 9 A. L. J. 103.

BOMBAY HIGH COURT. SECOND CIVIL APPEAL No. 248 of 1921, November 24, 1921.

Present:—Sir Norman Maeleod, Kr., Chief Justice, and Mr. Justice Shah. DOLA KHETAJI VAHIVATDAR.— DEFENDANT—APPELLANT

BALYA KANOO PATEL-PLAINTIFF-

RESPONDENT.

Res judicata—Sale of property—Suit to redeem on

ground that sale in reality a mortgage—Second suit to recover under contract of re-sale.

1. sold certrin property to D, and continued in possession as a tenant. Subsequently, D. executed

I. sold certrin property to D, and continued in possession as a tenant. Subsequently, D. executed in I's favour a satekhat to sell the property to him at any time within twelve years for a stated sum, I. brought a suit claiming to redeem the property on the ground that the sale by him was a mortgage, but the suit was dismissed. Before expiry of twelve years he brought the present suit to recover the property on payment of the sum stipulated in the satekhat, and it was contended that that question was res judicata:

Held, that the two suits were mutually inconsistent, and that the present suit was not barred as res judicata.

Second appeal from the decision of the District Judge, Thana, in Appeal No. 134 of 1919, reversing the decree passed by the Subordinate Judge at Alibag, in Civil Suit No. 220 of 1918,

Mr. G. S. Rao, for the Appellant. Mr. W. B. Pradhan, for the Respondent.

JUDGMENT,-The plaintiff sold the suit property to the defendant on the 16th March 1906, continuing to remain in possession as tenant. On the 13th August 1906, the defendant executed in his favour a satekhat to sell the property to him at any time within twelve years for Rs. 395, Rs. 5 being paid as earnest money. The plaintiff filed a suit in 1911 elaiming to redeem the property on the ground that the doenment of the 16th March was a mortgage, seeking the protection afforded by section 10A of the Dekkhan Agriculturists' Relief Act. That suit was dismissed. Before twelve years had expired the plaintiff sued again to recover the property on payment of Rs. 395. It was contended that that question was res judicata, as the plaintiff might in his original suit of 1911 have sued in the alternative for specific performance of

CHUNDI LAL U. GORUL.

the satekhat. Whether he could have sued in the alternative for specific performance in his redemption suit need not be determined. It certainly cannot be said that he ought to have done sc. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still number of years left under the satekhat within which he could have sued to get back the property on payment of the consideration mentioned in the sotekhat. We think, therefore, the decision of the lower Appellate Court is right and the appeal must be dismissed with costs.

W. C. A.

Appeal dismissed.

ALLAHABAD HIGH COURT. CIVIL REVISION No. 127 OF 1921. March 1, 1922. Fresent: -Mr. Justice Ryves. CHUNNI LAL-PLAINTIFF-APPLICANT tersus

GOKUL-DEPENDANT-RESPONDENT. Provincial Small Cause Courts Act (IX of 1887), s. 32, cl. 2-Suit filed as regular suit-Judge giren extended powers of Small Cause Court - Suit cannot be tried as Small Cause Court suit.

Where the powers of a Munsif invested with Small Cause Court powers up to Rs. 100 are extended up to Rs. 250, he cannot thereafter try a suit for the recovery of money over Rs. 100 but below Rs. 250, filed as a regular suit before the date of the extension of his power, as a Small Cause Court suit

Mahima Chandra Sirdar v. Kali Mandol, 12 C. W.

N. 167, referred to.

Civil revision from an order of the Munsif, exercising the powers of a Judge of the Court of Small Causes at Fatehabad dated 1st June 1921.

Mr. Baleshwari Prasad, for the Applicant, JUDGMENT .- This is an application in civil revision. The applicant was plaintiff in the Court below and filed a suit on a money bond for Rs. 157 in the Court of the Munsif of Fatehabad sitting at Agra, on the 12th of May 1921. At that time the presiding officer, the Maneif, had been invested with Small Cause Court powers only up to Rs. 100. The 1st of June was fixed for the decision of the case. On the 19th of May 1921 the Munsif's powers under the Small Cause Court Act were extended up to Be. 250. He, therefore, tried the suit as a suit of Small Causes. The defence to the suit was that certain payments had been made. The Court accepted the evidence of the defendant and gave the plaintiff a decree for Rs. 78 only. It is urged before me that the Court below had no jurisdiction to try the suit as Small Cause suit, and it seems to me that having regard to section 32, clause (2) and section 33 of the Provincial Small Cause Court Act (Act IX of 1887), the Court had no jurisdiction to try the suit, which had been filed properly as a regular suit, as a Small Cause Court suit. Paragraph 2 of section 32 runs as follows :- "Nothing in sub-section (1) with respect to Courts invested with the jurisdiction of a Coart of Small Causes applies to suits instituted or proceedings commenced in those Courts beforethe date on which they were invested with that jurisdiction." When the plaint in this suit was filed on the 12th of May 1921 the presiding officer of the Court had no juriediction to try it as a Small Cause Court suit involving more than Rs. 100. He, therefore, it seems to me, on the plain words of the ecction, had no right to try it as such on the let of June. The point seems to me quite clear, and if an authority is required, I would quote Lahima Ohandra Sirdar v. Kali kandol (1) which is exactly in point. The plaintiff, owing to the suit having been treated as a Smail Cause Court suit, has lest his appeal from the finding of the Court as to part payments. I am, therefore, constrained to allow this application with costs and set aside the decree of the Court below and send the case back to be disposed of as a regular suit.

J. P. Application allowed.

(1) 12 O. W. N. 167. the same of the sa

ATMARAM SHAMJI U. EMPESOR.

BOMBAY HIGH COURT.

ORIGINAL APPLICATION REVISION No. 335

OF 1921.

January 12, 1922.

Present: -Sir Norman Macleod, Kr.,
Chief Justice and Mr. Justice Coyajee.
ATMARAM SHAMJI-Accused-Applicant

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EMPEROR-OPPOSITE PARTY.

Bombay District Municipal Act (II of 1901), ss. 122, 155-Notice to remove encroachment-Non-compliance with notice-Prosecution, whether justified.

Although a Municipality may, as a matter of courtesy, send a notice to a person alleged to have erected
an encroachment to remove it, such notice is not
authorised by section 122 of the Bombay District
Municipal Act, and if a person to whom such notice is
sent fails to comply with it, he cannot be convicted
under section 155 of having disobeyed a lawful order,
the proper step, according to law, in such a case is for
the Municipality to remove the encroachment, and
charge accused with the cost of removal.

Criminal application for revision against the order of the First Class Magistrate at Ahmedabad confirming the conviction and sentence passed by the Third Class Magistrate at Dbolka.

Mr. G. N. Thakor, for the Applicant.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.—The accused was convicted by the Special Magistrate, Third Class, under section 155 of the Bombay District Municipal Act of having disobeyed a lawful direction given by a written notice issued by the Dholka Municipality to remove an otla. The facts ere that at least since October 1919 this offa was in existence. The Municipality, on the 17th December 1920, sent a notice to the secused:—

"You are informed by notice under section 122 of the District Municipal Act that you, by making an otla at the side wall of your house in the said street, have encroached on Government land. Therefore, within seven days of the receipt of this notice you should remove the said otla. If you neglect to do so, steps

will be taken assording to law."

The otla was not removed, and so the proper step according to law which the Municipality should have taken was to remove the otla themselves and charge the accused with the casts of the removal. Instead of proceeding in that manner, as provided by rection

BAM ERISHNA SINGH U. BMPBOB.

122, they charged the assused with having disobeyed a lawful order. An appeal against the conviction was rejected, but we think that the conviction was clearly wrong. Section 122 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroashment to remove it, although the Municipality may send such a notice, it is not a notice under the section. Such a notice might be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to ramove the encroachment themselves. Since these special powers have been given, it seems to me that was the proper remedy, as laid down by the Legislature in cases of failure to comply with such a notice. It was not intended, assuming a Municipality served a notice upon a person to remove an eneroach. ment, that if he did not do so, he might be convicted under section 155. I think, therefore, the conviction was wrong, and the actused must be discharged, and the fine, if paid, refunded.

W. C. A.

Order est asids,

PATNA HIGH COURT.

CR:MINAL REVISION No. 90 of 1922.

April 3, 1922.

Present: -Mr. Justice Jwala Prasad and Mr. Justice Coutte.

RAM KRISHNA SINGH AND OTHERS—

tersus

EMPEROR-OPPOSITE PARTE.

Criminal Procedure Code (Act V of 1888), s. 147, proceeding under—Possession, delivery of, by Oivil Court—Criminal Court, whether can investigate question of possession—Penal Code (Act XLV of 1830), s. 425—Mischief, ingredients of.

Where in a proceeding under section 145 of the Oriminal Procedure Code in respect of a house, it is established that possession was delivered by a Civil Court to one of the parties, the Criminal Court is bound to maintain that person in possession!

RAM KRISHNA SINGH C. EMPEROR.

and is not competent to re-open the question and to investigate it under section 145 of the Code. But in order to find out whether the possession is disputed or not, the Criminal Court can investigate the actual service of the writ of delivery of possession, and if dakhal dehani is proved, to its satisfaction, to have been effected, it is bound to maintain the possession of the person so obtaining it either by an order under section 145, or by having recourse to action under section 144 or section 167 of the Criminal Procedure Code. [p. 819, cols. 1 & 2.]

The principal ingredient of an offence under section 425 of the l'enal Code is that there must be an intention to cause wrongful loss or damage to the public or to any person, that is to say, the mischief must be done to the property belonging to another. If a person wishing to eject a trespasser sets fire to his own house, he cannot be said to cause wrongful loss to any person or to the public, and, therefore, cannot be convicted of an offence under section 425. [p. 819, col. 7; p. 820, col. 1.]

Application against an order passed by the Sessions Judge, Mongbyr, affirming an order of conviction, passed by the Assistant Sessions Judge of that place.

Mesers. Hasan Imam, S. N. Rai and G. C. Pal, for the Petitioners.

Mr. H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

JUDGMENT.

JWALA PRASAD, J .- The petitioners, five in number, have been convicted of rioting under section 147, Indian Penal Code. Petitioner Shibram was convicted by the Assistant Sessions Judge under section 436, Indian Penal Code (misshief by fire) and the other petitioners were convicted of misshief under sections 436-149, Indian Penal Code. The lower Appellate Court has set aside the conviction of Shibram under section 435, Indian Penal Code, and has convicted him under that section read with section 149. Thus all the petitioners have been convicted under sections 436.149 by the lower Appellate Court. Petitionere, Shibdbyan and Babua, bave been convicted also under section 323, Indian Penal Code. All the petitioners, after the reduction of the sentences, have been sentenced to one year's rigorous imprisonment under sections 436-149. They have further been sentenced to six months' rigorous imprisonment under section 147, Indian Penal Code, and Shibdhyan and Babua to three months' rigorous imprisonment under section 323, Indian Penal Code. The sentences are to run concurrently.

The facts briefly stated are as follows:--

desree against Adya, the complainant, on the 7th July 1915 and in execution of that decree he sold 8-annas share in Akbarpur Tauxi No. 79). Ram Krishna Singh and brothers purchased the same on the 2:th July 1918. The sale was confirmed on the 26th August 1918. Ram Krishna Singh obtained delivery of possession of the property on the 15th March 1911. This delivery of possession was under Order XXi. rule 95 of the Code of Civil Procedure. There was some litigation between the parties with respect to the sale, but the sale was finally upheld by the High Court (vide judg. ment Exhibit H.). On the 27th April 1920 the Sub-Inspector of Police submitted a report for an action under section 144 to be taken against Adya Singh and his family on the ground that the disputed property was in possession of the petitioners, Ram Krishna Sirgh and his brothers. Subsequently proecedings under section 145 were instituted on the 7th June 1920. On the 15th No. vember 1920 the Magistrate declared the possession of Adya Singh, holding that in spite of the delivery of possession, he continued to be in actual possession of the property in question. This order of the Magistrate was set aside by the Court on the 12th January 1921 with the observation that it was not open to the Magistrate to dispute or disregard the Civil Court writ of delivery of possession in favour of Ram Krishna Singh. This occurrence took place four days after the aforesaid order of the High Court on the 16th January 1921,

The case of the prosecution is that Ram Krishna Singh same to the house in question with a mob of about 200 armed with lathis, and ordered Adya Singh to leave the house in question. Adya Singh refused to do so. Thereupon Ram Krishna Singh ordered the mob to demolish the house, loot its contents, burn it down and remove the occupants. Adya Singh remonstrated and thersupon he was hit by Babua Singh with a lathi. Khela Singh, a grandson of Adya Singh, was also assaulted by Shibdbyan Singh with a lathi. Khela Singh retaliated and struck Ram Krishna Singh with a lathi. Subsequently, the ladies of the house came out and one of them, Lalbati, was struck on the head by Nasib Singh with a lathi and a box which she was carrying was snatched from her by Nasib Singh. The mob conBAM KRISHNA SINGH U. EMPEROR.

tinued the loot and eventually Shibram Singh set fire to a room on the northern side of the house. This room was wholly destroyed by firs. It was contended by the defence that the house in question was not the house which was the subject-matter of dispute under sestion 145 or with respect to the Civil Court delivery of possession to Ram Krishna Singh on the 15th March 1919. It was further asserted that Adya Singh was in possession of the house and was never dispossessed, and, therefore, the accused had no right to try to dispossess him by means of force; and that inasmuch as the house was in possession of Adya Singh and he with his family was residing therein, the assused did misshief as defined by section 425, Indian Penal Code, and hence, were liable to conviction under section 4 6. The Court below has come to a definite finding that the house in question was the very house with respect to which the Civil Court had executed the writ of delivery of possession in 1919 and that it was the property which was the subject of dispute under sention 145, Oriminal Procedure Code. The Court has farther heard that the possession of Adya Singh and his family was wrongful and that of a trespasser inasmuch as the petitioner, Ram Krishna Singh, was put in possession of it in pursuance of a Civil Court dakhal dehani. The Court very rightly repelled the suggestion that inasmuch as symbolical possession was only delivered under Order XXI, rule 95, Ram Krishna Singh should not be deemed to be in actual possession of the house in question. The Court, however, has held that, in spite of the Civil Court dakhal dehans, Adya Singh continued to be in actual possession of the house in question and, therefore, the assused were not justified in attacking him with a large mob and assaulting his party and in turning them out and burning the house. According to the finding of the Court below the house in question now belongs to Ram Krishna Singh by virtue of hie purchase at a Civil Court auction-sale 1918. He was also given possession by the Oivil Court ; therefore, Adya Singh was occupying the house, if at all, as a mere trespasser It was rightly pointed out by this Court that after the execution of the writ of delivery of possession, the Oriminal Court was bound to maintain Ram Krishna

Singh in possession of the house in question, In other words, the Criminal Court was not competent to re-open the question of possession and to investigate it under section 145 of the Code of Criminal Procedure. No doubt under section 145 a disputed possession may be enquired into and the party found in possession by the Magistrate may be maintained by an order under clause (4) of that section. fore, in order to find out as to whether the possession was disputed or not, the Magistrate could investigate as to the actual service of the writ of delivery of possession; but once a dakhal dehani was proved to have been effected to the satisfaction of the Magistrate, it was then his bounden duty to maintain the possession of Ram Krishna Singh either by an order under section 145 or by having recourse to actions under section 144 or 107, Criminal Procedure Code. In this case it appears that the dakhal dehani was proved and consequently the Criminal Court, whether acting under the preventive sections of the Code of Oriminal Presedure or enquiring into offence under the Indian Penal Code, has to maintain the possession of Ram Krishna Singh; therefore, Ram Krishna Singh was not committing any criminal act in going to assert his title and to take possesssion of the boase in question by ousting Adya Singh who was remaining in the house only as a trespasser. Therefore, the assused were not members of an unlawful assembly and they did not commit any riot. So the conviction under section 147, Indian Penal Code, must fail.

As to the conviction under section 436 of causing mischief by setting fire to the house, it is obvious that there sould Dot possibly be any wrongful loss or damage to Adya Singh or any person inasmuch as the house did actually belong to Ram Krishna Singh, the accused. The principal ingredient of an offense under section 425 is that there must be an intention to cause wrong. ful loss or damage to the public or to any person. Therefore, if the property in question did not belong to Adya Singh and belonged to the accused, no offence of misshief was at all committed. Explanation 2 to sestion 425, Indian Penal Code, has. been referred to by the learned Assistant Government Advocate in order to show

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that misshief may be by an act which affects any property belonging to the person committing the act or to that person and others jointly. Now, illustrations (g) and (h) clearly show the cases to which that explanation is applicable. The mischief must be done to the property belonging to another person, but the act whereby that mischief is done may have reference to the property belonging to the person committing the mischief.

The case of Empress v. Ra; coomar Singh (1) is an obvious illustration baving person his right deolared by a Civil Court destroying the property without being guilty of any mischief In that case B. obtained a decree from a Civil Court against A declaring his right in the properly, wherecoon the servants of B went on the land and pulled down the edifice which was erected thereon by A sulsequent to an order under section 530, Criminal Precedure Ccde, (145 of the precent Code), Jackson, J., held that as there had been no causing of wrongful loss, the accused had not been guilty of mischief. The following observation appears to me to be pertinent to the question in issue in the present case. His Lordship (Mr. Justice Jackson) observed : "Now it is clear from the decision of the Civil Court, which was then in force, that Shama Obran Labiri was not at that time legally entitled to have those barbccs put (cgether in that place in the form of a naubutkhena, and consequently there was no eausing of wrongful loss in the act done by the accused persons". Instead of pulling down the house, here the accused persons barnt it down; otherwise, the case appears to me to be on all fours with the present one. If there was no mischief in pulling down the edifice, there was no mischief committed in burning it. I would quote the ease cf. Parmethuar Singh v. Emperor (2) in order to show that no mischief can be committed by any act which causes damage to a property if the property actually belongs to the accused.

The learned Assistant Government Advosate then contended that rightly or wrongly the complainant, Adya Singh, occupied the house in question at the moment, and, therefore, the accused had no right, what the learned Assistant Government Advocate describes, to take law into their own bands. That phrase obviously means that the accused persons should not use more force than is necessary in order to maintain their own right or possession. It goes without saying that a rightful owner is entitled physically turn out a trespasser or one trying to infringe upon his rights. It is also true that a person exercising this right should not use more force than is reascnable to defend his possession from a treepasser. This is the view taken even in the case quoted by the learned Assistant Government Advocate; Emperor v. Gulshah (3). Therefore, the accused persons to my mind are not guilty either under section 147 or under section 436.

The last contention of the learned Assis. tant Government Advocate is that the conviction of Babua and Shibdbyan under section 323, Indian Penal Code, for eausing burt to Adya and Khela with lathis should stand. The learned Sessions Judgo has not ecme to any definite finding as to the sircumstances under which the aforesaid assaults were committed and whether they were necessary to eject Adya Singh from the house or that they were in excess of the right of private defence of property which Ram Krishna and the other accused had in order to maintain their possession of the house in question. Therefore, I am not prepared to convict the aforesaid petitioners, Babua and Shibdhyan, under section 323.

The result is that the conviction and the sentences passed upon the accused are set aside.

Cours, J.—I agree that these petitioners must be acquitted. The learned Sessions Judge has found that the complainant and his party were trespassers and it is clear that the accused have not exceeded right of private defence which they undoubtedly had.

W. C. A. Rule mase absolute.

^{(1) 3} C. 573; 1 C. L. R. 352; 3 Ind. Jur. 24; 1 Ind. Dec (N. s.) 949.

^{(2) 7} Ind. Cas. 812; 15 C. W. N. 224; 38 C. 180; 11 (r. L. J. 582,

^{(3) 17} Ind. Cas. 78; 13 Cr. L. J. 7:6; 6 S. L. R. 121.

VENEATRAD RIJERIO U. BEPEROR.

BOMBAY HIGH COURT,
CRIMINAL APPELL No. 747 of 1921,
February 14, 1922.

Present:—Mr. Justice Pratt, on a
difference of opinion between
Sir Norman Macleod, Kr.,
Chief Justice, and Mr. Justice Shah.
VENKATRAO RAJERAO
MUDVEDKAR—Accused—Appellant

versus

EMPEROR-RESPONDENT.

Penal Code (Act XLV of 1880), s. 224-Contempt-Insult to Court-Intention-Prosecution, duty of.

Accused was on his trial for riot, mischief by fire and attempt to murder, and, when opening his defence, put in a written statement complaining that he was being tried by a prejudiced Judge; when asked to withdraw this latter expression, he declined to do so, whereupon the Magistrate proceeded against him summarily under section 228 of the Penal Code, and convicted him thereunder:

Held, that accused was guilty of the offence charged, because his intention clearly was to offer

an insult to the Court. [p. 82rd, col. 1.]

In all offences in the Penal Code where the intention is an essential ingredient of the offence, that intention must be strictly made out by the prosecution. This rule applies to the offence under section 228 and it is also the duty of the Court of Appeal to decide if the intention is proved. [p. 826, col. 1.]

Criminal appeal from an order passed by the Sessions Judge, Dharwar, convicting and centencing the appellant for contempt of Coart.

FACTS appear from the following dissentient judgments of

Mickey, C. J.—The appellant was convicted by the Sessions Judge of Dharwar of an offence under section 228 of the Indian Penal Code and fined Rs. 50 by an order passed under section 480 of the Criminal Procedure Code. The appellant was one of the accused, in what is known as the Dharwar riot ease, who were being tried before the Sessions Judge sitting with assessors.

The appellant was questioned by the Judge as follows:-

Q.—Did you make the statement before the Magistrate which is now read over to you?

A.-Yes.

Q .- Have you anything further to say ?

4.- I wish to put in a written statement.

Q.—You have began reading that states ment and stated that the Judge is prejudiced against you. Are you willing to withdraw those words?

A .- I desline to withdraw them.

Q —Are you aware that you are liable to be dealt with for contempt?

A.-Yos.

Q —You have read your statement. Have you anything further to say?

A. - No.

The appellant's statement began as follows:-

1. I have been practising as a Pleader in this District for the last fourteen years.

 The first and the fundamental requirements of a judicial trial are chiefly these;

(a) Investigation by impartial and independent persons;

(b) an impartial and independent Judge;

(c) an impartial and independent prosecu-

3. In this trial not only are the above three elements wanting but there is positively an admixture of contrary elements in all these branches, vis., (a) Investigation by persons who are guilty of the marder of innocent and unarmed persons; (b) a prejudiced Judge; lastly, prosecutors some of whom are hired for a definite purpose.

The appellant was asked after the mid-day recess if he had reconsidered his statement but replied that he declined to withdraw it. He said his statement did not amount to an offence, and moreover, the Court having ricen for the recess had no power to pass any order. There was nothing in that point as an order can be passed at any time before the Court

rises for the day.

As mentioned above, the appellant was then convicted of contempt and fined Rs. 50 or in default fifteen days' simple imprisonment.

The defence, so far as it has been urged before us and so far as it can be extracted from the petition in appeal, appears to be that the appellant during the course of the trial had formed an honest opinion that the Judge was prejudiced against the accused including the appellant, and that while the appellant was in this honest state of mind brought about by circumstances over which he had no control, he was called upon to make a statement. That it was at that stage that the appellant succumbed to the very natural desire of asserting

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his innocence, and for that purpose, of giving expression to the feelings he entertained about the prosecution against him by making a clean breast of all that he truly and honestly believed about the prosecution and the trial. That this desire became all the more natural and necessary as the learned Judge was being assisted by assessors whose opinion had also to be moulded by properly explaining to them the attitude of the appellant. That there was no intention whatever on the part of the appellant to insult the Court.

Now, I do not think that the law regarding contempts is any different in India to what it is in England. To say that the Judge trying a case is prejudiced is an insult and in the first instance the words carry with them the intention to insult. It lies on the person uttering them to provide an explanation to show there was no such intention. They may bave been uttered in the beat of an argument, and the absence of intention to insult may be proved by taking the opportunity when offered to withdraw them. No Counsel or Pleader could be allowed to persist in making such an imputation against the Trying Judge, and though it may be admitted that a person conducting his own defence is allowed a greater latitude than legal practitioners, that must not be strained beyond the limits of decency.

Cases in which applications for transfer are made stand on an entirely different footing to the present one. As a rule they are not made because it is alleged the Trying Judge is incompetent to nome to a just decision but because there are eircumstances beyond his control, such as acquaintance with one of the parties or a personal interest in the subjectmatter of the proceedings, which in law are considered as preventing him from giving an unbiassed decision. It must also be remembered that on any such allegation being made, the Judge is afforded an opportunity of giving an explanation and the superior Tribunal only expresses its opinion after full consideration of all the circumstances in the case.

It is a different matter when, in the course of a trial, party defending himself commits direct contempt of the Court, and if I were to decide that it was sufficient excuse for him to say that there was no intention to insult, I should be dealing a blow to the anthority of

the Courts, the consequence of which would be disastrous beyond contemplation.

Speaking for myself, I do not think we should lightly interfere in appeal with the decision of a Judge in a matter of contempt, as he would be far more competent to ascertain whether the intention to insult was present or not. The test is not to my mind whether I on reading those papers or hearing arguments were to think that I should have forborne from taking notice of the appellant's statement but whether there is anything to show that the Judge was wrong in holding that there was contempt. Contempt of a Court which is not a Court of Record can only be made an offence by legislation, but it is an offence of an entirely different nature from the ordinary offences defined by the Penal Code and so, in my opinion, appeals from convictions for contempt should be dealt with having due regard to that fact. In Rez v. Davison (1) the defendant was fined by the Judge three for making insulting and irreletimes vant remarks in the course of his address Jury, while to the defending himself against an indistment for blasphemous libles. He afterwards submitted himself to the Court and the fines were remitted, On a motion for a new trial on the ground that the Judge had no power to fine for contempt a defendant for impropriety in the course of his speech to the Jary, for the reason that men should not be deterred to take their remedy by due course of law, the points at issue may not have been exactly the same as in this case, but the principles which should govern a Judge in the face of insult are very elearly laid down. It was held that a at nisi prius had the Judge of fining a defendant for a contempt committed by him in addressing the Jury, for every man who came into a Court of justice either as a defendant or otherwise must know that desensy was to be observed there, that respect was to be paid to the Judge, and that in endeavouring to defend himself from any particular charge, he must not sommit a new offence.

1 cannot do better than eite in full the remarks of Abbott, C. J. who said (p. 333):

^{(1) (1821) 4} B. & Ald. 329; 106 E. R. 958; 23 R. R. 295.

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"If I thought that the decision I am about to pronounce, sould have the effect of restraining any person who may here. after stand on his trial, from making a bold, as well as a legitimate course of defence, I would pause before I prononneed that decision. The question, indeed, is a momentous one. It is absolutely a question, whether the law of the land shall, or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered, if those who are charged with the duty of administering it, have not power to prevent instances of indescrum from oscurring in their own presence. That power has been vested in the Judges, not for their personal protection, but for that of the public. And a Judge will depart from his bounden duty, if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power, more especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and moderation,"

And the learned Ohief Justice concluded

by saying (p. 335):

"Upon the whole, I think that the law eannot be properly administered, unless this power of fining exists, and that the exercise of it, on the present occasion, was called for by the conduct of the defendant, and, being perfectly satisfied that the effect of it was not to deprive the defendant of anything that might have served him in his address to the Jury, I am clearly of opinion, that we ought not to grant a new trial,"

Holroyd, J., said (p.339):

"In the case of an insult to himself, it is not on his own account that he (the Jadge) examits, for that is a consideration which should never enter his minds. But, though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence at least, it shall not be infringed".

And Bast, J. said (p. 341):

"It has, since Carlile was tried, been seen, that persons indisted for libels, who defend

themselves, think that they may insult the Judge, calumniate all who are in authority in the country, and utter blasphemy more horrible than that for which that defendant was convicted."

It may very well be that if an accused person ignorant of the law in defending himself is punished for introducing irrelevant matter, such pucishment might be held to be not justified unless the party deliberately persisted after warning, but no system of jostice can tolerate unbridled license on the part of a person defending himself or accept as an excuse for an insult to a Judge, that it was necessary for the conduct of the defence or for the establishment of his innocence. The Sessions Judge did no more than his duty in drawing the attention of appellant to what he had written in his statement. Very fairly he gave the appellant an opportunity to withdraw it. only result was the objection that the Court having risen for a short time in the middle of the day, the power of the Court to punish for the contempt was lost. Clearly the intention of the appellant was to insult the Judge, and as Best, J, remarked, "to calumniate all who are in authority in the country." There is nothing in the petition of appeal which could lead me to come to a different opinion.

The conviction, I think, was right and the

appeal should be dismissed.

As my learned brother is of opinion that the appeal should be allowed, the appeal must be referred to another Judge.

SHAH, J.—This is an appeal under sestion 485 of the Code of Oriminal Procedure from an order made by the Sessions Judge of Dharwar against the appellant under section 480 of the Code.

The order was made as, in the opinion of the learned Judge, an offenes described in section 228, Indian Penal Code, was committed by the appellant in his view or presence. The learned Sessions Judge has not referred to section 228, Indian Penal Code, in his order but it is clear that on the facts the only section out of those mentioned in section 450 of the Code that he could have in view would be section 228, Indian Penal Code.

I need not recapitulate the facts which led to these proceedings, as they have been detailed in the judgment of my Lord the

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Ohief Justice. I have perused the whole of the statement made by the appellant as an accused person in the course of the trial. He was one of the several accused persons and read his written statement which contains the statement as regards the Judge.

The question that we have to decide in this appeal is, whether the appellant intentionally offered an insult to the learned Judge within the meaning of section 228 of the Indian Penal Code in making the statement. We are not in any sense concerned with the merits of the statement in question nor with the merits of the written statement filed by him as regards the charges against the appellant at the trial and I express no opinion whatever on the point.

In determining the intention of the appelwe must have regard to all the lant. facts. He made the statement in the course of a statement, which he was entitled to make as an accused person under section 342, Oriminal Procedure Code, and though he was a Pleader of standing and experience, he was then in the position of an accused person defending himself. On the other hand, we must have regard to the expressions nsed and to the context in relation to which they were used, as also to the fact that he adhered to them in spite of an opportunity very fairly offered by the Trial Judge. It is elear that an accused person like any other person can be guilty of an offence under section 228 if he contravenes the terms of the section by any act or words of his own. The law imposes the restriction upon an accused person as much as upon any other person: and while a reasonable latitude ought to be allowed to an accused person in making his own defence, he cannot be allowed to act in any manner which offends against the section.

The sole question in this case is whether the accused has transgressed the reasonable limits within which he is perfectly free to put forward his defence. I have carefully considered this question. While I do not for a moment approve of the manner in which he has put forward his defence, the merits of which will have to be considered in the appeal from the convictions at the trial, I am unable to hold that in saying what he did say his intention was to offer an insult to the Judge: at least I feel

very doubtful that that was his intention. His conduct is consistent with the view that his intention was to press a defence which was adopted and adhered to without sufficient thought and which was couched in improper language and not to offer an insult to the Judge.

In coming to this conclusion, I have not overlooked the observations in Rez v. Davison (1), While I agree that these observations are very useful in dealing with each ease of this type as it arises, we have to decide this appeal on facts with reference to the presise language used in a Statute. The expressions were used by the accused in that ease under different circumstances, and the point which the Court had to the accused was consider was whether entitled to a rew trial on the ground of prejudice to his defence at the trial in consequence of the contempt proceedings. It appears from the judgment of Bayley, J., in that sase that the Judge alone was sompetent to determine whether what was done would be contempt or not, and that neither that Court nor any other so ordinate Court had a right to examine the question whether his discretion in that respect was filly and properly exercised, It also appears from the jadgment of Best J., who had originally purished Davison for three contempte, that he had ordered the fines to be taken off as the accused had submitted to his authority. At the same time, I recognize that the observations with regard to the Court's powers and duties should be borne in mind while desiding a case of contempt under the Criminal Prosedure Code or under the Indian Penal Code. It must be remembered that here an appeal is expressly provided by the Code against an order made by a Court under section 487, Criminal Prosedure Code, and that we are not concerned with the question whether such a sentence has prejudiced the appellant in any sense at the trial but with the question whether the appellant intentionally offered an insult to the Trial Judge, as required by section 228, Indian Penal Code. The contempt cases are not always easy to decide: and the same conduct partiou'arly when it is near the line as in the present case, is apt to strike different minds in different ways. On a consideration of all the facts appearing on these proceed. VERKATRAO RAJERAO U. EMPEROR.

inge, I am unable to affirm the proposition that his intention to offer an insult to the Trial Court is made out beyond a reasonable doubt,

I would, therefore, allow the appeal, set aside the order and direct the fine, if paid, to be refunded.

Mr. G. N. Thakur, for the Assassed. Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.—The accused in this case has been fined for contempt of Court in a summary proceeding held by the Sessions Judge of Dharwar under section 420 of the Oriminal Procedure Code.

On an appeal to this Court there was a difference of opinion between Macleod, C. J., and Shab, J., and the appeal has been referred to me for decision.

The contempt was the offence defined in ecction 228 of the Irdian Penal Code. The accused was on trial for offences of riot, mischief by fire and attempt to murder and when opening his defence put in a written statement complaining that he was being tried by a prejudiced Judge.

Each words are a gross insult to any Court of Justice, but Shah, J., came to a conclusion which is expressed in the following passage from his judgment:—

"His conduct is consistent with the view that his intention was to press a defence which was adopted and adhered to without sufficient thought and which was conched in improper language and not to offer an insult to the Judge."

With great respect, it seems to me that this pressage confuses motive with intentior. The accused's motive for using the effective expression was to support his defecte. But if the words are an offecte, the excellence of the motive will not make them lawful. A Frontier Tribesman has been known to cross the border and cut off a British Bania's head merely in order to test the blade of a new sword. The motive was simple, innocent and childlike, but the intention was nevertheless murder.

I agree with Shah, J., that the motive of the accused was to justify his defence. His defence was that the riot had been organised by the Police and the District Officers, that the investigation had been conducted by guilty officials in order to falsely

which he could not hope to substantiate either by the cross cramination of prosecution witnesses or by the examination of witnesses for the defence. He, therefore, cought for various excuses for his omission either to cross-examine or to examine witnesses. One of the excuses was that it was futile to call evidence before a prejudiced Court.

No doubt, the statement did, to some extent, serve the purpose of his defence and was made with that motive, but it is nonetheless an offence if the intention was to insult.

I think the same fallacy underlies the judgment of the Allahabad High Court in Murli Dharv. Emperor (2). A suggestion of prejudice was made in a petition praying for an adjournment in order to apply to the High Court for transfer. The High Court reserved the conviction under section 228 apparently on the ground that the immediate object of the application was to obtain an adjournment." But surely, however legitimate the object, it was not lawful to commit an offence in order to attain that object.

The question is whether the insult was intentional and on this point I think it clear that this intention is an inference attaching to the words themselves, and this inference is not rebutted by any excuse as to the motive with which the accused used the words or the object that he thought would be attained by so doirg.

The referring judgment of Maeleod, C. J., has been severely criticised on the ground that it is based on Rez v. Davison (1) which deals with the more extensive jurisdiction as to contempt of superior Courts of Record. But that ease is relevant as showing that the summary jurisdiction for contempt is essential to the proper administration of justice and that it is exercised not from any exaggerated notion of personal dignity but to prevent instances of indecorum occurring in Court.

On the other hand, also with respect, I differ from Macleod, C. J. when he says that the offence under section 228 of the Indian Penal Code is of an entirely different nature from other offences as defined in the

(2) 88 Ind. Cas. 613; 38 A. 254; 14 A. L. J. 217; 17 Cr. L. J. 163.

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Penal Code. In all offences in the Penal Code where the intention is an essential ingredient of the offence, that intention must be strictly made out by the proscention. This rule applies to the offence under section 223 and it is also the duty of the Court of Appeal to decide if the intention is proved. Possibly, however, all that Maeleod, C.J., meant was that the Trying Judge's appreciation of the intention should not lightly be set aside, for apparently innocent words might be attered in a manner which was contemptuous. I doubt if this consideration was properly appreciated by Shah, J., in his hesitating conclusion that same condust particularly when it is near the line as in the present case is apt to strike different minds in different ways."

However that may be, I find that the intention is clearly made out in the present case: first, by the words themselves, and secondly, the conduct of the accused. When the Judge took proceedings for contempt and the accused found that the Judge put an unfavourable construction on his words be offered no explanation. The effect of this was, I think, that he persisted in them in the sense put upon them by the Judge.

I, therefore, confirm the conviction and sentence and dismiss the appeal.

W. C. A.

Conviction and sentence confirmed.

LAHORE HIGH COURT,
CRIMINAL APPEAL No. 808 of 1921.
February 8, 1922.
Fresent:—Sir William Chevis, Kt., and
Mr. Justice Abdul Qadir.
SAHIB DIN and OTHERS—Convicts—
APPELLANTS

t ersus

EMPEROB - RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 350— Trial transferred from one Magistrate to another— Accused, right of, to re-summon witnesses—Time for making demand—Evidence recorded by first Magistrate, whether can be relied on.

When a case is transferred from the Court of one Magistrate to that of another, the accused has a right to demand that the witnesses or any of them shall be re-summoned and re-heard, and he has such a right not only in warrant-cases, but also in the case of summary trials, and trials of summons-cases, and when an accused person makes such a demand, his demand must be complied with, as it is not competent to the second Magistrate to treat the evidence recorded by the first Magistrate as evidence in the case. The time when an accused person must exercise the right is, when the second Magistrate commences his proceedings. [p. 831, col, 1.]

When a witness is re-summoned under the proviso to section 350 of the Criminal Procedure Code, and he retracts his former statement, it is not admissible to treat the former statement as evidence in the case. [p. 831, col. 2.]

Appeal from an order of the District Magistrate, Gujranwala, dated the 14th September 1921.

Messrs. O. Bevin Petmin and Ablul Asia, for the Appellants.

Kanwar Dalip Singh, for the Government Advocate, for the Respondent.

ORDER.

BROADWAY, J.—(November 17, 1921).—
Sahib Dio, son of Sheikh Muhammad Bakhah, Muhammad Sharif and Muhammad Latif, sons of Sahib Dio, have been convicted of offences under section 489 A, B and D, Indian Penal Code, and sentenced to an aggregate of ten years' rigorous imprisonment each. Sahib Din has also been sentenced to pay a fine of Rs. 500 or in default to rigorous imprisonment for a further term of one year. They have appealed to this Court and on their behalf I have heard Mr. Petman while Mr. Dalip Singh appeared before me on behalf of the Crown.

For the present purposes it will be suffieient to give the following facts. On the 28th of April 1921, one Khwaje, son of Karam Din, was arrested at the Shahdara Railway Station in the act of passing a counterfeit note of the value of Rs. 2.8.0. As a result of certain statements made by him, the house of Sahib Din and his three sons (the third son, Muhammad Hanif has been acquitted) was searched and certain articles found therein which, according to the prosecution, are eapable of use in the process of sounterfeiting notes. On the 18th of May 1921 the three appellants together Muhammad Hanif were produced before the District Magistrate of Gajran. wals with an incomplete chalan, the Police that the statements of three requesting

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witnesses including Khwajs, son of Karam Dig. might be resorded and a further remand granted for the completion of the investigation. For reasons not necessary to be detailed here, the District Magistrate found it impossible to deal with the ease and sent it to Sheikh Abdul Rahman, Magistrate, First Class, with section 30 powers, directing him to record the statements of the three witnesses and grant the remand. At the same time the District Magistrate ordered that when the chalan was completed it should be laid before him for trial.

In assordance with the orders of the District Magistrate, Sheikh Abdul Rahman, on the 18th May 1921 recorded the state. ment of Khwaja, son of Karam Din, in the presence of the appellants and Muham-While Khwaja's statement mad Hanif. was being recorded, he was sent for by the Magistrate who was trying the case against him and an order convicting him was pronounced. After this interval Khwaja was brought back to the Court of the section 30 Magistrate and concluded his statement. After the section 30 Magis. trate had recorded the statements of the other two witnesses, he granted a further remand and returned the chalan to the Police directing them to lay the completed ease before the District Magistrate on the 30th May 1921. On the 30th May 1921 the Police reported that the investigation was not complete and a further adjournment was granted to the 13th of June 1921, On this date, i. s., 30th of May 1921 the then assused intimated to the Court through their Counsel that, in the event of the ease being transferred to the Court of the District Magistrate, they would require the statement of Khwaja re-resorded.

On the 13th of June 1921 the case came up before the District Magistrate and Khwaja's statement was re-taken. The statement so re-taken was practically a retraction of his evidence as given before the section 30 Magistrate on the 18th of May 1921. In the opening part of his judgment the District Magistrate referring to Khwaja said as follows :-

He has, however, made two contradictory statements in the witness-box nder eirenmetanees which I shall deal

with later, the first implicating and the sabsequent etatement exemplating Sahib Din and his sone. The case against Sahib Din and his sons turns to a great extent on the finding as to which of these contradistory statements is true. The evidence in the present case is purely circumstantial. But the shain which links the various scattered factors into a combination of circumstances from which, in my opinion, the guilt of the assused must inevitably be inferred, is the original statement of Khwaja which I hold to represent the true version of the facts, If, however, this original statement were held to be unreliable, there is nothing in the remaining evidence to fix the guilt indubitably on the accused."

It will thus be seen that the case against the present appellants rests almost entirely on the statement made by Khwaja on the 18th of May 1921 from which he resiled on the 13th of June 1921. The Magistrate has held that the statement of Khwaja made on the 18th of May 1921 is admissible as evidence at the trial held by him and further that it is relevant. Mr. Petman contended that this statement was not, and sould not be, regarded as evidence in the trial. He pointed out that the ordinary rule is that a Magistrate convicting an accused should hear the evidence against him. A departure from this rule is to be found in section 350, Criminal Procedure Code, which deals with the procedure to be adopted when a case is transferred from one Magistrate to another. Clause (1) of that section gives the Magistrace, to whom the ease is transferred, a diserction to ast on the evidence recorded by his predesessor, or partly recorded by his predecessor and partly recorded by bimself or to re summon the witnesses and re-sommenes the inquiry or trial. Proviso (a) says that in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard. The learned Counsel contended that when the accused asting under this proviso elaims that any witness or witnesses be re-heard, the Magistrate is bound to disregard the record of such witness or witnesses' testimony and to come to a finding on the evidence recorded by himself. On the other hand, Mr. Dalip Singh contended that this provise only refere to trials and that as a trial before a Magistrate

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does not commence until a charge has been framed, the previous record of the testimony of any wilness is evidence in the case which can be treated as substantive evidence by a Magistrate who finally disposes of it. He urged that the proviso under considertion does not give an accused the right to have a trial re commenced but merely to insiet on the Magistrate seeing and hearing the witnesses. My attention was drawn to Orown v. Nathu (1) and Palaniandy Gounden v. Emperor (2). In the former case it was held that a trial commences with the framing of the charge and that, therefore, the record Magisfrate must either convict or acquit and not discharge if a charge bad been framed by the first Magistrate. The facts of that case, however, were somewhat different to the present one. In the Madras case it was held that the proviso (a) does not apply to what are termed in that Province register eases" or in other words committal prosecdings when the offence under inquiry was triable exclusively by the Sessions Court. Mr. Petman, in support of his contention, that when an accused person takes action under this proviso (a), the previous record of evidence becomes inadmissible, referred me to varicus authorities. First Daroga Chowdhury v. Emperor (3). In that case it was held that proviso (a) to section 355, Criminal Precedure Code, meant a new beginning, a new start unfettered and unrestricted by any. thing that antecedently had taken place. The facts are dissimilar and I would not be prepared to subscribe to that pronouncement in ite entirety. Secondly Sobh Nath Singh v. Emperor (4). In that case certain persons were tried on a charge of rioting bafore a Magistrate who was transferred before he could complete the case. The trial was then continued in the Court of a second Magistrate hefore whom an application was made under rection 250, Criminal Proecduse Code, for a de novo trial. This applieation was granted, but when the witnesses for the prosecution appeared, the Mukhtar for the prosecution declined to examine them. The deferoe Mukhtar without objecting proseeded to orcss examine the witnesses.

This procedure was held not to be a compliance with the provisions of section 350. This case also does not touch the presise point now before me. Thirdly Queen-Empress v. Bashir Khan (5). There certain persons were tried for an offenes under section 355, Indian Penal Code. The case was pending before certain Honorary Magistrates who had examined the witnesses for the prosecution and framed a charge. On the application of the accused persons the case was at this stage transferred from the Court of the Honorary Magistrates to that of a First Class Magistrate to whom an application was made, asking him to re-summon the witnesses for the prosecution and to have them examined before himself de noro. This request was not acceded to. It was held that the failure to comply with this request, whether amounting to an irregularity or illegality or not, was prejudicial to the accused. And fourthly Ram Dass v. Emperor (6). The point in this case, however, was whether restion 350, Criminal Precedure Code, applied to cases where a trial is transferred from one Magistrate to another by an order of the superior Court or only to cases where a Magistrate ceases to have jurisdiction by reason of his transfera point which does not arise in the present case.

Mr. Patman then drew my attention to Aigar's Oriminal Procedure Ocde, Third Edition, Volume II, page 1090, under the heading " Effect of de novo trial." This learned author is of opinion that sestion 350 gives the second Magistrate two alternative courses ; firsly, he can act on the evidence recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself; or secondly, he may summon the witnesses and re commence the erquiry or trial. Where an accused demards that all the witnesses are to be re summoned and re heard, he compels the second Magistrate to adopt the second alternative course and to re-commence the trial or erquiry. If the second re-commences the trial, he has full power to deal with the case and can discharge the

19 Cr. L. J. 878,

^{(1) &#}x27;4 P. R. 1908; Cr. 175 P. L. R. 1903.

^{(2) 1} Ind. Cas. 54; 32 M. 213; 5 M. L. T. 218; 9 Cr L. J. 146.

^{(3) 52} Ind. Cas. 398; 20 Cr. L. J. 638.

^{(4, 12} C. W. N. 138; 6 Cr. L. J. 431,

^{(5) 14} A. 346; A. W. N. (1892) 19; 7 Ind. Dec. (N. s.) 589. 6) 44 Ind. Cas. 682; 40 A. 507; 16 A. L. J. 217;

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He cannot act on the charge, if any, framed by his predecessor, or on any depositions or examination of the accused recorded by him. In support of this proposition the learned author cites the case of King-Emperor v. Nga Pe (7) which lays down that when an accused person acts on proviso (a) and demands that the witnesses here summoned and re heard he compels the eccord Magistrate to re commence the trial.

It will be seen that none of these authorities deal directly with the point now under consideration with the exception of King. Empsror v. Nga Pe (7), and it has been argued by the learned Counsel for the appellants that as the object with which an acoused person takes action under proviso (a) to section 350 is that the second Magis. trate should re-bear the evidence of a witness or witnesses and form bis own ecnelusions as to the weight to be given to the evidence so recorded, this object would be nullified if the previous record by the first Magistrate was to be treated as substantive evidence in the trial itself. It seems to me that there is a good deal of force in this contention. The primary rule is that the Magistrate convicting should be the Magistrate who resorded the evidence. The Legislature by the enactment of section 350 has sanction. ed a departure from this ordinary rule in certain circumstances and has limited the discretion of the second Magistrate by enacting the provise which enables the person accused to insist on all or part of the evidence being re-heard by the Magistrate who is finally to dispose of the charge against him. If, as in the present case, a witness resiles from a statement made previously by him and if in spite of this fact the previous statement can be regarded as substantive evidence in the trial, the object of the provise would become of little value. The question is one of consider. importance generally and is vital able in the present case; and though I am inclined to the view that the previous record cannot be regarded as a piece of substantive evidence, I think that the matter is one which should go before a Division Banch and in order to save time I refer the whole same to the Division Bench,

JUDGMENT.

Sahib Din CHEVIS, J .- In this case and his sons, Muhammad Sharif and Muham. mad Latif, bave been convicted of offences under section 489 A, B and D and centensed to an aggregate of ten years' imprisonment each, while Sahib Din has also been sentenced to fine or imprisonment in default. The fasts are stated in the order of the 17th November 1921, by which a Judge sitting in Chambers referred this case to a Division Bench. The orusial question for desision is, whether the evidence of Khwaja, recorded by Sheikh Abdul Rabman, Magistrate of the First Clase, is admissible in evidence. The learned District Magistrate, who has convicted the appellants admits that the evidence is insufficient for a conviction if the statement of Khwaja be excluded; and Mr. Dalip Singh on behalf of the Crown has admitted before us that he sannot argue that the conviction should be supported if Khwaja's statement recorded by Sheikh Abdul Rahman excluded. What happened may be briefly related as follows:-

The case was sent up before the District Magistrate with an incomplete chalan and as the District Magistrate himself had not time to take up the case at once, he sent the sage to bheikh Abdal Rahman, who recorded the evidence of Khwaja, Siraja and Muhammad Din. The case was then re transferred to the Court of the District Magietrate, when the accused applied that Khwaja should be re-called and re examined, and the prosecution applied for Siraja to be re-salled and re-examined, while both sides agreed that the evidence of Muham. mad Dip, recorded by Sheikh Abdul Bahman, should be transferred and treated as evidence proseedings before the District Magistrate. Khwaja, when re-salled, retracted. his former story entirely. The provisions of section 350, Criminal Procedure Code, have to be earefully examined. It is clear that when a case is transferred from the Court of one Magistrate to that of another, the succeeding Magistrate may elect to act on the evidence already taken, and, if the syidense for the prosecution has not been completed, he may proceed to record the evidence of the remaining witnesses, or he may re-summon the witnesses and re-somonce the enquiry or trial. In this case, the

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District Magistrate, acting partly at the request of the assused persons, treated the evidence of one witness, viz. Mahammad Din, as if it had been resorded by himself and so it cannot be said that the enquiry or trial was recommended from the very beginning. He re-summoned and re-examined two other witnesses but not the third, and I do not think that this action of his was contrary to the provisions of section 350. But the proviso to the section lays down that, in any trial the accused may, when the second Magistrate commences his proeeedings, demand that the witnesses or any of them be re-summoned and re-heard. On behalf of the Crown it is urged before us that the proceedings prior to framing of the charge were only an inquiry and not a trial, and that the accused persons, there. fore, could not claim as of right that any witnesses should be re-summoned when the District Magistrate commensed his proceedings, since the provise gives the accused a right only to demand that the witnesses should be re-summoned in case of a trial. For the proposition that until charge is framed a proceeding is only an enquiry and not a trial. Mr. Dalip Singh relies on the following rulings: Narayanaswamy Naidu, In re (8), Queen-Empress v. Chotu (9) and Hari Das Sanyal v. Saritulla (10). No doubt, there are remarks in these judgments to the effect that a trial begins when an accused is charged and is called upon to answer, e.g. see Narayonaswamy Naidu, In re (8) but I note that all three of these cases deal with the scope of the provisions of section 437 and do not refer to section 350. In Crown v. Nathu (1), I also find it stated that proceedings prior to the imposition of a charge amount "probably" only to an enquiry, not to a trial. But all that the ruling seems to me to lay down is that, when a charge has once been framed, if the accused demands, in pursuance of the right given to him by the proviso, that the evidence shall be heard, the trial re commenses and unless the accused is convicted. the order must be one of acquittal and not of discharge. On the other hand, in King-Emperor v. Nga Pe (7), I find it held that

when an accused demands that all the witnesses be re-summoned and re-heard, the enquiry or trial must be re commenced and all the previous proceedings, whether a sharge has been framed or not, must be treated as non-existent. In Daroga Chowdhury v. Emperor (3) it was held that, where a Magistrate on taking over a case recommences the whole enquiry, the proceedings before the former Magistrate are entirely superseded and cannot be revived, even if former Magistrate subsequently is re-transferred to the district and again takes over the case, In Sobh Nath Singh v. Emperor (4) the Magistrate who took over the case from his predecessor commenced the trial de novo. The prosecution witnesses were re-called but not again examined though they Were tendered for eross-examination and were cross-examined by the defence. It was held that the trial was invalid as not in assordance with the provisions of section 350 and a re-trial was ordered. Whether a charge had been framed by the Magistrate, who first dealt with the case, does not appear from the report.

Turning to the table of contents at the beginning of the Code of Criminal Procedure, I find that there are certain Chapters dealing with enquiries and others dealing with trials. Chapter XVIII relates to enquiries into cases triable by the Court of Session or High Court. Chapter XX deals with the trial of summons.eases, Chapter XXI deals with the trial of warrant-cases, Chapter XXII deals with summary trials, and Chapter XXIII deals with trials before High Courts and Courts Now, the proceedings under of Session. Obapter XVIII are obviously enquiries and not trials, for the reason that the Magistrate who enquires into the case has no power to convict and can only either discharge or commit for trial. Such proceedings must elearly be regarded merely as enquiries and Trials before the Court of not as trials. Session or High Court commence with the framing of a charge, and obviously such proceedings are not merely enquiries but are undoubtedly trials. But there are eases spoken of as trials and in which no charge sheet is ever framed, vis., summary trials and trials of summons-eases. If it be correct to say that in no case does a trial commence until a charge is framed, then it seems to me to follow that what

^{(8) 1} Ind, Cas. 228; 32 M. 220 at p. 234; 5 M. L. T. 233; 19 M. L. J. 157; 9 Cr. L. J. 192.

^{(9) 9} A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. s.)

^{465 (}B. F.). (10) 15 C. 608; 7 Ind. Dec. (N. s.) 989 (F. B.).

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is spoken of in the Code as trial of summors. cases and summary trials are not really trials at all but only enquiries. But I feel sure that the right given to an accused person by the proviso to section 350 was not intended to be exercised only in trials before the Courts of Session or High Courts. The principle in all cases surely must be the same, viz, that an accused person has a right not to be convicted of a criminal offence by a Magistrate who has not himself heard the evidence. I would hold, therefore, that even in the ease of a summary trial or a trial of a summonsease the accused, if the case is transferred from one Magistrate's Court to that of another, has a right to demand that the witnesses or any of them shall be resummoned and re-heard. I would hold, therefore, that for the purposes of scotion 350 a trial cannot be said to commence only when the charge is framed and that, though in an enquiry by a Magistrate into a case triable only by a Court of Session or High Court the assused has not the right to demand that the witnesses shall be re-summoned and re heard in the event of change of Magistrate, he has such a right not only in warrant cases but also in the ease of summary trials and trials of summons cases, and I would hold that the time when he must exercise the right is when the second Magistrate commences his proceedings (these are the words actually used in the proviso). I lay stress on the fact that the proviso lays down that the time for the demand to be made by the accused is when the second Magistrate commences his proceedings. If the trial does not commence till a charge is framed, and if the case has been transferred from one Magietrate's Court to that of another before a charge has been framed, then apparently the proviso does not help the accused person at all. For, if, when the new Magistrate commences the proceedings, the assused asks that the witnesses should be resummened, the answer will be that the proceedings are not yet a trial but only an enquiry; whereas, if he waits until a charge has been framed and then make his demand, the answer will be that the time for making such a demand is when the second Magistrate commences his proceedings. The object of the provisions

is, no doubt, as I have already stated, that a man shall not, without his consent, be convicted on evidence which has not been recorded in the presence of the Magistrate with whom the final decision of the case rests. There are certain special provisions in the Code by which evidence resorded in the presence of the convicting Magistrate or Judge may be treated as evidence in the case. For instance, section 288 provides for the evidence of a witness recorded by the Committing Magistrate being treated as evidence in the case the discretion of the Judge presiding the trial. Section 512 again provides for evidence recorded in the absence of absecuding person being treated as evidence against him at a subsequent trial if the witness is dead or incapable of giving evidence or if his attendence cannot be produced without unreasonable delay. But there is no provision, so far as I know, providing for evidence recorded by one Magistrate being treated as evidence by a second Magistrate in a case where the accused person has demanded that the witnesses shall be resummoned and re-heard unless his demand is to be complied with. If he has a right to make a demand, it must not be refused, and I think it will be no answer in such a case to say that the witnesses whom the assused wishes to resummon are dead. In such a case, I think, the depositions of the witnesses recorded by the former Magistrate sould not be treated by the susseeding Magistrate as evidence. Similarly, too, in a case like the present where the witness is resummoned and retracts his former statements, 1 do not think it is admissible to treat the former statement evidence in the case. 88 would hold then that evidence the of Khwaja recorded by Sheikh Abdur Rahman is inadmissible in the present ease, and, as it is admitted that excluding that evidence there is no sufficient evidence to warrant a conviction, I would acquit the appellants, set aside conviction and sentences and order them to be released and the fine, if paid, to be refunded.

ABDUL Qualit, J.—I concur. This appeal will be accepted, the appellants will be released and the fine, if paid, will be refunded.

W. C. A.

Appeal accepted,

JAGGAVABAPU BASAWAMMA U, JAGGAVABAPU SEETABEDDI.

MADRAS HIGH COURT, CRIMINAL REVISION CASE No. 728 OF 1921.

February 16, 1922.

I resent: -Mr. Justice Kumaraswami

JAGGAVARAPU BASAWAMMA-PETITIONER

versus

JAGGAVARAPU SEETAREDDI-

RESPONDENT.

Criminat Procedure Code (Act V of 1898), s. 458

-Maintenance-Husband agreeing to maintain wife,
but refusing to cohabit with her-Wife, whether entitled to separate maintenance.

Where a husband agrees to protect and maintain his wife in a manner suitable to her condition in life, it is a sufficient offer under section 488 of the Criminal Procedure Code, and the mere fact that he refuses to cohabit with her is not a ground for granting her separate maintenance.

Petition under sections 435 and 439, Oriminal Procedure Code, praying the High Court to revise the judgment of the Sub-Divisional Magistrate, Ellore, in Miscellaneous Case No. 11 of 1921, dated the 13th August 1921.

FACTS appear from the judgment.

Mr. B. Satyanarayana, for the Petitioner.

There has been no proper offer by the respondent to maintain petitioner within the meaning of section 458 (3), proviso. Though he agreed to maintain her and give her clothing, he does not make up his mind to cohabit with her. Marakkal v. Kandappa (1) and Queen Empress v. Mannatha Achari (2).

Mr. V. Suryanarayana, for the Respondent.—There has been a sufficient offer under the section. The section only requires that the husband should offer to maintain his wife. The respondent has agreed to give petitioner desent maintenance according to her station in life. The refusal to cohabit does not entitle petitioner to separate maintenance.

ORDER.—I think the order of the Magistrate is right. The counter petitioner agreed to maintain the petitioner, his wife, with the consideration due to her position as wife and give her food and clothing, but stated that he had not made up his

(1) 6 M. 371; 2 Weir 639; 2 Ind. Dec. (N. s.) 538. (2) 17 M. 260 at p. 263; 2 Weir 641; 4 M. L. J. 88; 6 Ind. Dec. (N. s.) 179. mind whether he would cobabit with her. It is argued that this is not a sufficient offer under section 488 of the Criminal Procedure Code. All that the proviso to sub-clause (3) enacts is that if a husband offers to maintain his wife on condition of her living with him and she refuses to do so, the Magistrate may consider any ground of refusal stated by her and pass orders.

I do not think there is anything in the Code which compels the Criminal Court to award separate maintenance to a wife whom the husband agrees to protest and maintain in a manner suitable to her position in life because he refuses to schabit with her. Reference has been made to Marakkal v. Kandappa (1), where it was held that an offer by a Hindu baving two wives to maintain his first wife by allowing her to live in his bonse and to supply her with grain to be scoked and caten separately coupled with a refusal to live with her as busbard and wife was insufficient in & complaint under section 536 of the Criminal Procedure Code of 1872. in that case was to treat the wife practieally as an outcaste. In Queen-Empress v. Marnatha Achari (2), it was held that all that is necessary is that the offer must be an offer to maintain the wife with the consideration due to her position as wife.

The question was considered by Jardine and Parcons, JJ., in Gulabdas Bhaidas, In re (3) with which judgment I entirely agree. I diemiss the petition.

M. C. P.

W. C. A.

Petition dismissed.

(3) 16 B. 269; S Ind. Dec. (N. s.) 658.

SHAH MAHOMED U. RAMZAN.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 21 OF 1916. February 23, 1920.

Present: - Mr. Fawcett, J. C., and Mr. Kemp, A. J. C.

SHAH MAHOMED, CON OF MAHOMED AYUBKHAN-DEFENDANT-APPELLANT

RAMZAN, SON OF MAHOMEDALI-PLAINTIFF-RESPONDENT.

Easements Act (V of 1882), s. 83-Right of privacy -Custom-Question of fact-High Court, power of, to interfere-Larkana Town-Privacy as to roofs of houses -Nuisance-Substantial damage-Injunction, grant of-Local custom-Civil Procedure Code (Act V of 1938), O. XLI, r. 25-Issue new, Court, power of.

The question as to the existence of a custom of privacy in any locality is a question of fact only, and where ovidence for and against the alleged castom has been properly taken and considered by the lower Court, a High Court is not entitled in second appeal to disturb the lower Court's finding on the point. [p. 834, col. 1.]

Under Order XLI, rulo 2 of the Civil Procedure Code, a Judge is authorised to frame new issues in a suit and allow additional evidence to be adduced where he finds that question essential to the right decision of the suit upon the merits has not been properly raised and tried in the lower Court. [p. 835,

col. 1.]

In the town of Larkana in Sind there is a eastom of privacy with respect to the roofs of houses which contain parapet walls round them and where the women sleep at night in the hot weather, and any threatened invasion of the right sufficient to cause substantial damage entitles the person aggrieved to an injunction. [p. 835, col. 2.]

Where, therefore, a person raises the roof of his house and opens a window overlooking the roof of the house of another person, he commits a nuisance implying substantial damage within the meaning of section 38 of the Easements Act, as his act materially diminishes the value of the dominant heritage by diminishing its value as a house suitable for use by a family and he is liable to be restrained. [p. 6:6, cel. 2.

A losal custom need not be shown to be immemorial if it is sufficiently certain and reasonable to satisfy the legal requirements of a valid custom. [p. \$36, cel. 1.]

Second appeal against a desision of the District Judge, Larkana.

Mr. Rupoland Billaram, for the Appellent.

Mr. Tahilram Maniram, for the Respond. oni,

JUDGMENT.-The plaintiff respondent has been granted a perpetual injunction restraining the defendant-appellant from opening any windows and spertures in his

house so as to ozerlook into the house of the plaintiff. The lower Appellate Court has found the facts to be as follows :-

The plaintiff and the defendant own adjoining houses in Larkana. Both houses are old, but the defendant's was the older one. It was also I or 2 feet higher than the plaintifi's. The plaintiff's roof is flat and is unsovered; and his family, which is pardah-nashin, sleep on it in the hot weather. To secure privacy it has (as is usual in Larkana) a reed parapet wall round it. The defendant's roof was accessible by means of stair, and apparently was flat, defendant's statement that it has no parapet wall has been disbelieved. On the plaintiff's roof is a privy, this is currounded by reed wa'ls which only screen a person when sitting down. The height of plaintiff's parap); walls secured privacy for his roof to the extent that his women could sit or sleap without any real danger of being see 1. They could apparently be seen only by a person standing and looking over defendan 'a parapet wall,

The above deals with the sircumstances originally existing. The defendant is a Zemindar, who is not a resident of Larkana, and is never likely to bring his women folk to the town. He had resently bought this house and was re-building it, when the suit was filed. In doing so he has built it a storey higher than before and proposes to put a window in the north wall. would overlook the plaintiff's roof. The learned District Jadge has also held it proved (1) that there is a sustom in Larkana of secluding women from the observation of males ontside of the family circle; (2) that the great majority of the inhabitants, including all the respectable people of both the communities, Hindus and Mahammadans, follow it; (3) that in the hot weather seeluded or pardah women sleep on the roofs of their houses; (4) that the neighbours are expected to. and do respect the privacy of such women, or, in other words, there is a valid and binding enstom in Larkana of including the roofs of the houses in portion thereof ordinarily excludad from the observation. He holds that the losal sustom of privacy is ansient, certain and reasonable, so as to be valid in law, and that the plaintiff who had so far enjoyed privacy in respect of his roof, had a cuetomary easement to enjoy it, which would

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be invaded by the opening of the threatened window, such windows in the opinion of the learned Judge, would be a nuisance practically preventing plaintiff's women folk from using the roof. He accordingly thought it a proper case for an injunction. This is a second appeal, and we can only interfere one of the grounds mentioned in section 100 of the Code of Civil Procedure. Mr. Rapeband for the appellant has attacked the finding that there is a custom of privacy in Larkana of the kind mentioned above, but it is clear that the question as to the existence of such a custom is a question of fact only. Kailas Chandra Datta v. Fadma Kishore Roy (1). Evidence for and against the alleged oustom has been properly taken and considered in a very careful judgment and we are not entitled in second appeal to disturb the lower Court's finding on this point. Two recent decisions of the Privy Conneil which emphasize this point are Nofar Chandra Pal Chozdhury v. Shukur Sheikh (2) and Milnapur Zenindary Co., Ltd. v. Uma Charan Mandal (3).

I, therefore, confine myself to discussing the questions of law which have been raised. First, it is said that the District Court Judge committed an error of procedure in raising additional issues as to the custom extending to the roofs of houses and in allowing additional evidence on this point. What happened was, that the Judge, after hearing the appeal and reading the record, at first concluded that the plaintiff's claim was not established. Before, however, delivering the judgment he had written to that effect, he showed it to the Pleaders concerned in the case, one of whom urged that he had misconceived the whole question and asked him to visit the houses of the parties before giving judgment. He agreed to do this, and made an inspection accordingly, accompanied by the Pleaders. This inspection, he says, showed at once that the record did not properly explain the case for the plaintiff, for it was based on an alleged onstom of

which was not made clear by the pleadings or issues and had not been sufficiently dealt with in the examination of the witnesses. He gave grounds for thinking that the alleged custom exists, but he could not hold this proved on the scanty materials afforded by the record. Accordingly, he thought it necessary and equitable to have a further enquiry and allow additional evidence for and against the specific custom relied on by the plaintiff. He framed the following two issues for this purpose:—

1. In the town of Larkana, are the roofs of the houses of people who follow the purdah custom, included in the portion of their houses ordinarily excluded from observation?

2. Is the alleged enetom of excluding the roof from observation sufficiently eartain and invariable to give rise to an easement?

The Judge took some evidence himself on these issues, but finding that he had not time to continue doing so on ascount of his criminal work, he passed an order under Order XLI, rule 25. Civil Procedure Code, remitting the above two issues to the lower Court and directing it to take the additional

evidence required, etc.

Mr. Rupehand urges that the District Judge thereby made out the new case for the plaintiff, which was outside the plead. ings. The plaint is, no doubt, somewhat vaguely drawn and does not specifically refer to the roof of plaintiff's house. But it elearly objects to windows and apertures in the northern wall of the defendant's house, which would overlook the plaintiff's house, and the claim was based on a eustom of privacy and allegation that the proposed windows and apertures would greatly interfere with plaintiff's pre existing privacy. It turns out that the only part of the plaintiff's house affected by the threatened windows is his roof, and this was apparently quite elear to the parties. Judgment of the Sub Judge, who tried the suit, refers to the roof as the part of the house where there would be an invasion of privacy, and the evidence taken did (as mentioned in the District Judge's first interlocutory judgment) include some, about roofs, though not sufficient to enable him to deside the real issues arising on that connection.

In these eironmstances, I think it is clear that there has been no material departure

^{(1) 41} Ind. Cas. 959; 45 C. 285; 25 C. L. J. 613; 21 C. W. N. 972.

^{(2) 51} Ind. Cas. 767; 45 C. 189; 23 C. W. N. 315;

⁹ L. W. 552; 45 L. A. 183 (P. C.).

^{(3, 5?} Ind. Cas 497; 22 Bom. L. R. 7; 37 M L, J. 199; 17 A. L. J 1034; (1919) M. W. N. 817; 23 M. L. T. 189; 24 C. W. N. 20; 11 L. W. 371 (P. C.).

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from the pleadings, so as to contravene the principle laid down by the Privy Council in Eshenchunder Singh v. Shamachurn Bhutto (4). Nor can there be any question of the defendant being taken by surprise. I. therefore, reject the contention put forward by Mr. Rupshand. I think the District Judge asted rightly in bolding that questions essential to the right desision of the suit upon the merite had not been properly raised and tried in the lower Court, and in framing the issues he did, and allowing additional evidence to be adduced regarding them. Such action is, in fact. expressly authorised by Order XLI, rale 25, Oivil Procedure Code, and had the Judge failed to act as be did, his decision might have been successfully objected to in resond appeal under clauses (b) and (c) of section 100.

Mr. Rupshand further contended that the Judge had no power to take the additional evidence himself as he first of all did. I think this objection is also unsound. words 'for any other substantial sause' in Order XLI, rule 27 (1) (b), Civil Procedure Code, are wide enough to cover the sause in question. Moreover, the ciranmetances eatisfy the limitations laid down in Reshowji Issur v. G. I. P. Railway Co. (5). The further evidence was ordered after the appeal on the merite had been heard and the evidence as it stood had been examined by the Judge; also in consequence of inherent lacuna or defect becoming apparent on examining the evidence as it stood. The defest was the omission of the parties to grasp the essential questions arising regarding the alleged privacy of plaintiff's roof and addrsing adequate evidence regarding them. But even if the case does not fall under Order XLI, rule 27, the error of the District Judge would, in my opinion, be an irregularity not affecting the merits of the case and falling under section 99 of the Code. It was certainly not a "substantial error or defeat in the procedure which may possibly have produced error or defect in the docision of the case upon the merits," so as to fall under section 100 (1) (c). His having examined some

of the witnesses would in fact put him in a better position to appresiate their testimony and so do justice between the parties. The next objections to be considered are those affecting the decision of the lower Court that the custom he held proved had the essential attributes of a eastom valid in law. It was argued that a valid custom of privacy covers only portions of a house ordinarily used by women, and that a roof could not be such a place, as it is only in the hot weather that they sleep there. But the fact that the Iceal custom mentioned in Illustration (b) to section 18 of the Easements Act refers to portions of a house "which are ordinarily excluded from observation," does not preclude a local costom of the kind held established in this ease. That the use of the roof by plaintiff's women for sitting and sleeping is reasonal and not all the year round is a part of the local custom; and section 15 does not say that a customary easement must be a right asserted or exereised continuously. Section 6 of the Act, on the contrary, shows it can be exercised at eartain times only without this affecting its validity. In this case the District Judge has held that in the town of Larkana the roofs of the houses of people who follow the purcha eastom are included in the portions of their houses ordinarily excluded from observation, and we are bound by this finding of fact. Arguments like the one raised by Mr. Rupchand that the parapet walls are erected for self-protection and not for securing privacy, are clearly irrelevant before us. Of course, in a case where there is no parapet wall round a roof, which is thus open to easy observation, there might be ground for coneidering that no right of privacy in respect thereof sould properly be established; but that is not the ease now under consideration.

Objection has been taken to the findings that the custom in question is ancient, certain and reasonable. On these points it is sufficient to say that I agree with the reasons given in paragraphs 40 46 of the District Judge's judgment. I would only add that, having regard to the long continued prevalence of the pardah system in India and the predominance of Muhammadanism in Sind, at any rate since the 12th century A. D. (Sind Gazatteer, page 92), there is strong presumption that the enstom was not of recent growth but has extended over many

^{(4) 11} M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. s.) 67; 20 E. R. 3; 2 Sar. P. C. J. 109 (P. C.).

^{(6) 81} B. 881; 9 Bom. L. R. 671; 11 C. W. N. 721; 8 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 317; 2 M. L. T. 435 34 I. A. 115 (P. C.).

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generations. As is pointed out in Kuar Sen v. Mamman (6), a local onstom need not be shown to be immemorial, if it is sufficiently certain and reasonable to satisfy the legal requirements of a valid oustom. Illustration (b) to section 18 of the Easements Act affords statutory recognition of the validity of such a custom in this country. It also shows that it may give rise to an easement. That the plaintiff has such an easement has been found by the lower Court, and this follows from its findings as to the customs and plaintiff's previous enjoyment of privacy for his roof in accordanse with that custom. It was argued by Mr. Rupehand that the privacy held established was merely a sort of semi-privacy. but there are, of course, degrees of privacy and that which the Distrist Judge finds the plaintiff has enjoyed is (though not complete) yet substantial enough to be entitled to the protection of the law.

Then, is the plaintiff entitled to the injunction which has been granted to him? On this point, the District Judge has rightly considered the question whether the threatened disturbance of his easement would amount to a nuisance and has answered this in the affirmative. Mr. Tahilram's contention that a mere invasion of plaintiff's right of privacy is sufficient to entitle him to an injunction is incorrect, as is shown in Framji Shapurji Patuck v. Framii Edulji Datar (7). There must be a threat of disturbance sufficient to cause substantial damage to the plaintiff, or in other words, it must amount to a nnisance, which in law implies substantial damage. As stated in Halsbury's Law of England, Volume XXI, Article 853, page 510, the damage must not be merely centimental or trifling; but in considering whether the property of the plaintiff is in fact injured, or his comfort or convenience in fact materially interfered with, by an alleged nuisance, regard is had to the character of the neighbourhood and the pre existing circumstances (Pollock's Law of Torts, 7th Edition, page 401). In my opinion, the Court should, therefore, attach weight to the feelings of persons who follow the pardah sustom, such as live in

Larkans, and avoid regarding such feelings as sentimental, or trivial in nature. I think the District Judge has rightly held that the opening of a window overlooking the plaintiff's roof would be a nuisance, even though its position may be only a little above the top of the parapet that was formerly on the defendant's roof. As he points out, a window raises an apprehension of spying, whilst no one can look over a parapet without himself being seen; and in view of the extra risk, the plaintiff's women folk would not be able to use the roof with the same security that they did before. The case is to some extent analogous to that of soldiers defending themselves on the plaintiff's roof from the attack by riflemen from defendant's roof. The former would obviously have less security if a 4 feet parapet wall on defendant's roof was re-placed by a wall entirely screening the latter from view, except through a window in it. Glances from eyes of male strangers correspond to bullets in this comparison, and the analogy derives some force from the fact that the defendant's house is a Zemindari Otak, likely to be used by young unmarried men. I agrae, therefore, with the view of the District Judge that there will be a material diminution of plaintiff's right of privacy of his roof, as it has hitherto existed and been enjoyed. His exercise of this right in the accustomed way will be materially interfered with. The inteference will, I think, materially diminish the value of the dominant heritage by diminishing its value as a house suitable for use by a family, whose women are pardah. nashin and the case, therefore, falls under the definition of substantial damage in sec. tion 33 of the Easements Act. I think also that the threatened disturbance must neces. sarily disturb the easement in the manner already mentioned, and the condition required by section 35 (b) of the Ast is, therefore, fulfilled. Finally, I think, it reasonably clear that the act threatened will be nuisance, so that section 56 (8) of the Specific Relief Act does not prevent an injunction being granted. I would assordingly dismiss the appeal with coste.

J, P.

Appeal dismissed,

^{(6) 17} A. 87; A. W. N. (1895) 10; 8 Ind. Dec. (N. s.) 391.

^{(7) 80} B. 319, 7 Bem. L. R. 825,

GOVINDASWAMI KADAYASAN U. KALIAPERUMAL MUNAYATHIRIYAN,

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 502 OF 1920 AND CIVIL REVISION PETIT.ON No. 308 OF 1920.

November 18, 1920.

Present: -Mr. Justice Sadasiva Aiyar and
Mr. Justice Coutts Trotter.
GOVINDASWAMI KADAVARAN-

APPELLANT IN S. A. No. 502 OF 1920
AND PATITIONES IN O. R. P. No. 308 OF 1920
—DEPENDANT—PETITIONES

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KALIAPERUMAL MUNAYATHIRIYAN AND CTSERS-PLAINTIFFS-OOUNTER-

PETIT: ONESS - RESPONDENTS IN S. A. No. 502 OF 1920 AND C. R. P. No. 308 OF 1920.

Civil Procedure Code (Act V of 1908), O. II, r. 2, s. 98 (1)—Relinquishment of portion of claim for purposes of jurisdiction—Relinquishment, whether can be made after filing of suit—Consent-decree, what is—Expression of consent at passing of decree, necessity of.

Per Sadasiva Aiyar, J. (Coutts Trotter J., dissenting).

—The meaning of Order II, rule 2, Civil Procedure Code, is that a plaintiff in order to bring his suit within the jurisdiction of a particular Court may in his plaint relinquish a portion of his claim based on the same cause of action. But once the suit is filed in a Court having no jurisdiction to grant the relief prayed for in the plaint, the provision in Order VII, rule 10 at once becomes applicable and the only course open to the Court is to return the plaint for presentation to proper Court. [p. 840, col. 2.]

Per Coutts Trotter, J. A consent decree does not necessarily mean a decree passed with the consent of the parties expressed at the moment the decree is passed. [p. 810, col 2.]

Second appeal against a decree of the District Court, Tanjore, in Appeal Suit No. 614 of 1918, preferred against a decree of the Court of the District Munsif, Tanjore, in Original Suit No. 539 of 1916, and

Petition, under section 115 of Act V of 1908, and section 107 of the Government of India Act, praying the High Court to revise an order of the District Court, Tanjore, in Civil Miscellaneous Appeal No. 63 of 1918, preferred against the order I. A. No. 411 of 1918, in Original Suit No. 599 of 1916, on the file of the Court of the District Munsif, Tanjore.

Mr. V. Ragavictari, for the Appellant, Mesers. K. S. Kristnasawny Aiyangar and P. S. Ramasawny Iyengar, for the Respondents.

JUDGMENT.

Sadativa Alvas, J.—Second Appeal No. 502 of 1920 and the connected Civil Revision Petition No. 308 of 1920 have arisen out of a suit instituted by three trustees of a temple against their so trustee in a Munsif's Court.

The suit, as I understand the plaint, is one for directing the defendant to submit his accounts and to pay up whatever may be found as the balance in his hands on the scratiny of the accounts. The Courtfee paid on the valuation of the reliefs sought for were paid on two sums as follows:-"(a) amount which plaintiffs estimate as likely to be due from defendant on assount of receipts and expenditure in res. pest of the temple..... Rs. 950.0 0," "(b) for randering accounts Rs. 50-0.0." Order VII. rule 2, of the Civil Procedure Cods, states that where the plaintiff sues for an amount which will be found due to him on taking unsettled assounts between him and tha defendant, the plaintiff shall state approximately the amount sued for and I take it that R. 950 is mentioned accordingly in the plaint as such approximate amount.

As I said, this suit was brought in the Muneil's Court. Section 92 of the Civil Procedure Code, corresponding to old section 53', contains a new eleuse, (clause 2) which is as follows :- "Save as provided by the Religious Endowments Act, 1863, no suit elaiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to" (i.e. a public charitable or religious trust) except in conformity with the provisions of that sub sestion" (ie., except in a Distrist Court or in specially empowered Court after obtaining the sanction of the Advocate. Ganeral). Paragraph 7 of the plaint, no doubt, resites that the defendant received certain moneys (1,300 and odd rupees) and sertain quantities of paddies (195 and odd kalams) belonging to the temple. But that resital was elsarly inserted in order to show that the defendant is liable to submit his accounts in respect of those amounts and paddies and the other and predies which must have esived by him (ess 9th and 10th paragraphs

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plaint mentioning approximate οŧ annual incomes of the temple) and to have the accounts duly scrutinized and to pay the balance after deducting authorized and valid expenses proved and established by such serutiny. In paragraph 19 (b) of the plaint, the plaintiffs also seek for resovery of damages from the defendants for acts of malfeasance and misfeasance (the Munsif has, in the beginning of his judgment, set out the nature of the suit correctly), and I am, therefore, clear that the recitals in paragraph 7 of the plaint as regards sertain sums and paddies cannot be treated as eapable of converting the suit into, or permitting us to construe the suit as, a simple money suit for the recovery of those particalar sams and of the value of those particular paddies mentioned in paragraph 7 alone. The decree passed was also not a money and a paddy decree for the amounts and quantities mentioned in paragraph 7 but for what was agreed upon as due on the soruting and settlement of accounts.

Now sub clause 1 of section 92, Civil Proeedure Code has added to the sub-slauses of the old section 539 a new clause (d) whose words are "directing accounts and inquiries." The present suit is a suit praying for a direction to the defendant to render accounts and for inquiries into the amount due by him as such an accountable person and, therefore, clearly falls under clause (1). Hence, it follows that as under new clause (2) of section 92, a suit claiming any of the raliefs specified in sub-section (1) cannot be instituted except in conformity with the provisions of sub sestion (1) i.e., except in the District Court or in a Subordinate Jadge's Court, (all Saburdinate Judges having been empowered by the Link Government in the Madras Presidency to entertain such saits), this suit brought in the District Munsif's Court was brought in a Court which had no jurisdiction to extertain it. The decision in Nellaiyappa I illai v. Thangama Nachiyar (1) was pronounced when the old Code was in force and when no provision corresponding to the provision of section 92, clause (2) of the present Civil Procedure Code was in existence. Having regard to the history of the legislation on

this matter, I think the reasonable conelusion is that the Legislature wanted to put an end to the conflict of decisions between the Bombay High Court and the Madras High Court on the question whether a suit may or may not be entertained for any or all of the reliefs mentioned in section 539 (old Code) without conforming with the requirements of that section (present section 92, clause 1), if the plaintiffs were persons who had by the common law of the land or otherwise a sertain peculiar and special interest in the trust (such as that of a trustee thereof) over and above that of the ordinary public "having an interest in the trust." That conflict was intended by the Legislature to be ended by enacting elause (2) so as to favour the Bombay view.

Now, taking it then that the Munsif had no jurisdiction to entertain the suit, the defendants, not taking an objection, in the first instance, cannot confer on the District Munsif jurisdiction to deal with any question arising in the suit except of course the question of jurisdistion. [See Ledgard v. Bull (2).] Order II, rule 2, no doubt, plaintiff to relinquish any enables portion of his claim in order to bring a suit within the jurisdiction of a particular Court. That, of course, means that in bringing the suit, he can in his plaint relinquish any portion of his elaim based upon the same cause of action in order to bring it within the jurisdiction of a particular Court. But if a suit has been filed in a Court having no jurisdiction to grant the reliefs prayed for, I think the provision in Order VII, rule 10, of the Code at once becomes applicable. That provision sorresponds to old section 57. In the old section, it was enacted 'the plaint shall be returned to be presented to the proper Court in the following exces," and then follows the enumeration of earss where the Court had no jurisdiction to entertain the suit. Order VII, rale 10 enacts the same provisions more tersely than: 'The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have

^{(2) 9} A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind, Dec. (N. s.) 561.

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been instituted." Of course, it follows that all proceedings which took place in the suit before such return are of no effect.

Now, as I said, this suit should have been instituted in the proper District Court or Subordinate Judge's Court and should not have been instituted in the Munsif's Court. Hence the only course open to the Mansif was to have returned the plaint to be presented to the proper Court. I think whether a second appeal lies or not, whether the civil revision patition entertainable on the grounds set forth in it or not, the question of jurisdiction having been brought to the notice of this Court, the proper course is to do what the District Munsif ought to have done, namely, order the return of the plaint to be pre-

sented to the proper Court.

On the question what is a consent decree within the meaning of clause (3) of section 96 of the new Civil Procedure Code (that elause containing a provision not found in the old Code), Tyabji, J., and myself expressed a certain opinion in Ayyagiri Veerasaling 1m v. Kovvuri Basicireddi (3) which was approved in Thenal Ammal v. Sokkammal (4), Oar opinion was that a consent decree was a deeree to the passing of which both sides consented in a communication or communieations made by both sides to the Court, and that a decree passed in ascordance with the terms to which the parties might have consented outside the Court but the passing of which decree, one side treence eti evig ten bluow bna bladdiw was not a consent decree. The soundness of that opinion was hotly criticised at the Bar and my learned brother expressed strong dissent therefrom at the arguments. There seems to be much to be said in favour of that view. Having, however, regard to the fast that in Order XLIII, rule 1 (corresponding to old section 538) a new provision has been inserted under elause (m), allowing an appeal from an order under rule 3 of Order XXIII, resording or refusing to record an agreement of compromise, I admit that there is great force in the contention that Order XXII, rule

In the view I have above taken of the proper course to be followed by this Court where a lower Court has no jurisdiction entertain suit, all the 8 eeedings passed by the lower Court during the course of the suit ought to be set aside and the only order which ought to have been passed by that Court, vie, the return of the plaint to be presented to the proper Court ought to be passed now. I would assordingly pass orders to that effect. As my learned brother takes a different view, the second appeal and civil revision petiticn will former dismissed. the with costs in plaintiff's favour.

COCITS TROTTER, J .- I regret that I cannot agree on all the points on which my learned brother has given judgment, though I do

agree on some of them.

First with regard to the appeal. I am of opinion that no appeal lies under the Oode and of source in that opinion I am in corflict with the two eases referred to. The matter is of some importance, and my view is that Courts ought not to encourage multiplicity of appeals where the Code has indicated that they should some to a stop. What happened in this case was that the defendant in this suit was alleged to have given full authority

^{3.} Order XLIII, rule 1, slause (m) and section 96, clause (3) should be read together, and that, so reading them together, the only appeal intended by the Legislature was an appeal against the "recording or refusing to record" the agreement alleged to have been made between the parties about the passing of a particular decree, a decree passed and that finding arrived at in favour of such agree. ment is also intended in the expression, "decree passed with the consent of the parties" in section 96, clause (3). Though, in practice, there has been a distinction nenally made between what is called decree based on a compromise agreement and a decree passed with consent, I am (on further consideration) not very much inclined to stand by the opinion J, and myself expressed in Ayyagari Vesra. salingam v. Kosvuri Basivireddi (3) as I am as much (if I may say so with respect) for surtailing unnesessary and repeated appeals as my learned brother. It is, however, not essential to express a final opinion on that question for deciding this ease.

^{(8) 25} Ind. Cas. 56; 27 M. L. J. 173; 16 M. L. T. 125; 1 L. W. 541.

^{(4) 41} Ind, Cas. 429; 41 M. 288; 22 M. L. T. 140.

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to his Vakil to arrange the settlement of the elaim against him by the payment of a lump sum of money in lieu of the moneys and paddy elaimed. The Vakils met and agreed on a figure which was endorsed on the pleadings and knowing the kind of person be had to deal with, the defendant's Vakil got the defendant to sign the paper himself. When it came to the passing of a decree, the defendant began to resile from the compromise he had entered into and made all sorts of allegations which have been entirely disbelieved by both the Courts below. An enquiry was held by the District Munsif as to whether or no it was a fact that the defendant had consented to judgment being entered up against him, and as a result of that enquiry, be found that be had consented. Now, ordinarily that would have been done by the machinery of Order XXIII, rule 3. An application would have been made to record the compromise and the Court would have made an order recording the compromise and would have gone on to pass a decree in accordance with that and from that order there is an appeal given by Order XLIII, rule 1 (m). So that whatever the result of the suit,-I will come to that presently-from the order resording the compromise there would have been an appeal, and if the Appellate Court came to the conclusion that the compromise cught not to have been recorded, it would, I suppose, bave ordered the District Munsif to re-try the suit.

But with regard to the suit itself, in my opinion, it is regulated by scetion 96 (3) which says that "no appeal shall lie from a deeree passed by the Court with the consent of the parties." I want to follow the reason of the thing and I cannot agree with the two decisions that have been cited that a decree passed with consent means and only means a decree passed with the consent of the parties expressed at the moment the decree is passed. It seems to me that the reason of the thing is this: there are only two ways in which a decree can come into being and there is no third way; one is by allowing the dispute to be determined by the Court and the other isyou may call it ocmpromise or consent or what you will-not by the determination of the Court but by reason of an agreement between the parties. That ceems to me to be the essence of a consent decree and I cannot conceive of anything that is neither a decree by the determination of the Court nor

by consent of parties. It seems to me that every decree must be one or other of those things and it seems to me that the policy of the Code is that all consent deerees when they have been ones established to be by consent should be unappealable. The consideration for consent or compromise decrees is that both sides give up the right of appeal for ever and the Code, I think, includes eases of this sort when it says that these consent decrees should not be appealable. The answer to this, as I have pointed out already by implieation, is the answer pointed out in Thenal Ammil v. Sokkimmal (4), namely, that from the question of sensent being proper or not there ought to be an appeal, that is, although you cannot appeal from the decree as a decree when it is a consent decree, you can appeal against the determination that it is a consent Therefore, with regard to the appeal, my opinion is that no appeal lies and I do not think it lay to the lower Appellate Court either.

Then I come to the civil revision petition and that I think is more difficult matter. The defendant is invoking the aid of this Court in revision to say that there was no jurisdiction in the District Muneif's Court to try the suit. The suit is by three trustees of a temple against a so trustee asking for a variety of reliefs, and I think it may be said that the frame of the suit was very much to suggest that it was such a suit as would ordinarily be brought under section 92, Civil Procedure Code. Accounts were asked for and there was in the plaint a prayer for payment of a certain lump sum of money and a certain defined quantity of paddy. Now, what the defendant says is that the suit being of the kind contemplated by section 92, Civil Procedure Code, and the sanction of the Advocate General not having been obtained. it was incompetent for the plaintiffs to bring the suit without the sanction, and moreover, in a District Munsif's Court. I agree that the language of cection 92 must not necessarily be held to re enast the old law as laid down in Nellaiyappa Pillai v. Thangima Nachiyar (1) and other easer; and that the preliminaries required by section 92 of the Code must be somplied with. There are two answers put forward: one is a very surious one and it is this. The civil revision petiticn is against an order, not

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deerse, but it is to revise an order whereby the District Mansif refused to set aside the decree on the ground that it had not been obtained by a genuine consent, the defendant having been deceived by his own Vakil. At any rate, the petitioner asks that his signature should be cancelled. What Mr. Krishnaswamy Aiyangar says is this: this has nothing to do with jurisdiction at all, simply to ask the Munsif to cancel the signature. I, at one time, was rather inclined to think that if there was no jurisdiction to try the case. there was no jurisdiction to try a point which can only be regarded as auxiliary to the case. It seemed to me that if he had no jurisdiction to try the suit, he had also no jurisdiction with regard to the petition. But I think there is another answer and it is one which I am prepared to adopt: in the plaint, as I have said, there are two pleas and there is a distinct claim for moneys and paddy; and with regard to that, the action was sattled by the defendant agreeing to pay so much money and the decree is for that and for none of the other reliefs. When the plaintiff consents to a decree in which one of the reliefs asked for is granted, it seems to me the only possible inference is that the rest of the reliefs he abandons.

That trings us to the question on which unfortunately I have to differ from my learn. ed brother, as to whether it is open to the plaintiffs to clothe the Court with jurisdiction by atardoning all claims except a claim for a specified sum of morey and paddy which would be a вапев cf which the Munsif was clearly competent to try. The question is whether Order II, rule 2 permits that course to be taken. I cannot see what there is in Order II, rule 2 which should hinder any person in abandoning any portion of his claim. It isays "the plaintiff may relinquish any portion of his elaim in order to bring the suit within the jurisdiction of any Court," It seems to me that when the plaintiff abandons all his claims except his claim for money and paddy and states the compromise as to tha to be recorded and consents to judgment, he may be taken to have abandoned all parts of his elaim which were obnoxious to the provisions of section 92 of the Code. I am therefore, prepared to hold that, by that abandonment which I hold to have taken place, the District Munsif was invested with jurisdiction and, therefore, there is nothing we can touch in revision. I may add that in the last resort I would be prepared to say that this is not a case in which even if there was a lack of jurisdiction I should exercise the powers of this Court which are purely discretionary in this matter. It seems to me that this is a fraudulent and verations defence and that the defendant ought not to be allowed to pursue his dishonest attitude any longer.

M. C. P.

N. H.

Appeal dismissed.

ALLIHABAD HIGH COURT.
STAMP REFERENCE IN FIRST APPEAL No. 120
CF 1922.

March 27, 1922.

Present:—Mr. Justice Piggott.

KANHAIYA LAL AND ANOTHER—DEPENDANTS

—APPELLANTS

Seth RAM SARUP—PLAINTIPF— RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (f; -Suit for accounts-Preliminary decree-Defendant's appeal-

In an appeal from a preliminary decree in a suit for accounts an appellant has under section 7 (iv) (f) of the Court Fees Act the option of placing his own valuation upon the memorandum of appeal and of paying Court-fee according to that valuation [p.) 845, col. 2.]

KANHAIYA LAL D. RIM SABDP.

Dr. S. N. Sen, for the Appellants.

JUDGMENT .- Tois memorandum appeal has been laid before me as Taxing Judge in order that the question of the Court-fee payable in respect of the same may be finally determined. The suit was one "for accounts" within the meaning of section 7 (4) (f) of the Court Fees Act. of 1870. It was incumbent on the plaintiff to state the amount which he valued the relief sought, and the amount of the fee payable under the said Act was to be computed on this valuation. The plaintiff accordingly valued the relief sought by him at a sum of Rs. 8,000 and paid the necessary Court-fee. Court below has passed a preliminary decree which calls upon the defendant to render a true account of the transactions in suit. The defendant by his memcrandum of appeal seeks to have this decree set aside, not because he denies his liability to render accounts, which he has all along admitted, but because he takes exception to the form of the deerce and contends that it ought to have contained a specification of the period over which the liability to render assounts should extend and an adjudication upon a question which the defendant had raised as to the period of limitation applicable to a portion of the plaintiff's claim. The defendant, as appellant in this Court, criginally sought to file his apreal on a fixed fee of Re. 10. was undoubtedly liable to pay an ad valorem fce, as is sufficiently obvious from the wording of the section itself and was determined by a learned Judge of this Court in his decision in Bhola Nath, In the matter of (1). Now, the appellant in this Court had originally valued his appeal at the sum of Rs. 8,000 as stated in the plaint, but when called upon to pay an ad valorem fee, he asked to be permitted to amend the valuation. This permission was granted and he has amended the valuation by stating that the relief sought by him in his appeal to this Court is worth to him no more than Re. 200. On a formal objection taken by the Stamp Reporter to this Court, the matter has been crdered to be laid before me for

adjudication. There is no doubt that the Madras High Court in the case of Dhupati Erinivasacharlu v. Perindevamma (2) bas held that in a matter of this cort the valuation put by the plaintiff on his plaint must be accepted by the appellant in any appeal which he may bring against the decree of the Trial Court. 1 do not know if the learned Judges, who formulated this decision, were thinking only of a preliminary decree, or had in mind the possibility of an appeal against a final decree in a suit for accounts. It seems sufficiently obvious that in the latter case the valuation put upon the plaint by the plaintiff could not possibly determine the correct valuation, and, therefore, the proper Court-fee Stamp, for the memorandom of appeal. Taking the present care as an instance, it is quite conceivable that when the Trial Court came to work out the accounte, it might find that the sum due to the plaintiff was either very much less or very much more than Bs. 8,000, In the latter case, of course, the provisions of scotion 11 of the Court Fees Act, VII of 1870, would protect the fiscal interests of the State. In either ease it is beyond question that the defendant, if he desired to appeal, would have to value his memorandum of appeal at the amount of the decree actually passed against bim, whatever that amount might be. I mention these considerations merely because they raise a doubt in my mind as to the correctness of the view taken by the Madras High Court. The point for determination before me is, however, the proper valuation of an appeal against a preliminary decree. Locking at the matter apart from technicalities, I think it obvious that it would be inequitable, and might produce serious hardship, to apply in all cases of this nature the principle insisted upon by the learned Judges of the Madras High Court. Taking the facts of the present case, to far as they are disclosed by the pleadings, they afford an illustration of my point. The plaintiff comes into Court claiming a settlement of accounts and alleging that at least Rs. 8,000 will be found due to

^{(1) 6} Ind. Cas. 832; 7 A. L. J. 546; 32 A. 517.

^{(2) 33} Ind. Cas. 602; 30 M. L. J. 402; 89 M.

KANHAIYA LAL U. RAM SARUP.

him upon such settlement : naturally he is required to pay a Court-fee upon the sum of Rs. 2,000. The defendant does not deny that he is under some liability to render accounts, but contends that on such repdition of accounts, and after a proper application of the Statute of Limitation to sertain rortions of the plaintiff's elaim, the amount found due in favour of the latter will prove to be a trifling sum, if any. The Court of first instance has passed a preliminary decree directing the defendant to render accounts. It seems to me quite irrelevant to say that the defendant is appealing against the whole of that decree; be sould scarcely as a matter of form appeal against a part of it. fast remains that he takes exception to the form of the decree which has been pareed. He has nowhere abandoned or modified in the least his essential plea on the merits, namely, that the sum legally due from him will prove upon a proper examination of the question of accounts to be something far less than the amount stated in the plaint. There seems no principle of equity upon which the defendant can resconably be debarred from main(aining Lie appeal against this preliminary decree unless and until he is prepared to pay an ad ralorem fee upon the entire sum stated by the plaintiff in his plaint.

The words of the section to be inter-

preted are as follows:-

"The amount of fee payable under this Act in suits for accounts shall be computed according to the amount at which the relief sought is valued in the plaint or memerandum of appeal," Those words, as they stand, are elearly in favour of the appellant's contention and, as I have already pointed out, I cannot see any principle of equity upon which it can be suggested that the appellant to this Court is not within his rights when he says that the success of the appeal which he desires to prefer to this Court will not be worth to him a larger sum than Re. 200. The learned Judges of the Madrae High Court seem to me to bave in effect added the words "and the valuation given in the plaint shall be accepted in the memorandum of appeal" to the section and the real question is whether there is any

warrant in the context for doing this' If such warrant is to be found arywhere, it is in the words which immediately follow those already quoted by me. These words are :- 'In all such suits plaintiff shall state the amount at which he values the relief sought." It is no doubt a little difficult to understand wby the Legislature should have felt it necessary to add this proviso in respect of the plaintiff, without in express terms laying any analogous obligation upon the appellant. The answer seems to be that this proviso governs the whole of the suits falling under clauses (a), (b), (c), (d) and (e), as well as under clause (f) of sub-section 4 of section 7 of the Court Fees Act. In some of these cases no question of the passing of a preliminary decree can possibly arise, and the Legislature was probably of opinion that, in most instances at any rate, when once the Trial Court had passed a final decree, no difficulty would arise as to the valuation of the appeal therefrom. On the whole, taking the words of the section as they stand, I think that the appellent is allowed the option of placing his own valuation upon the memorandum of appeal in a case like the present, that no intention to the contrary can fairly be inferred from the wording of the section and that, in a case like the one now before me, it is by no means unreasonable that a defendant, who has all along been contending that he is being made the vistim of a wholly extravagant claim should be permitted to bring his appeal against the preliminary decree before this Court without being penalised in Court fees by reason of the heavy valuation put upon his elaim by the plaintiff. In the case to which I have already referred, which was decided by a learned Judge of this Court, it was assumed that the appellant would be permitted to put his own valuation upon his memorandum of appeal in a case like the present. I have now expressly examined the question and I am of opinion that the point was rightly assumed by my learned predecessor in favour of the appellant. This is my decision upon the question referred to me.

J. P. Order accordingly.

VENEATACHALAPATRI IVER O. CRIMA MUNA CHARRAPANI IVEZ.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2068 of 1920.

November 22, 1921.

Present:—Mr. Justice Oldfield and

Mr. Justice Krishnan.

VENKATACHALAPATHI IYER—

DEFENDANT—APPELLANT

t ersus

OHINA MUNA CHAKRAPANI IYER PLAIATIFF-RESPONDENT.

Trust, construction of - Charitable trusts, creation of - Executory trusts, doctrine of, whether applicable.

A written agreement between two persons stated, "Bs. 300 with balance of interest which has been allotted for dwadeshi charity shall be allotted for that charity and a dharmasanam executed," and again, "the sum shall not remain with both of us but we shall abide by the advice of mediators and conduct the charity." In a suit to enforce the agreement as a trust:—

Held, that no trust was created yet and that there was nothing more than an agreement between the parties to allot the money by a proper deed of trust to be executed hereafter. [p. 845, col. 1.]

The doctrine of executory trusts is applicable to cases of trusts created for valuable consideration, and has no application to charitable trust where the beneficiaries are purely volunteers. [p. 845, col, 2.]

Though the Trusts Act does not apply to charities and no formalities are required by law to create it, still where it is intended to create a trust with reference to a particular property it is necessary that the language used should be clear enough to show a definite intention to create a trust by it and it should amount to a declaration which is or can be construed to be imperative. Where there has been a completed dedication, the fact that the details of the trust have not been settled by the dedicator will not affect the validity of the dedication. [p. 845, col. 1.]

Second appeal against a decree of the District Court, Madura, in Appeal Suit No. 21 of 1920, presented against a decree of the Court of the First Additional District Munsif, Madura, in Original Suit No. 134 of 1919 (Original Suit No. 386 of 1918 on the file of the Court of the Principal District Munsif, Madura).

FACTS appear from the judgment.

Mr. K. S. Jayarama Aiyar, for the Appellant.—The decree of the District Court directing specific performance by creation of a trust-deed is wrong. The suit was not for specific performance but was framed as one to enforce a trust. The trust not having been found to have been created, the suit should have been dismissed. No amendment of the plaint was asked in the earlier stages of the suit.

To allow the amendment would be to alter the nature of the suit. The recital in Exhibit A is that a dharmasasanam was to be executed and the parties were to take the advise of mediators. The trust might or might not come into being. The parties might abandon the proposal by mutual con-There is no trust impressed on the There must be a definite declaration constituting the dedication which is absent in the present case, Manchar Ganesh Tambekar v. Lakhmiram Govindram (1), Bhuggobutty Prosonno Een v. Goorgo Frosonno Sen (2), Warriner v. Acgers (3), Richards v. Delbridge (4). The whole of the Rs. 300, belonged to defendant and there was no consideration for the agreement.

Mr. K. V. Sesha Aiyangar, for the Respondent.—There is a definite ellotment to charity in Exhibit A and a trust has been created. Being a charitable trust no definite form of language is necessary to create it.

In any event there is an agreement to create a trust and the doetrire of executory trusts applies. The details may be wanting but there is a dedication. The Court could supply the defect and settle the details itreit. As there is an exforceable contract in Exhibit A, the Court had power to direct specific performance.

JUDGMENT.

OLIFIELD, J.—I agree with the judgment which my learned brother is about to deliver and have nothing to add.

KRISENAN, J.—The first question we have to decide in this second appeal is whether a trust has been created by the parties with reference to the Rs 3CO and interest dealt with in Exhibit A. The lower Courts have held that no trust was created but the respondent's Vakil has tried to support the decree of the lower Appellate Court by arguing that in reality a trust was created.

The question has to be decided entirely on the wording of Exhibit A, the agreement between the parties, for there is no other evidence bearing on it. That document says in one portion of it "Rs. 300 with balance of interest which has been allotted for duadesi

^{(1) 12} B. 247; 12 Ind Jur. 387; 6 Ind. Dec. (N. s.) 650.

^{(2) 25} C. 112; 13 Ind. Dec. (N. s.) 76. (3) (1873) 16 Eq. 340 at p. 348; 42 L. J. Ch. 581;

²⁸ L. T. 863; 21 W. R. 766.
(4) (1874) 18 Eq. 11 at p. 19; 43 L J, Ch. 459; 23, W. R. 584.

VENEATICHALAPATHI IVER U. CHINA MUNA CHARRAPANI IVER.

charity out of the balance still due, shall be allotted for that obarity and a dharmasasanam be executed," and again in another part "the sum of Rs. 300 with balance of interest relating to the said charity shall not remain with both of us but we shall abide by the advice of mediators and conduct the charity." It seems to me that the lower Courts are right in bolding that the parties contemplated taking the advice of mediators in settling the details of the trust they desired to ereate and embodying those terms in a dharmasasanam or formal deed of trust before the trust was to be taken as created. The language of Exhibit A in saying "shall be allotted and a dharmasasanam be exceuted" eceme elearly to point to a frust to be created in the future by a proper deed. No doubt Exhibit A ures the expression "which has been allotted" with reference to the Rs. 300 but that must be read with what follows, and I think it only means "which we have agreed to allet." In my opinion, Exhibit A only evidences an agreement between the plaintiff and the defendent to so allot the money by a proper deed of trust to be executed thereafter, and as no such deed has yet been excented, the matter has not passed beyond the stage of agreement into the stage of a completed trust or dedication to charity. If the money had already been dedicated to sharity, it would not be open to the parties to revoke that dedication or resile from the arrangement. But I think in the present case there are no words in Exhibit A to show that that position has been reached, for I consider that under it, it will still be open to the plaintiff and the defendant jointly to abandon their agreement if they so desire and to take the money themselves. Plaintiff or defendant perhaps sould not by himself give up the arrangement against the wishes of the other but they sould, I think, by mutual consent do so. There is no trust impressed on the money yet, nor have any rights been created in any of the intended beneficiaries, the Brahmins, who are to be fed on dwades days, to insist on the trust being carried out. In fact it seems to me that the parties have not parted with the swnership of the money. They have only agreed to do so in the future.

It is true that the charity contemplated is a form of public charity and the Indian Trusts Act does not apply to it and consequently no formalities are required by law

See Manohar Ganesh Tambekar to create it. v. Lathmirem Govindram (1) and Bhug. gobutty Prosonno Sen v. Gooroo Frosonno Sen (2). Nevertheless to create a trust with reference to a particular properly it is necessary that language used should be elear enough to show a definite intention to create a trust by it and it should amount to a declaration which is or can be construed to be imperative. See Helsbury's Laws of England, Volume XXVIII, page 12, paragraph 17. It is further necessary that the rights of the author of the trust in the property should have been parted with for the benefit of the beneficiary. Vice-Chancellor Bason observes in Warringr v. Rogers (3), that 'the one thing necessary to give validity to a declaration of a trust-the indispensable thing-I take to be, that the donor, or grantor, or what. ever he may be called, should have absolutely parted with that interest which had been his up to the time of the deelaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest." This passage is quoted with approval by Sir G. Jessel, M. R., in the case of Richards v. Delbridge (4). Applying the above tests to the present case, I think it is elear no trust has been erested.

It is further argued for the respondent that even though an executed or completed trust may not exist in the case, there is nevertheless an executory trust here, because there is a contract to create a trust which is specifically enforceable between the parties. Defendant urges in answer that there was really no consideration for the agreement embodied in Exhibit A, as the whole of the money dealt with in it really belonged to him. It is not necessary to decide this point, for even assuming that there is a valid and enforesable sontract between the parties, the dostrine of executory trusts does not apply. In cases of contract, that doctrine is applicable only in cases like marriage settlements where there is a contract based on valuable consideration for the creation of a trust of which specific performance can be ordered at the instance of the beneficiary. See Underhill on Trusts, page 14. No authority has been eited to show that it applies to eases of charitable trusts where the beneficiaries are purely volunteers as in the present case.

It was also argued that once there is a

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dedication to a sharity, the fact that the details of the trust are not settled by the dedicator will not affect the validity of the dedication. In such cases the defect will be cared by the Court in some cases and by the Crown in others. See Tudor on Charities and Mortmain, 4th Edition, Chapter VII. But the fundamental thing required to support the contention is a completed dedication: a mere intention to dedicate in future is insufficient as it has no legal effect. In the present case, as I hold that there was no gift or dedication to charity, the argument becomes irrelevant.

From the above discussion it follows that the plaintiff was not entitled to any declaration regarding any trust, for no trust exists. It is then argued that Exhibit A evidenses a specifically enforceable contract between plaintiff and defendant, and that in this suit itself, specific performance should by directed by the execution of a formal trust. deed after the details for the conduct of the sharity are settled by a punchayat as contemplated by Exhibit A, or failing, that by the Court itself. This is what the lower Appellate Court has ordered, but I think that course is not justifiable. There is no prayer in the plaint for any such relief and without an amendment of the plaint and a re-trial of the suit, such relief eannot be given without prejudie. ing the defendant. To grant such an amendment will entirely alter the nature of the suit. In these sirenmstances I consider that it is not proper to allow an amendment of the plaint at this late stage of the case. The District Munsif dismissed the plaintiff's suit on the very ground that his remedy was to sue for specific performances and yet plaintiff made no application for amendment till now. The plaintiff, I think, should be left to enforce his remedy, if any, in a separate suit if so advised.

In the absence of a trust the plaintiff's suit based solely on the existence of one must fail. I would, therefore, allow the second appeal and reverse the decree of the District Judge and restore that of the Munsif with costs here and in the lower Appellate Court.

M. C. P.

N. H. App:al allowed.

CALCUTTA HIGH COURT,
APPEAL FROM OSIGINAL DECREE
No. 77 of 1920.
April 12, 1921.

Present: - Justice Sir Asutosh Mookerise, Kr., and Mr. Justice Buckland. BARODA PROSAD DEY, CHAIRMAN, SERAMPORE MUNICIPALITY

-CLAIMANT-APPELLANT

THE SECRETARY OF STATE
FOR INDIA IN COUNCIL—

RESPONDENT.

Land Acquisition Act (I of 1894), s. 23, cls. (3), (4)

—Assessment of compensation—Special usefulness of land to be taken into consideration—Principle of reinstatement.

Per Mookerjee, J.—The assessment of the value of a land compulsorily acquired, regardless of the user for which it is specially fitted, cannot lead to an adequate award of compensation for the loss sustained by the owner. The special adaptability of the land acquired cannot accordingly be altogether ignored in the determination of its market-value. [p. 847, col. 2.]

Where land is compulsorily acquired, the fact that it has peculiar natural advantages for a particular purpose is an element for consideration in the assessment of compensation, apart from any special value created or enhanced by the scheme of the acquisition. [p. 847, col 2.]

Where a sum awarded to an owner of land compulsorily acquired under the Land Acquisition Act is not sufficient to re-place the premises or land taken, by premises or land which would be to him of the same value, the compensation awarded is inadequate in view of the principle of re-instatement. [p 848, col. 2.]

Per Buckland, J.—Where land is used for a special purpose in conjunction with other lands of its owner which are injuriously affected by its acquisition, and where it is established that the owner will be compelled by law to provide himself with other land capable of being adapted in such a way as to restore to his land injuriously affected its former usefulness, one measure of the damage sustained by the acquisition injuriously affecting the other property is the difference between the sum awarded for the land acquired and the cost to the owner of providing himself with other land to be used in a manner similar to that in which the land acquired was used plus the cost of adapting it to such use.

[p. 849, col. 2; p. 850, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, Hooghly, dated the 1st of March 1920.

Babus Sib Chander Palit and Namilal Das, for the Appellant.

Babas Ram Charan Mitra and Surentra Nath Guha, for the Respondent. SERAMPORE MUNICIPALITY U. SECRETARY OF STATE FOR INDIA.

JUDGMENT.

MOGKEFIZE, J .- This appeal is directed against an award made under the Land As. quisition Act in respect of a piece of land in the town of Serampore acquired by the Government for the residence of the Assistant Superintendent of Police. The land covers an area of 1 cuttah 2 chattack 40 equare feet (that is one officieth of an acre) and at the time of used by the Serampore acquisition was Municipality as a public drain for the discharge of water from the losality into the river Hooghly. The Collector made an award for Rs. 407.4.8, that is, Rs. 354.2.8 as the value of the land and Ro. 53 2.0 as the statutory allowance. In the statement of grounds on which the amount of compensation determined, it was stated that "the land had been valued at Rs. 300 per cottah, that is, at the same rate as the adjoining land, insemuch as the drain was shallow." The Chairman of the Municipality objected to the award as inadequate and claimed the easts for the construction of two sulverts over a new drain which would have to be constructed in place of the drain acquired which was an important outfall. The Municipality also objected that as the drain in question, which bad existed eines a long time, was one of the main outlets for the discharge of water of an important area, and as it would be extremely difficult to make satisfactory arrangements for drainage of the place if the drain was closed, the acquisition should not have been sanctioned upon public grounds of sanitation. The Municipality further urged that a proper diversion drain for the drainage of the place would cost much more than the amount awarded as the market value of the land. They also pointed out that the cost of the two big culverts at both ends of the drain had not been taken into account in the award. though the sulverts would become useless in the absence of the drain. The Land Acquisition Judge held that the amount awarded was adequate and dismissed the claim with costs. The Municipality has now appealed to this Court and has valued the appeal at Rs. 500. In my opinion, it is manifest that the award made by the Collector and confirmed by the Judge is inadequate.

Clause 3 of section 23 of the Land Asquisition Ast provides that in determining he amount of componention to be awarded

for land acquired, the Court shall take into consideration the damage sustained by the person interested by reason of severing such land from his other land. The fourth elause similarly makes it obligatory upon the Court to take into consideration the damage sustained by the person interested by reason of the acquisition injuriously affecting his other property. There can be no room for controversy that the result of the stoppage of the public drain (the immediate subjestmatter of the asquisition) would be, not only to render valueless the two solverts at its own ends, but also to stop the drainage of the adjoining land (for which the Municipality was under statutory obligation to make suitable provision) and thereby to depreciate its value. Consequently the assessment of the value of the land, regardless of the user for which it is epecially fitted, cannot lead to an adequate award of compensation for the loss sustained by the owner. The special adaptability of the land acquired cannot accordingly be altogether ignored in the determination of its market-value. where land was asquired which had been bought by the owner for the purpose of building a school, and there was no other suitable. the neighbourhood, available in land it was held that this must be taken into consideration, even though no steps had been taken towards carrying out the project; Bailey v. Isle of Thanet Light Railways Oo. (1). The same result was reached on the basis of a special clause in a Private Act of Parliament empowering a Railway Company to asquire land in School Board for London v. South-Eastern Railway Co. (2). It has also been held that where land is compulsorily acquired, the fast that it has pseuliar natural advantages for a particular purpose is an element for sonsideration in the assessment of compensation, apart from any special value created or enhanced by the scheme of the acquisition; Gough and Aspatria Silloth and District Joint Water Board, In re (3). Reference may in this connection be made to the judgments of Grove and Stephen, JJ. in Ossalinsky (Countess)

^{(1) (1900) 1} Q. B. 722; 69 L, J. Q. B. 412; 82 L, T. 713; 48 W. R. 569.

^{(2) (1887) 8} T. L. R. 710.

^{(3) (1904) 1} K. B. 417; 73 L. J. K. B. 223; 90 L. T. 43; 52 W. R. 552; 68 J. P. 229; 20 T. L. R. 170.

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v. Corporation of Manchester (4) where the owner of land adjoining a lake was held entitled to compensation on the basis of its special adaptability for the purpose of a recervoir; see also the judgments of Bramwell, Brett and Cotton, L. JJ. Riddell v. New Oastle and Gateshead Waterworks Co. (5) and contrast the decision in Holt v. Gas Light & Coke Co. (6) with that in Wernicke v. Secretary of State (7).

That the compensation awarded is inadequate also becomes obvious if we invoke the aid of an important principle which has been felicitously, though perhaps not assurately, salled the principle of reinstate. ment. There are cases where the income derived or probably to be derived from land does not constitute a fair basis assessing the value to the owner; in such cases, the principle of reinstatement is applied. This principle is that the owner eannot be placed in as favourable a position as he was in before the exercise of compulsory powers, unless such a sum is assessed as will enable him to replace the premises or lands taken, by premises lands which would be to him of the same value. It is not possible to give an exhaustive eatalogue of all eases to which the principle of reinstatement has been or can be made applicable. But the principle may be called in aid when the land is used for some particular purpose, generally not of a commercial nature, such as Churches, Schoole, Hospitals, public parks, houses of an exceptional character and premises in which the business can only be earried on under special conditions or by means of special licenses. Reference may be made, for illustration of the prineiple, to the decision of the House of Lords in Metropolitan Ry. Co., v. Vurrow (8); see also the opinion of Lord Shand in Corporation of Edinburgh v. North British Ry. Co. (9) where the applicability of the doctrine was restricted to eases in which land for reinstatement is available or can be ob-

(4) (1883) 2 Hudson on Comp. 1546; Browne & Allan on Comp. 659.

(5) (1879) Browne & Allan on Comp. 672 at p. 678; 90 L. T. 44n.

(6) (1872) 7 Q. B. 728; 41 L. J. Q. B. 351; 27 L. T. 442.

(7) 2 Ind. Cas. 562; 13 C. W. N. 1046 at p. 1060.

(8) (1884) 2 Hudson on Comp. 1521.

(9) (1892) 2 Hudson on Comp. 1530; Brewne & Allan on Comp. 656.

tained on reasonable terms and consequently the attempt to extend the principle to the case of acquisition of a portion of a public graden proved unsussessful.

There is thus no escape from the conelusion that the compensation awarded in the present case is inadequate, whether we consider the value of the land from the point of view of its special adaptability as a public drain, or whether we take into account the damage sustained by reason of severance or injurious affection, or whether we treat the matter as governed by the principle of reinstatement. There can further be no doubt, from the materials on the record, that the sum of Rs. 500 claimed as additional compensation constituted a vary modest demand. We must express our regret, equally with our surprise, that a just claim of this description should have been strenuously opposed on behalf of the Secretary of State and that the time of public officers of all grades should have been wasted because of an endeavour to resist a claim which was really unanswerable.

The result is that this appeal is allowed and the compensation payable to the Claim ant is increased by Rs. 500. The appellant will be entitled to costs both here and in the Court below. We assess the hearing fee in this Court at five gold mohure.

BUCKLAND, J .- I agree that this appeal should be allowed and the compensation increased by the sum claimed. The intention of clause 23 of the Land Acquisition Act, taken as a whole, is to provide a complete indemnity to a person whose land is compulsorily acquired. The subclauses give effect to this principle by enumerating the heads under which compensation may be awarded. This case presents features which tend to obsente the application of the section. The actual land acquired itself is of very little value, In fast to any person other than the appellant Municipality or to the owners of the adjoining plots of land it would be useless and of no value at all. To the present owner, i. e. the Government, and to the appellant Municipality it has a value in excess of its value as a mere piese of land; to the former by reason of the use to which it will be put in conjune, tion with the adjoining plots, which

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we are informed have also been acquired, and to the latter by reason of the use to which it has been put in connection with its drainage seheme. Any enhanced value, which it may have by reason of the use to which it will be put after acquisition must, of course, be ignored. But it follows from the statement of its value to the appellant Municipality, that if the appellant Municipality is deprived of the land by compulsory acquisition, it loses something over and above the actual value of the land acquired. It is the duty of the Court to enquire what it is that the appellant Municipality so loses, whether such lose is of the nature of any one or more of the items of damage required by the sub-clauses of sestion 23 of the Act to be considered, whether it is eapable of assessment in terms of monetary exupensation, and if so, at what sum compensation should be assessed.

The appellant Municipality uses the drain on this land to condust and dissbarge water flowing into it from other drains, the whole forming part of its drainage scheme. Of such benefit as it obtains from this use of the land it will be deprived. It will have to make other arrangements to collect and discharge the water from the drains with which this drain has been connected which otherwise would sease to serve as drains. It manifestly impossible for the appellant Municipality to adopt the contention, which, were its undertaking of a private and commercial nature, might possibly be open to it, though with what measure of success is problematical and dependent upon considerations foreign to this case, that, deprived of this outlet its entire enterprise is rendered useless and that, therefore, it requires to be compensated accordingly. But the fast that. owing to its being a Municipality with duties required of it by Statute and not a trading concern, the appellant cannot adopt any such attitude does not deny the application of the principles contained in sub-clauses 3 and 4 of section 23 of the Act. Whether or not a claim can be justified according to these principles must be desided upon a consideration of the position at the time when the acquisition takes place, that is, when the elaimant is deprived of his land. An instance where compensation was allowed for damage eaused "by severing or otherwise injuriously affecting?" where neither the land acquired nor the land injuriously affected were a source of

profit to the elaiment is to be found in Holt v. Gas Light & Coke Co. (6) which was a case of a rifls range. Owing to the defendant Company acquiring the land behind the butts, the range became unsafe and had to be closed. The plaintiffs were held to be entitled to compensation. The following passage from the judgment of Blackburn, J., lays down the principle in vary elear language: - 'I sannot see, however. when the two are compled together for a common purpose, and the possession of both is essential for that purpose, why any person who has lost the benefit of the part taken away should not be compensated; and, as I have said, the words of the Act are quite wide enough to cover it, the damage not exactly arising from severance, but even if not, at all events so much e;usdem generis as to some within the general words which follow." It is quite immaterial that in the Indian Act the covering words are to be found in two sub-sections, In my judgment the appellant Municipality is entitled to compensation under clauses 3 and 4 of sestion 23. The quantum of damages is another matter. As I have indicated already, what a elaimant may or can or will by Statute or otherwise be compelled to do to remedy his position and to restore to himself the benefits of which he has been deprived other than the benefit of ownership of the land itself is not a matter to be considered in determining the application of section 23, but may be, and in this case is material to be considered in determining whether the damage is sapable of assessment and at what amount it should be assessed. In cases where the elaimant does not trade, one obvious method of assessing damages is not open to the Court, But in a case such as this, where land is used for a spesial purpose in conjunction with other lands of its owner which are injuriously affected by its acquisition, and where it is established that the owner will be compelled by law to provide himself with other land capable of being adapted in such a way as to restore to his injuriously land affeated its former usefulness, one measure of the damage sustained by the acquisition injuriously affecting the other property is the difference between the sum awarded for the land asquired and the cost to the owner of providing himself with other land to be used in a manner similar to that in which the land asquired was used, plus the cost of

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adapting it to such use. Applying this to the present circumstances, the appellant Municipality is unquestionably entitled to receive the extremely moderate sum claimed.

I entirely concor in what my learned brother, Mr. Justice Mookerjee, has said with regard to the propriety of contesting this elaim. It does not appear that this was done on account of any principle involved, nor is it the case of an exaggerated claim by a grasping landowner. From first to last the total time of the officers of Government, both excentive and judicial, which has been occupied in dealing with it must have been out of all proportion to the amount at stake which, if conceded in the first instance, would have made but a comparatively trifling addition to the capital outlay on the residence required for the Assistant Superintendent of Police.

J. P. &. B. N.

Arreal allowed.

NAGPUR JUDICIAL COMMISS:ONER'S COURT.

SECOND C.VIL APPRAL No. 35 OF 1921.

Jaduary 5; 1922.

Present:—Mr. Hallifax, A. J. C.

AMOLAKSAO—DEFENDANT No. 1—

APPELLANT

MAHIPATRAO AND OTHERS-PLAINTIFFS -- DEFENDANTS NOS. 2.?- RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Exp. IV, Sch. III, para. 11—Adjournment granted by First Court—Powers of Second Appellate Court to interfere—Attachment before judgment—Dismissal of first execution application—Transfer of Property Act (IV of 1882), s. 55 (6: (b)—"Charge," when created—S. 52, applicability to involuntary sales—"Court," meaning of—Judgment-debtor agreeing to sell property—Charge forbidden by para. 11, whether created.

The granting of an adjournment on an application of a defendant for the purpose of enabling him to go into the witness box and of procuring the evidence of other witnesses is a matter in the discretion of the First Court, and not in that of an Appellate Court still less in that of a Court of a Second Appeal. [p. 850,

col. 2.]

An attachment before judgment does not enure beyond the dismissal of the first application of execution made after the passing of the decree. [p. 851, col. 1.]

Ganpati v. Mukunda, 23 Ind. Cas, 712; 17 N. L. R.

121, followed.

A charge to which a buyer is entitled under section 55 (6) (b) of the Transfer of Property Act can be secured by him under a decree declaring that he is so entitled. It does not come into existence at the time of the agreement to sell or acceptance of the price. [p. 851, col. 1.]

A judgment-debtor by contracting to sell a property which is in the hands of the Collector does not charge the property in a manner forbidden by paragraph 11 of the Third Schedule of the Civil Pro-

cedure Code. [p. 851, col 2.]

Section 52 of the Transfer of Property Act applies equally to voluntary and involuntary transfers. [p. 501, col. 2.]

Jogeshwar v. Moti, 66 Ind Cas 631, followed.

The Court to which the concluding portion of section 52 of the Transfer of Property Act refers is the Court in which the suit or proceeding mentioned earlier in the section is being actively pursued and that Court only when it is engaged in that suit or proceeding. [p. 851, col. 2.]

In a suit for the specific performance of a contract it is open to the defendant to plead that the agreement is void on certain grounds, and if he fails to take up that plea, he or any other person claiming under him and litigating under the same title is debarred by Explanation IV of section 11 of the Civil Procedure Code from taking up that plea.

[p. 852 col. 1.]

Appeal against the decree of the District Judge, Nagpur, dated the 25th of Ostober 1920, in Civil Appeal No. 72 of 1920.

Dr. H. S. Gour and Mesers. W. R. Puranik and V. V. Chitale, for the Appellant. Messrs. G. L. Subhedar and K. P. Vaidya,

for the Respondents.

JUDGMENT .- As the learned District Judge has remarked in his judgment, there is no substance in the appellant's contention that he cught to have been given another adjournment in the First Court for the purposes of going into the witness-box himself and of procuring the attendance of other witnesses. Having examined the order sheet, I am distinctly of opinion that the learned Sab. ordinate Judge would have been wrong if he had granted this concession, but in any case this is a matter in the discretion of the First Court, not in that of an Appellate Court and still less in that of a Court of second appeal. In this Court the learned Counsel for the appellant has taken fresh ground, and arges that the sale to the plaintiff was void against his elaim under section 64 of the Civil Procedure Code. This is based on an insemplete examination of the facts and a mistaken notion that the first attachment in 1912 by Birbal, in execution of whose decree the property was eventually sold, subsisted till the sale in 1916.

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2. The actual facts are these. Birbal first attached the property before judgment on the 27th of August 1912. After obtaining a decree he presented an application for execution which was dismissed in default of appearance on the 6th of July The agreement to sell the property to the plaintiff was made on the 5th of September 1913, that is to say, before the dismissal of the application for execution and while the attachment was still subsisting. Later, Birbal presented a second application for the execution of the decree which resulted eventually in the sale of the property to the plaintiff on the 12th of April 1916. In the face of my own recently published judgment in Ganpati v. Mukunda (1) it cannot be orged that Birbal's first attachment enured beyond the dismissal of his first application for execution in 1914. The transfer was, therefore, not made during the continuance of the attach. ment under which Birbal's claim was enforced by the sale in 1916, and section 64 has not application to the case.

3. The learned Counsel then fell back on the position that, at the time of the contrast for sale, the property was in the hands of the Collector, though not under Birbal's deeree, and that, by that sontrast to sell, the judgment-debtor charged the property in a manner forbidden by paragrah 11 of the .Third Schedule of the Civil Prosedure Code. The learned District Judge has held that the judgment-debtor did not charge the property by agreeing to sell it or ascepting the purchase money but that the charge arose by operation of the law out of that transaction and therefore, the paragraph cited does not apply to the ease. I would go further and say that the charge did not even arise directly out of that contract. Section 55 (6) (b) of the Transfer of Property Act says that, in the circumstances of this case, the buyer is "entitled to a charge." But he can only get the charge to which he is entitled under a decree declaring that he is so entitled, for which he may never ask. The charge does not come into existence at the time of the agreement or asseptance of the price. Indeed, the bayer is not even entitled to it till there is default in complet. ing the sale. Even then he does not

get it till a deerse declares that he has it. It is till then an inchoate right, similar to the inshoate right to forcelosure or sale which a mortgages is "entitled to" get but does not hold, between the maturity of the mortgage-debt and the desree mortgage-suit. The acceptance of the money by the judgment-debtor seems to me similar to the refusal of an absolute ossupancy tenant to pay any rent while his holding is in the hands of a Collector. After obtaining a desree for the rent the landlord would have a charge on the property but it could hardly be said that the tenant had sharged his property in the manner he is made incompetent to do by paragraph 11 of the Third Sobedals of the Civil Procedure Oode.

4. The lower Appellate Court has also held that the sale to the appellant is vitiated by the dostrine of lis pendens. His learned Counsel contends that that dostrine cannot apply to an involuntary sale by a Civil Court, and further that the sale to him was under the authority of the attaching Court. That section 52 of the Transfer of Property Act applies equally to voluntary and involuntary transfers was the unanimous opinion of a Fall Bansh of this Court in Jogeshwar v. Moti (2) (Sasopi Appeal No. 218 of 1919) and I see no reason to differ from that opinion. Dhobley, A. J. O, was of opinion that a transfer by foreslosure under a mortgage did not take place at the time of foreslosure bat at the time of the mortgage, but he agreed with the rest of the Banch in thinking that section 52 did apply to a transfer made during a suit, even if that transfer was made by a Court in execution of a decree. The suggestion in the latter part of the plea just mentioned that the Court to which the concluding words of section 52 refer is any Court hardly requires refutation. It ean only be the particular Court in which the suit or prosseding mentioned earlier in the section is being astivaly prosecuted, and that Court only when it is engaged in that suit or proceeding,

5. The decree of the lower Appellate Court ean also be supported on another ground which was rejected by that Court, the principle of resjudicata. When the plaintiff sued the julgment debtor for spesific per.

^{(1) 68} Ind. Cas. 712; 17 N. L. R. '21,

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formance of the contract to sell, it was open to the latter to plead that the agreement was void because the property was attachment or in the hands of the Collector at the time. Explanation IV of section 11 of the Civil Procedure Code will bar him from taking that plea in this subsequent suit, and it will equally bar the appellant who claims under him and is litigating under the same title, as was held in Burlur Fan Rishen Singh v. Lali Fam (3) and Eanchan Mandar v. Ramala Proceed (4). All the appellant bought at the auction-sale was the judgmentdebtor's title, and from his original title had already been deducted at that time the right conferred on the plaintiff by the decree of the 31st of January 19.6.

6. I do not sonsider it necessary or possible to disones any question of estoppel. In the appellant's written statement in the First Court, which extends to three pages of type written matter, I can find only ore mention of estoppel. At the end of paragraph 6, which really ocneists of three separate paragraphs and alone occupies nearly a page, these words coour : "They are further estopped from setting up their prior agreement as against the defendant auction purchaser." The words have no connection that I can discover with anything else in any part of the written statement. There was however an issue framed asking "whether plaintiff is estopped from setting up his prior agreement as against the defendant and whether he is late in doing so," and the learned Judge simply held that he was not. The blessed word estoppel appears again in the memcrandum of grounds of appeal in the lower Appellate Court, but the learned District Judge did not discuss the matter, probably because he was as unable as I am to see where or how any question of estoppel arose. The appeal fails and is dismissed, The appellant must pay all the costs.

J. P. & G. R. D.

Appeal dismissed.

ALLAHABAD HIGH COURT, SECOND CIVIL APPEAL No. 1046 of 1920. March 20, 1922.

Freient: - Mr. Justice Gokul Prasad,
Thakurain ANAR KUAR AND ANOTHERDEFENDANTS-APPELLANTS

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POHAP SINGH AND ANOTHES -PLAINTIFFS -- RESPONDENTS.

Damages, suit for - Distraint, illegal - Cause of action.

The cause of action for a suit for damages for illegal distraint arises on the date of the actual loss or damage or at the latest when the plaintiff comes to know of such loss and not on the date of the release of the property from distrains. [p. 853, col. 1.]

Second appeal against a decree of the District Judge, Mainpuri, dated the Eth May 1920.

The Hon'ble Mr. N. P. Asthana, for the Appellants.

Mr. S. N. Muker, i, for the Respondents.

JUDGMENT,-This appeal arises out of a spit for damages for illegal distraint. The First Court came to the conclusion that the suit was barred by time and it also found that no damage had been proved. As to the second issue, his judgment runs thus: "There is no convincing evidence as regards the loss of property. The Amin and other witnesses of defendants clearly say that the six bigha kachcha land cannot produce 25 maunds of grain, as alleged by the plaintiffs. The property distrained is 6 maunds 201 seers wheat and 8 maunds 31 seers of bhusa (vide plaintiff's own statement dated 24th April 1919 before the Tabsildar of Shikohabad). This is still in possession of Karimullah with whom it was deposited by the Shahna. In my opinion no damage bas been proved."

The plaintiffs went up in appeal and the learned Officiating District Judge has set aside the Assistant Collector's decision on both these issues. He proceeds mainly upon presumptions and probabilities rather than on the evidence on which the Assistant Collector decided the case. He takes no notice in his judgment of the statement made by the plaintiff as detailed by the Assistant Collector. I am informed that the record of the original case tried by the Tahsildar was before the First Court. If that was so, it was the duty of the lower Appellate Court to refer to that record and

^{(3) 13} C. P. L. R. 1.

^{(4) 29} Ind. Cas. 734; 21 C. L. J. 441.

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come to the conclusion after taking into consideration the statement of the plaintiff made on the 24th of April 1919. The learned District Judge was not justified in ignoring the statement of the plaintiff on which the First Court had relied and coming to the conclusion independent of such an admission. I, therefore, refer the following issue for finding to the Court below:—

(1) What damage, if any, had the plaint-

iffs sustained?

The Court below is to take into consideration any admission of the plaintiff contained in his statement of the 24th of April 1919 referred to by the Assistant Collector along with the other evidence on the record before it comes to any desision on the question.

The lower Appellate Court seems to have followed a desision of the Board of Revenue reported in 2 Legal Remembrancer (Ravenue Series) page 61 in thinking that the cause of action for a suit for compensation for illegal distraint arises on the date of the release of the property from distraint view is not, however, the view taken by the two Jadges of this Court in Dambar Singh v. Balwant Singh (1) where it has been held that the cause of action arises on the date of the actual loss or damage or at the latest when the plaintiff comes to know of such lose. I, therefore, remit a second issue also to the lower Appellate Court for a slear finding: -

(2) When did the plaintiffs come to know of the loss of the property for which they sued for compensation?

The lower Appellate Court will submit its findings at an early date. No fresh evidence

on this issue.

On return of the findings the usual ten days will be allowed for filing objections.

J. P.

Issue remitted.

(1) 10 Ind. Cas. 502; 8 A. L. J. 503.

PRIVY COUNCIL.

APPE L PROM THE OUDH JUDICIAL COMMIS-BIONER'S COURT. December 9, 1921.

Present: -Lord Backmaster, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

MOHAMMAD SHER KHAN -

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Raja Seth SWAMI DAYAL -RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 60, 98

—Anomalous mortgage — Mortgage for term — Redemption—Right to redeem in certain event excluded by contract, effect of—Statute, interpretation of.

An anomalous mortgage enabling a mortgagee after a lapse of time, and in the absence of redemption, to enter and take the rents in satisfaction of the interest will be perfectly valid if it does not also hinder an existing right to redeem. A provision hindering such an existing right is invalid and cannot be given effect to [p. 855, col 2.]

A mortgage for a term provided that, if the debt was not re-paid at the end of the term, the mortgagee would be entitled to enter into possession of the mortgaged property and continue in such possession for another period during which the right of the mortgager to redeem was excluded. The debt not having been paid at the end of the term, the mortgagee instituted a suit for possession. The mortgager resisted the suit in all the Courts unsuccessfully and then brought a suit for redeemption:

Held, that the mortgagor had, under section 60 of the Transfer of Property Act, a statutory right to redeem at the end of the term, even if the mortgage was one in which by section 98 the rights of the parties were to be determined by the contract between them [p. 855, col. 1]

The provisions of one section of an Act cannot be used to defeat those of an other unless it is impossible to effect reconciliation between them. [p 855, col, 2.]

Consolidated appeals by special leave from two decrees of the Court of the Judicial Commissioner, Oadh, reported as 30 Ind. Cas. 377 and 48 Ind. Cas. 32, affirming two decrees of the Court of the Sabordinate Judge, Kheri.

FACTS.—The only question for determination in the appeal was whether the appellant's right to redeem was premature, having regard to the terms of the mortage, dated the 9th June 1908. The terms of the mortage and the material facts are fully set out in the judgment.

The Trial Judge and the Judicial Com-

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were bound by the terms of the mortgage and that the mortgagor's suit for redemption was premature. Hence the present appeal.

Mr. Upjohn, K. C., and Mr. Dube, for the Appellant.—The mortgage is a simple mortgage and not an anomalous mortgage to which section 98 applies. Under section 60 the appellant had the right to redeem at the end of the term. Such a statutory right cannot be defeated by the contract between the parties. Lingam Krishna Bhupati v. Manya Sultan (Maharoja of Vicionagram) (1).

Mr. De Gruyther, K. O. and Mr. Purikh, for the Respondent.—Section 98 applies and the rights of parties are determined by the contract. The right to redeem was expressly excluded and the present suit for redemption is clearly premature.

Mr. Up;ohn, K. O., replied.

JULGMENT.

SIR LAWRENCE JENKINS.—These are consolidated appeals preferred by special leave of His Majesty in Council from two decrees dated the 9th February 1915,* and the 19th June 1918; of the Court of the Judicial Commissioner of Oudh, which affirmed two decrees passed by the Sabordinate Judge of Kheri on the 7th September 1914, and the 17th April 1916, in Suits No. 234 of 1913 and No. 93 of 1915.

The question for determination is whether Muhammad Sher Khan, the mortgagor and appellant in both appeals, has a present right on payment of the mortgage money to redeem the mortgaged property. This has been decided adversely to him in both the lower Courts.

The mortgage is dated the 9th of June 1908, and is Exhibit A 36 on the record. The sum of Rs. 82,000 is recited to be due, and the mortgagor declares: "Therefore, I. do hereby mortgage for five years" the immoveable property there described. Then follow the terms.

Olause 1 provides for the payment of interest half-yearly at the rate of $\{\frac{1}{2}\}$ annas per cent. per month, for compound interest in the event of default, and that—

(1) 1C Ind. Cas. 272; 15 C. W. N. 44'; 9 M. L. T. 445; 8 A. L. J. 494; 13 C. L. J. 584; 18 Bom. L. R. 447; (1911) 2 M. W. N. 429; 21 M. L. J. 1147 (P. C.).

* See 30 Ind, Cas. 37i-[Ed] + See 48 Ind, Cas. 32-[Ed.] "This system of payment of interest and of compound interest by six monthly instalments will continue during the stipulated period as well as after that till redemption and payment of the entire amount."

Clause 2 is in these terms : -

"After five years at the end of Jeth 1320 Fasli in the fallow season I shall pay at a time and in a lump sum the entire principal, interest and compound interest and redeem the mortgaged property."

Clause 3 provides :-

That if interest for four six months be not paid in fall, or if at the stipulated period, i.e., after five years, I do not get the mortgaged property redeemed on payment of the entire amount of principal, interest and compound interest, then in both eases the mortgagee will have the option either to take possession of the mortgaged property in lieu of the principal for a period of twelve years commencing from the date of entering into possession or to let his interest and compound interest run as usual, in which case I shall not raise the objection to the effect that the mort. gagos did not take possession in order to let his interest accumulate—the mortgages having the option to shoose one of the two alternatives."

Clause 4 deals with mutation of names.

Clause 5 is in these terms :-

"The mortgages will remain in possession for twelve years from the date on which he takes possession of the mortgaged property and the mortgagor will not have the right of redemption during the period of twelve years."

Clause 6 stipulates for the appropriation of produce and profits in lieu of interest, and that during the period of possession neither the mortgages will have any claim to interest nor the mortgagor to profits, and there will be no assounting as to shortage or surplusage of profits at the time of redemption.

Clause 9 provides :-

"That on the expiry of twalve years at the end of Jeth, i.e., on Puranmashi in the fallow season I shall redeem the mortaged property on payment of prinsipal, interest and compound interest," and other specified payments.

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"Pending the payment of the entire demands due hereunder, the mortgages will as usual remain in presession and outpation of the mortgaged property in assordance with the above-mentioned conditions."

Interest fell into arrear, and at the stipulated time the mortgage money was not paid. Thereupon Suit No. 234 of 1913 was instituted by Raja Sath Swami Dayal, the mortgages, for possession of the mortgaged property under the terms of the mortgage. He was resisted by the mortgagor, who pleaded that he intended to redeem the

property.

On the 7th September 1914 the Sab. ordinate Judge decided in favour of the mortgages, who obtained possession on the 14th February 1915. An appeal was preferred by the mortgagor to the Court of the Judicial Commissioner of Oadb, but it was dismissed on the 19th February 1915, the Court at the same time deslaring that the decree would not affect any right of redemption exercised in the manner provided by law before the delivery of possession. On the 25th Fabruary 1915, the mortgagor applied for leave to appeal to His Majesty in Council, but his application was dismissed on the 26th April 1915, On the 18th June 1915, the mortgager instituted Suit No. 93 of 1915 for redemption. It was dismissed in the First Court on the 17th April 1916, and this was affirmed on the 19th June 1918, by the Appeal Court on the ground that the suit was premature. On the 23rd August 1918 the mortgagor applied to the Court of the Judicial Commissioner for leave to appeal to His Majenty in Counsil, but without sussess.

Finally, the mortgagor, on an application here, obtained special leave to appeal from the appellate decrees in both suits on the 30th May, 1919.

Many questions were raised in the Courts below which have now disappeared, and all that now remains to be determined is whether the present claim to redeem is premature. Mortgages of immoveable property are governed by the provisions contained in Chapter IV of the Transfer of Property Act, 1882. In section 58 four kinds of mortgage are described—a simple mortgage, a mortgage by conditional cale, and implementations of the provisions contained in Chapter IV of the Transfer of Property Act, 1882. In section 58 four kinds of mortgage are described—a simple mortgage, a mortgage by conditional cale, and implementations of the property act and an English

Mortgages," contemplates a mortgage that does not fall under any of the four descriptions contained in section 58, and is not a combination of a simple and an usufructuary mortgage or of a mortgage by conditional sale and an usufructuary mortgage. In the case of such a mortgage, the rights and liabilities of the parties are to be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

By section 60 of the Act it is provided that at any time after the principal money has become payable, the mortgagor has a right to redeom, and a suit to enforce it is called a suit for redemption.

The contest between the parties to this litigation turns upon whether the mort-gagor's right to radeem is suspended by the provision in the mortgage which purports to entitle the mortgages to remain in possession for twelve years from the date on which he took possession.

In the argument there has been considerable dissussion as to the estegory to which this mortgage belonge, and more especially as to whether or not it is an anomalous mortgage. But their Lordships do not think it necessary to pursue this enquiry, for, in the view they take, the rights and liabilities of the litigants must depend on the terms of the instrument as controlled by the Transfer of Property Act, for, even if it were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by section 60, and the provisions of the one sestion eannot be used to defeat those of another, unless it is impossible to effect resonsiliation between them. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfeetly valid if it did not also binder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under sestion 60 of the Transfer of Property Act, is the event on which the BBIRHARI SINGH C. JORHAM.

mortgager bad a right on payment of the mortgage-money to redeem.

The section is unqualified in its terms and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships, therefore, see no sufficient reason for withholding from the words of the section their full force and effect. In this view the mortgagor's right to redeem must be affirmed, and as both suits are now before the Board, there will be no difficulty in passing one decree in both so framed as to give due effect to this right.

Though the appellant has succeeded in these appeals, by his procedure and dilatoriness he must be held responsible for this protracted litigation, and the consequent wasted expense; and to mark their disapproval of his conduct, their Lordships will not interfere with the orders as to costs made by the lower Courts, nor will they allow him any costs of these appeals.

The decrees of the lower Courts should, therefore, be discharged except so far as they order payment of costs by the mort-

gagor.

There should then (in their L rlships opinion) be one preliminary deeree for redemption in both suits in accordance with Order XXXIV, rule 7 (f the Code of Civil Procedure, 1908. But in teking the accounts, the period during which mortgagee may have been in possession urder the decree in Suit No. 234 of 1913 should be excluded, for, though the provisions of the mortgage entitling the mortgages to possession cannot operate to defeat section 60 of the Transfer of Property Act, effect should be given to them so far as they provide that the mortgagee is to appropriate in lieu of interest all the produce Mal and Sewai and profits of the mortgaged villages after payment of the Government revenue. And sc, during this period, as in effect provided by the mortgage, neither will the mortgagee be accountable for profits nor the mortgagor for interest.

The decree should further provide that if payment is not made on the fixed day the mortgaged property should be sold.

Their Lordships will humbly advise His Majesty that the case ought to be remitted to the Court of the Judicial Commissioner of Oudh with directions to pass a decree

in accordance with the opinion expressed, There will be no order as to the costs of these appeals.

J. P. & N. H. Appeal allowed.
Solieitors for the Appellant,—Mesere,
Barrow, Rogers and Nevill.

Solicitors for the Respondent, -Mesers, T. L. Wilson & Co.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPRAL No. 1003 or 1920,
March 16, 1922.

Present - Mr. Justice Gakul Presed

Present: -Mr. Justice Gokul Prasad, BHIKHARI SINGH AND OTHERS— DEPENDANTS—APPELLANTS

versus

JOKHAN-PLAINTIFF-RESPONDENT.

Agra Tenancy Act (II of 190), ss. 79, 198— Jurisdiction, question of, not raised in First Court— High Court, whether point can be raised in—Appeal, second—Point of law, new, when can be allowed to be raised—Wrongful dispossession of tenant—No suit within six months, effect of.

Where a point as to jurisdiction that the suit is not cognizable by the Civil Court is not raised in the First Court, it cannot be allowed to be raised in the High Court, by reason of section 196 of the Tenancy Act. [p. 858, col. 1.]

A point of law, which does not require any questions of fact to be determined but can be decided on the record as it stands, can be allowed to be raised in second appeal. [p. 857, col. 2.]

The failure of a tenant to apply to recover possession of a holding from which he has been wrongfully ejected by the landholder within the period of six months allowed by the Tenancy Act bars not only his remedy but extinguishes his right also. [p. 857, col. 2.]

Second appeal from a decree of the District Judge, Allahabad, dated the 23rd April 1920, reversing that of the Additional Muneif.

Mesers. Baleshwari Prasad and Kamuda Frasad, for the Appellants.

Mr. Haribans Sahai, for the Respondent.

appeal arising out of a suit for possession.

The plaintiff is the occupancy tenant of certain plots and the defendants are Zemindars. The plaintiff suad on the allegation that there had been a dispute between him.

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and the defendants in respect of other tenancy holdings and ultimately defendant No. 1 obtained a desree for ejectment of the plaintiff from those plots, that after obtaining possession of those plots the defendant foreibly and without any right took possession of some of the plots in dispute, that the plaintiff filed a complaint in the Oriminal Court about his dispossession but the complaint was ultimately dismissed on the 10th of December 1918, that after the dismissal of this complaint the defendants improperly took possession of the remaining plots in dispute, that the defendants had in the criminal case relied upon a certain mortgage deed which was quite wrong, false, ineffectual and invalid, and that the defendants have no right to possession and have dispossessed the plaintiff through highhandedness. The plaintiff went on to say that the cause of action arose in the months of Kuar and Katik (September and Ostober) 1918, hence the present suit for possession and mesne profits.

This suit which was instituted on the 15th of September 1 119 was, on the face of it, barred by the provisions of Schedule IV, Group C. No. 30 of the Tenancy Act. No. defence of limitation was, however, raised by the defendants who contended that they had taken possession under the terms of a mortgage executed by Hannman, the father of the plaintiff, as interest had not been paid and that they did not take wrongful poseession but entered into possession with the

plaintiff's consent.

The Trial Court dismissed the suit, but the lower Appellate Court has decreed it.

The defendants some here in second appeal and the point raised by them was that the snit was not cognisable by the Civil Court. I cannot entertain this ground of appeal, because the question of jurisdistion was not raised in the First Court (vide section 196 of the Tenancy Act).

The ground of limitation was, however, urged with my permission. The principle which has been accepted in this Court in allowing questions of law to be raised for the first time in second appeal is, that a point of law which does not require any questions of fact to be determined but can be decided on the record as it stands such a question of law may be allowed to be raised in second appeal and not otherwise. (See in this

connection Kanahai Lal v. Suraj Kunwar (1).]

A large number of authorities were sited and reference was made to the Privy Council sase of Raghunath Das v. Sundar Das Khetri (2) on behalf of the respondent to support his contention that I could not allow this contention to be raised. As to the Privy Council case, all that I need say is that it has no application just as the others have none. In the Privy Council case their Lordships refused to allow the question be raised for the first time in appeal, because it would have made further enquiry nessessary before the sould be decided. In the present case in order to deside the question of limitation no further enquiries or findings are required. On the sause of action, as stated in the plaint itself, the point of limitation has been argued and can be decided. It has not been suggested by the learned Vakil of the respondent that any further fasts have to be found before this question can be determined. There is no doubt that, having regard to the course of rulings in this Court commencing from the case of Dalip Rai v. Deoki Rai (3) up to the case of Balbhaddar Chaubey v. Eonaroo Rai (4). it has been uniformly desided that the failure of a tenant to apply to recover possession of a holding from which he has been wrongfully ejacted by the landholder within the period of six months allowed by the Tenancy Act bars not only his remedy but extinguishes his rights also. In the present case the plaintiff, the occupancy tenant, somes to Court on the allegation that be has been wrongfully dispossessed by the defendants (his Zemindars) under the guise of invalid mortgage said to have been executed by his (the plaintiff's) father. This was certainly not dispossession in accordance with law. Such dispossession was wrongful and, as such, the plaintiff tenant ought to have sued for recovery of possession within six months of his dispossession under the special period of limitation provided by the old Rent

(1) 21 A. 446; A. W. N. (1839), 164; 9 Ind. Dec. (N. s) 992.

(8) 21 A. 204; A. W. N. (1693) 86; 9 Ind. Dec.

(N. B.) 840.

^{(2) 24} Ind. Cas. 804; 18 C. W. N. 1038; 1 L. W. 567; 27 M. L J. 150; 16 M. L. T. 851; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154, 42 C. 72; 41 I. A. 251 (P. O.).

^{. (4) -27} Ind. Cas. 914; 18 A. L. J. 195.

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Ast and the present Tenancy Aet. He baving failed to do so, his right to possession has ceased to exist. He is not suing to redeem the mortgage executed by his father and, therefore, the case of Abhilakh Dhelphora v. Liladhar Dhalphora (5), does not apply. The mere fact that if the question of juris. distion is not raised in the First Court the Appellate Court is to decide the suit as if it had been brought in the right Court does not in any way warrant the correlusion that limitation to be applied to that suit is not the one which would have applied if the suit had been brought in the right Court but that some other rule of limitation is to be applied. This would appear from the provision that if the Appellate Court has not all the materials before it, it might direct a remand to the Court in which the suit ought to have been brought.

In my opinion the suit was barred by six months rule of limitation and, as sueb, should have been dismissed.

I allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs in all Courts, inelading in this Court-fees on the higher seale.

J. P.

Appeal allowed.

(b) 45 Ind, Cas. 549.

MADRAS HIGH COURT. SECOND CIVIL APPEAL No. 1465 or 1920. November 15, 1921. Tresent :- Mr. Justice Krishnan and Mr. Justice Odgere. KRISHNAN PATTER AND ANOTHER-DEPENDANTS-APPELLANTS

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LAKSHMI alias AMMU AMMAL AND OTHERS - PLAINTIFFS - RESPONDENTS.

Benami purchase, constituents of-Trusts Act (II of 1882), ss. 5, 6, 7-Minor, whether can create valid trust - Constructive trustee - Express trustee - Limitation Act (IX of 1908), s. 10, applicability of, to constructive trustee-Appeal-Plea, new.

Where a property is purchased with plaintiff's money, but the sale-deed taken is in the name of the defendant in which there is a recital that the purchase is on behalf of the plaintiff, it is a case of an ordinary benami transaction, and the trust created is a constructive and not an express one. [p. 859, col. 2.]

To constitute a benami purchase, it is not neces. sary that there should be any thing secret about it, and, unless it is intended for a fraudulent purpose, there is no reason why the deed evidencing the transaction, should not disclose the nature of the transaction. [p. 859, col 2; p. 860, col. 1.]

A minor cannot create a valid trust under section

7 of the Trusts Act. [p. 800, col 1.]

A constructive trustee is bound to account for profits under section 95 of the Trusts Act and the fact of his doing so would not make him an express trustee. [p. 860, col. 2.]

Section 10 of the Limitation Act refers only to express trustees, and would not cover the case of a

constructive trustee. [p. 860, col. 2.]

A plea which is not set up in the pleadings by the plaintiff, and in respect of which there is no issue, nor any reference thereto in the First Court, and to allow which would require a fresh trial or the facts, ought not to be allowed to be raised in the Appellate Court for the first time. [p. 860, col. 1.]

Second appeal against a decree of the District Court, South Malabar, in Appeal Suit No. 407 of 1918, preferred against the deeree of the Court of the Subordinate Judge, Palghat, in Original Suit No. 79 of 1916.

FACTS appear from the judgment.

Mr. O. V. Ananthakrishna Aiyer, for the Appellants —The lower Appellate Court erred in holding that the plaintiff's suit was not barred by time. The sale-deed, Exhibit I, does not ereate an express trust in favour of the plaintiff. It is only in the nature of a benami ecoveyance. The venders could not be deemed to have created any trust in favour of the plaintiff, nor are there words in the sale deed terding to show that defendants accepted any trust. They are only in the position of constructive trustees. Even if trust was intended, it is invalid as one of the vendors is a minor.

The District Judge is wrong in applying the principles of the law of agency to save limitation. This aspect of the case was not suggested in the lower Court. Even if there was an agency, it terminated long before suit.

Mesere, T. R. Vencutarama Saitri and C. V. Makadeva Aiyar, for the Respondents .-The defendants were collecting the profits of the land and paying them over to the plaintiff. That put them in the position of trustees with a liability to account. Though they were not made express trustees at the execution of Exhibit I, they became such by having assumed that position and

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of 12 years. In England persons in certain defined fiduciary relations were held incapable of pleading the limitation bar. In Foar v. Ashwell (1), a Solicitor who held trust moneys in his hands was held to be an express trustee. See also Rochefoucauld v. Bousteal (2), Burdick v. Garrick (3),

Lyell v. Kennedy (4).

JUDGMENT.—This second appeal arises from a suit brought by the plaintiff to recover certain lands with mesne profits for 15 years. No objection was raised by the defendants to the plaintiff's claim for the lands, and they have been decreed to her and there is no appeal about them. But as regards the profits, defendants denied their liability and pleaded limitation. To avoid the plea of limitation plaintiff's case was that defendants Nos. I and 2 were holding the lands and collecting the profits as her trustees and she relied on section 10 of the Limitation Act.

The Subordinate Judge who tried the ease held that no express trust was made ont, that defendants were only constructive tructses, and that three years' limitation was applicable to the elaim for profits, apparently, under Article 109. He further held that, as pleaded by the second defendant, the profits for the last 9 years had been accounted for to the plaintiff and dismissed her elaim in toto for past profits. The Distrist Judge reversed that decree, holding that an express trust was made out, and that section 10 applied and that, evan if it did not, the defendants were plaintiff's agents in law, and under Article 19 the plaintiff's claim was in time as the demand for accounts was only made just He gave a decree as prior to the suit. sued for, without passing a preliminary desree for ascounts under Order XX, rule 16, Civil Procedure Code, and without taking any notice of the plea that the profits had been assounted for. Defendants Ncs. 1 and 2 have appealed to us.

The first question for decision is whether an express trust is made out or not, as it is material to decide it in considering the application of section 16 The only facts from which we are asked to find an express trust are these. The plaint lands were purshased with plaintiff's money and in the sale-deed taken by defendants Nos, 1 and 2 in their own names there is a recital that the purchase was on behalf of the plaintiff. Defendants were receiving the rant of the lands subsequently and it is the second defendant's case that he gave eredit to the plaint. iff for them in the accounts. From these fasts it is difficult to infer the existence of an express trust or of anything other than a constructive truct. To create a trust with reference to immoveable property, the Indian Trusts Act, II of 1882, which applies to this case, requires a registered instrument signed by the author of the trust or the trustee where no question of a Will or of fraud arises, and there must be a clear indication of an intention to ereate a trust; see sections 5 and 6 of the Ast. The only registered instrument we have in the case is Erbibit I, the sale-deed. It is signed only by the vandors and cannot, therefore, be used to support a case of express trust by declaration by defend. ants Nos. 1 and 2, nor can it be relied on to show that the vendors created the trust. as was argued before us, because there is nothing to show that they intended to ereste any trust. The words in Exhibit I do not support any such contention, In fact, after reciting that the purchase was on behalf of the plaintiff, Exhibit I goes on to say that the lands should be enjoyed by the plaintiff and her heirs; it says no. thing about defendants managing the lands and paying over the profits to the plaintiff. It is extremely improbable that strangers like the vendors under Exhibit I would intend to create any trust for plaintiff. Though, no doubt, it is possible to take a conveyance in the form of a deed of trust. there is nothing to show that that was done here. Exhibit I is an ordinary deed of benami purchase which resites its benami character. To constitute a beaumi purchase it is not necessary, as the District Judge thinks, that there should be anything searet about it; and, unless it is intended for a fraudalent purpose, there is no reason why

^{(1) (1893, 2} Q. B. 390; 4 R. 602; 69 L, T. 595; 43 W. R. 165.

^{(2) (1897) 1} Ch. D. 193; 66 L. J. Ch. 74; 75 L. T. 502; 45 W. R. 272.

^{(8) (1870) 5} Ch. 238; 89 I, J. Ch. 863; 18 W. R. 387. (4) (1890) 14 A. C. 437; 5) L. J. Q. B. 269; 62 L. T. 77; 88 W. R. 353.

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the deed should not disclose the character of the transaction.

There is a further difficulty in holding that Exhibit I amounts to a trust created by the vendors, as one of them is a minor who cannot create a valid trust under section 7 of the Act.

It was next argued by the plaintiff's Vakil that, even if the defendants Nos. 1 and 2 were not made express trustees at the outset, they must be held to have become such, because they acted as trustees for over 12 years and they cannot be heard to aver the contrary. It is difficult to see how any question of adverse possession or estoppel arises. A sufficient answer to the argument is that the defendants at no time did anything to change their legal position with reference to these lands. As constructive trustees they would be bound to assount for the profits under section 95 of the Act, and their doing so cannot make them express trustees; and they did nothing else.

The learned Vakil for the plaintiff eited some English eases Soar v. Ashwell (1), Rechefouciuld v. Poustead (2), Burdic's v. Garrick (3) and Lyell v. Kennely (4) as showing that the term "express trustee" in English Law included not only persons expressly appointed trustees but also persons standing in various fiduciary relations who were incapable of pleading limitation. In the first case cited, a Solicitor acting for the trustres and holding trust moneys in his hands was held to be in the position of an express trustee and he was not allowed to plead limitation. Lord Justice Bowen enumerates the cases where such extension of the term 'express trustes' has been made in England but the defendants here fall under none of these categories. It is doubtful how far such extensions can be considered to be cases of express trustees in this country. for, as remarked by the learned Chief Justice in Raja Rajeswara Dorai v. Ponnusam: Tevar (5), the Indian Trusts Ast, which governs us. restricts the scope of the term 'trustee' more closely than in England and considers ecnstructive and resulting trusts as not trusts but as obligations in the nature of truste, See Chapter IX.

(5) 6! Ind. Cas. 907; 44 M. 277; 13 L. W. 56; 40 M. L. J. 52; (1921) M. W. N, 37; 29 M. L. T. 101.

The case in Rochefoucauld v. Boustead (2) eited above was the case of an express trust ereated by certain letters and it was held that it satisfied the Statute of Frauds but that, even if it were otherwise, parol evidence could be allowed to make up the deficiency in proof in spite of section 7 of the Statute, on the ground that the Statute should not be allowed to be used to perpetuate a fraud, the defendant there elaiming the property himself as his own. No such care arises here, and the two other English cases cited are equally beside the point here. The case of Bhurabhai v. Bai Rukmani (6) refers to a sum of money, to create a trust with reference to which a registered instrument was not nessassary. It is thus distinguishable from the present case and it is unnecessary for us to consider whether we should follow it or not.

For the above reasons it seems to us that the contention that there was an express trust in this case must be rejected. This case is one of a constructive trust or of an obligation in the nature of a trust as the Trusts Ast calls it, falling under Chapter IX. Now, restion 10 of the Limitation Act has never been held to apply to such cases. It is true that in section 10, the term "express trustee" is not used in the section itself but only in the marginal note, but the language of the section, referring as it does to "persons in whom property has become vested in trust for any specific purpose', is explicit enough to show that it refers only to express trusteer, It is not contended before us that it would cover the case of a constructive trustee. The plea that section 10 saves limitation in the present case must, therefore, be rejected.

The District Judge has also held that the case of express trust failing, the parties may be looked upon as holding the position of principal and agent, and Article 89 may be applied, in which case he thinks the suit is in time, because the account was demanded and refused only shortly before suit. He overlooks the fast that there is another starting point for limitation under the Act, cis, the termination of the agency, and it has been argued before us that, if there was any agency created in the case it was terminated long prior to the suit and the claim for profits would be barred

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under that Article and that the deferdants were not able to show it because no plea of agency was set up in the case. It is clear from the pleadings that no such case was set up by the plaintiff; there was no issue about it and there was no reference to it in the First Court. In these circumstances the question of agency should not have been allowed to be raised in the Appellate Court for the first time. To allow it now will require a fresh trial on facts, and we are, therefore, of opinion that the plea should be excluded from consideration.

In the result we must hold that the bar by limitation is a proper plea in the case with regard to the profits claimed. It is not necessary to decide whether the three years' rule or the 6 years' rule applies to it, as in either case the plaintiff fails, as the finding by the Subordinate Judge that profits for the last 9 years have been accounted for has not been displaced by the District Judge and we have not been addressed any argument about it.

In the result, the decree of the lower Appellate Court must be reversed and the decree of the first Court restored with appellant's costs here and in the Court below to be reid by the plaintiff

be paid by the plaintiff.

M. C. P. W. C. A. & N. H.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 163 of 1919.

February 1,1922.

Present:—Mr. Justice Das and

Mr. Justice Adami.

JAGAT MOHAN NATH SAHI DEO—

PLAIKTIFF—APPELLANT

KALIPADA GHOSH - DEFENDANT -- RESPONDENT.

Damages—Defamatory statement by Vakil in course of argument, whether actionable—No statutory provision—Judges, duty of.

An action for damages cannot be maintained against a Vakil for defamatory statements uttered by him in the course of the administration of law. [p. 862, col. 2.]

In all cases for which no specific statutory directions are given, Judges are bound to act according to justice, equity and good conscience. [p. 8t3, col. 1.]

Appeal against a decision of the District

Judge, Ranchi.

Messre, Yunus, Farmeshwar Diyal, A. P. Upadhya and Murari Frasad, for the Appellant.

Mr. Baikuntha Nath Mitter, for the Re-

JUDGMENT.

pellant for recovery of 1,00,000 as damages from the respondent. The learned District Judge without going into the evidence has dismissed the suit on the ground that the plaint disclosed no cause of action. We must, accordingly, assume for the purpose of our decision that the allegations made in the plaint are correct. The question which we have to determine is that, assuming that the allegations in the plaint are correct, whether the plaintiff is entitled to recover damages for defamation as against the defendant.

The defendant is a Vakil practising in the District Court of Ranchi, The plaintiff alleges that, owing to some report made by him to the Mabaraj of Chota Nagpur whose Vakil the defendant is, the defendant began to act against the interest of the plaintiff. He further alleges that he was examined as a witness in a certain action brought by Messrs. Sarkar, Barnard & Co., against the plaintiff's wives, and that in the course of his argument on behalf of the plaintiff in that case, the present defendant, who appeared as the Vakil on behalf of Mesers. Sarkar, Barnard & Co., "used very abusive language against the plaintiff and described him as a liar and swindler, without any justification and out of sheer personal grudge and malice against him with the malicious intent of lowering the plaintiff in estimation of the public." These are the allegations of the plaintiff and we have to determine whether on these allegations the plaintiff is entitled to slaim any damages from the defendant.

The leading case in England is Munster v. Lamb (1). In that case it was admitted on

(1) (1888) 11 Q. B. D. 588; 52 L. J. Q. B. 726; 49. L. T. 252; 82 W. B. 248; 47 J. P. 805.

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behalf of the plaintiff that so long as an Advocate acted bona fide and said what is relevant, owing to the privileged occasion, defamatory statements made by him did not amount to libel or slander, although that would have beer actionable if they had not been made whilet he was discharging his duty as an Advosate. But it was contended that an Advocate cannot claim the benefit of his privilege unless he acts bona tide, that is, for the purpose of doing his duty as an Advocate, and unless what he says is relevant. Precisely the same argument was advanced before us by Mr. Yunus who has argued the appeal on behalf of the appellant. Brett, M. R., after discussing the cases which establish that an action would not lie either against Judges or witnesses, although they speak maliciously and without reasonable

or probable cause, said as follows :-'If upon the grounds of public policy and free administration of the law the privilege be extended to Judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the berefit of administration of the law that Counsel also should have an entirely free mird? Of the three classes-Judge, witness and Counsel-it seems to me that a Counsel has a special reed to have his mind clear from all anxiety. A Counsel's position is ore of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which be desires for his elient. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he east is relevant or irrelevant. he would have his mird so embarrassed that he could not do the duty which he is called upon to perform. For, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a Counsel even more than a Judge To my mind it is illogical to or a witness. argue that the protection of privilege ought

and maliciously slanders another person. The reason of the rule is that a Counsel, who is not malicious and who is acting bona nde, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of Counsel might be norighteously harassod with suits, and, therefore, it is better to make the rule of law so large that an innocent Counsel shall never be troubled, although by making it so large Counsel are included who have been guilty of malice and missonduct;"

and then the learned Judge laid down the law as follows:-

"With regard to Counsel, the questions of maliee, bona fides and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a Counsel must be stopped at once."

It is admitted in this case that the words complained of were uttered by the defendant in the course of the administration of law. That being so, the action could not be maintained against the defendant, if the question as between the plaintiff and defendant arose in England.

But it has been urged by Mr. Yuous that the rules of English Common Law are not applicable in this country and that we are bound in the administration of the law in this country by the rules formulated by the Indian Penal Code. To this argument a conslusive answer has been given by the Full Bench of the Calentta High Court in the case of Satis Chandra Chakrabarti v. Ram Dayal De (2). Mockerjee, C. J., delivering the judgment of the Full Bench said as follows:—

"It is necessary to emphasize that in this country, questions of civil liability for damages for defamation and questions of liability to criminal prosecution for defamation do not, for purpose of adjudication, stand on the same basis; as regards the former, we have no codified law; as regards the latter, the relevant provisions are embodied in the Indian Penal Code."

That learned and distinguished Judge then pointed out that in all eases for which

(2) 59 Ind, Cas. 143; 24 C. W. N. 932; 33 C. L. J. 21; 22 Cr. L. J. 31; 49 C. 383 (S. B.).

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no epseife statutory directions are given, Judges are bound to act assording to justise, equity and good conscience, and that there is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applieable in such sireumstances should be identisal with the sorresponding relevant rules of the Common Law of England. Mr. Baikunth Nath Mitter, who appeared on behalf of the respondent, has convinced us by his very able and lucid arguments that the principles embodied in Munster v. Lumb (1) are equally applicable to this country and that to depart from the rule enunciated in England would be to affest the administration of justice in this country. The decision of the Madras Fall Bench in the ease of Sullivan v. Norton (3) completely supports the arguments of Mr. Baikuntha Nath Mitter.

I have considered all the decisions on the point, and I am not prepared to differ from the decision of the Madras High Court in the case to which I have referred. In my opinion, the view taken by the learned District Judge is right and ought to be affirmed. I would dismiss this appeal with costs.

ADAMI, J .- I agree.

J. P.

Appeal dismissed.

(8) 10 M. 28; 3 Ind. Dec. (N. s.) 770.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER No. 143 of 1921.
March 16, 1922.

Freient: - Mr. Justice Walsh and Mr. Justice Ryves.

MISRI LAL-PLAINTIFF-APPELLANT

Pandit KANHAIA LAL SHARMA

- OPPOSITE PARTY—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 4—
Receiver—Sale of property in possession of third persons

—Question of title—Insolvency Court, power of, to
decide—Decision, final.

When a Receiver has reason to believe that property in the possession of third persons is the property of the insolvent, he may treat it as such and attach it or put it up for sale. When

the person who alleges that the property is his and not the insolvent's, objects and wishes to assert his title, he may appeal to the Insolvency Court against the act of the Receiver, but he is not obliged to do so although it is the most effective remedy, at any rate the most expeditious means of preventing a sale. He may, if he likes, sue the Receiver as a trespasser. [p. 852, col. 2.]

Where an Insolvency Court decides a question of title its decision is final and binding between the person asserting it and the insolvent's estate but the Court should not decide such a question without hearing the claimant on the merics. (p. 863,

col. 2; p. 854, col. 1.]

First appeal from the order of the let Additional Judge, Aligrab, dated the 29th of April 1921.

Mr. G. Agaruala, for the Appellant. Mr. Panna Lal, for the Respondent.

JUDGMENT .- It is quite slear that in this case the learned Judge has overstepped the mark. When the Reseiver has reason to believe that property in the possession of third persons is the property of the insolvent, he may treat it as such and attach it or put it up for sale. When the person who alleges that the property is his and not the insolvent's, objects and wishes to assert his title, be may appeal to the Insolvency Court against the act of the Receiver, but he is not obliged to do so although it is the most effective remedy, at any rate the most expeditions means of preventing a sale. He may, if he liker, sue the Reseiver as a trespasser. If my property is seized by a public official like an Official Receiver and I have a clear case to establish my title, there is no reason why I should not seek redress in the ordinary course. On the other hand, I might prefer and I should probably prefer to apply in the Insolveney Court against the act of the Receiver. If I do so, I myself raise before the Insolveney Court the question of the title of my property. If I have no title, I have no case and by section 4 of the new Provincial Insolveney Act, V of 1920, the Insolvency Ocurt is given full power to deside all questions of title. It has always been considered that if a person complains of the act of the Reseiver and asserts a title and goes to the insolvency Court to redress his grievance, he cannot afterwards turn round and litigate the matter afresh in a Civil Court, and sub-section 2 of section 4 elearly provides that every such decision, that is to say, a desision of a question of title by the lusel. vency Court shall be final and binding both MISBI LAL U. KANHAIA LAL SHARMA.

as between the person asserting it and the insolvent's estate.

There is a provision in sub section 3 of section 4 which has been relied upon by the respondent, in this instance the Official Receiver, which we will refer to in passing. It is not necessary that we should commit ourselves to final opinion as to the scope and meaning of that section, but two things are elear, that is to say, if an Insolveney Court finds, for example, that serious and difficult questions of mortgages or other securities arise over the debtor's property which it does not deem expedient or necessary to decide itself, but prefers to leave to the contending ereditors to fight out in an ordinary Civil Court, it may, if it has reason to believe that notwithstanding such securities the debtor has an interest, forthwith direct the sale of such interest which would not affect the right of the sontending creditors; and secondly, if the Court decides to exercise its jurisdiction under sub section 3, it ought to make it clear beyond question that it is doing so and the reasons for the course it is taking. We are quite satisfied in this case that sub-section 3 of section 4 never entered into the learned Judge's contemplation when he disposed of this case. The question really is, and it has been fairly pressed upon us by Mr. Panna Lal on behalf of the Official Receiver, whether the learned Judge did decide and did purport to decide what was in substance a question of title which if it stood would be binding upon the present appellant. We are quite satisfied that he It is true that the matter came did. before him by way of application an in objection to the Official Receiver's that did not he conduct, and possibly realise that that was the only and the proper way in which a question of title by anybody outside the insolveney could be raised, but when you come to look at the application and the answer which was before him and the language of the judgment, it is quite elear what the Judge meant to do. The applicant in his petition complained that he was the purchaser of the property in question, that he had been in possession and occupation, and that the effect of the Receiver's proceeding was to deprive the petitioner of his property without any cause. The late Kanhaiya Lal, who was then Bessiver, objected in the Insolvency Court

that the petitioner had no case and asked that the Court would prevent him from taking possession. When he said that the petitioner had no sage, he meant that the petitioner had no title. The learned Judge was made aware at the bearing that there had been a good deal of legal proceedings which for the moment are irrelevant. He was disposed to think that the result of them brought into play section 11 of the the Civil Procedure Code, and that the petitioner's claim to his property was barred by that section. He was not, however, prepared to decide that as a matter of law, and we are inclined to think that as a matter of law it would require eareful consideration. He, therefore, passed it by, and went on to examine the petitioner's case as a matter of fast. He pointed out that presumably from the evidence and records of previous litigations, which were before him, the question had been fought out more than once to the bitter end and that the High Court itself had been pestered with similar cases. He then went on to say that if the present objector went over the old ground which had failed before, he had no prospect of success, while if he produced new evidence he could not expect it to be believed, and that, therefore, there was no cause for refraining from putting the property to sale. In plain English this means, and we have no doubt that the learned Judge would agree with this, that the case was such a hopeless one, that it must fail and that the petitioner could never hope to make out a title. But it would be impossible to say that it was not a decision on the question of title if the matter was legally before the Judge in such form as he could decide. We think it undoubtedly was and that he has decided it without realising it, but has decided it adversely to the elaimant without hearing him on the merits, being satisfied that it would be an idle eeremony to bear what his ease consisted of. This is more than any Court can do, however reasonable it may appear in the special circumstances of the ease. The ease must go back to the learned Judge to hear the evidence and to deside it on the merits after hearing the appellant and such evidence as the Official Receiver is able The learned Judge will, of to produce. course, in hearing the case on the merits, dismiss from his mind any presonesived notions he may have formed as to the probabilities of success, but, on the other

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hand, he is entitled to take into ascount, independently altogether of any question noder sestion 11 of the Code, as to which we express no opinion except one of doubt, the result of previous proseedings and the evidence tendered thereon. It must be elearly understood that we definitely hold that the learned Judge being vested with jurisdiction in insolvency or the learned Judge who at present sits in that Court, whoever he may be, is the proper person to hear this application, and there must be no application for transfer of the proceedings from the learned Judge who disposed of this matter if it is the same Judge. Any application for transfer made to this Court must be laid before this Banch. The learned Judge will, of source, keep his mind clear as to the difference between the party now sning and the parties, whoever they may have been, in the previous prossedings to which he refers. Costs of these proceedings and of the previous proceedings will abide the evant.

Order accordingly.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 234 or 1921.
November 29, 1921.
Present:—Sir Norman Masleod, Kr.,
Chief Justice, and Mr. Justice Shab.
Bal ADHAR—Plaintiff.—

APPELLANT

LALBHAI HIRACHAND -

RESPONDENT.

Evidence Act (I of 1872), s. 92—Sale-deed—Oral'
evidence, admissibility of, to prove variation of terms
of deed.

Oral evidence to prove variations in the terms of a sale-deed is inadmissible, unless such evidence comes within any of the provises to section 93 of the Evidence Act.

Second appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 203 of 1940, confirming the decree passed by the Joint Sabardinate Judge at Ahmedabadi in Civil Sait No. 1003 of 1919.

Mr. H. V. Divatia, for the Respondent.

JUDGMENT.

Macseon, C. J .- The plaintiff sael to obtain a deslaration and assounts with res. post to the plaint house in the city of Ahmedabad. It belonged to her step brother Trikamlal. He mortgaged the property to the defendant on the 11th February 1912 and sold it to the defendant on the 12th Ostobar 1916, the consideration being Rs. 1,031. The plaintiff alleged that there was an arrangement that the property should be reconveyed to Trikamial or his beirs their re-paying the total advances reseived. free from the burden of the alleged sale. The plaintiff, therefore, wished to prova anoral agreement to resonvey on taking so assount. It is admitted that the evidence which was sought to be adduced to prove this does not come within any of the provisos of section 92 of the Indian Evidence Act. But a most extraordinary argument been urged before us based on the evidence which cannot be called. It is first assumed that there was this arrangement, and then we are asked to believe that there must have been a representation made by the defendant to Trikamial that the dosument was never to be enforced as a sale. deed but was to be treated as a mortgage, That is not an argument which appeals to me, being contrary to the cases decided by this Court. There may be eases in which parties may succeed in getting the Court to agree that the evidence which is tendered may some whithin one of the provisos by implication, and the ease relied upon by the appellant | Krishna Bai v. Rama (1)] may be one of those. But this is certainly not one of those eases which can possibly, be brought within any of the provisos. The dosument in suit is a plain sale deed and it is attempted to prove by an oral, agreement to reconvey and take the assounts. that it is something different: I think that the appeal must be dismissed with essis.

SHAH, J.—I agree. I desire to add that on the allegations in the plaint I am satisfied that the view taken by the lower Courts as to the inadmissibility of the oral evidence to prove the alleged variation of the terms of the sale deed is right. Apart from any of the decided excess bearing on this

(1) 8 Bom L. B 784.

BBIAM BABAN C. BAFA: BI DAS.

point, it seems to me clear on these allegations that the case cannot be brought within any of the provisos to section 92 of the Indian Evidence Act. The decument in question is in terms a sale-deed, and no svidence to vary the terms of the deed can be admitted unless the case can be brought within any of the provisos. It is not easy to reconcile all the decisions of this Court on the point. But it seems to me that each eace has to be decided with reference to the facts and pleadings of that case, and that there is no real confliet of any principle, though it may not be always easy to apply it in an apparently consistent manner.

W C A.

Arreal dismissed.

ALLAHABAD HIGH COURT.

FIRST AFFRAL FROM ORDER

No. 66 CF 1921.

March 3, 1922.

Fresent:—Mr. Justice Piggott and
Mr. Justice Walsh.

SHIAM SARAN—PLAINTIFF—APPELLANT

BANARSI DAS AND OTHERS-DEFENDANTS
-RESPONDENTS.

Mortgage - Integrity broken by mortgagee - Part redemption - Appeal - Appellate Court - Findings of fact arrived at - Court, duty of.

Where a mortgagee acquires himself a portion of the equity of redemption, the integrity of the mortgage is broken, and a mortgager of a part owner of the remaining equity of redemption is entitled to redeem just as much of the equity of redemption as does not belong to the mortgagees themselves on payment of a proportionate share of the mortgagedebt. [p. 867, ccl. 1]

An Appellate Court, having found all the facts, should work out their legal consequences itself and uphold or amend the decree of the Trial Court according to the findings arrived at by it and should not send the case back to the Trial Court for the preparation of a new decree on the basis of its findings of fact. [p 867, col. 1.]

First appeal from an order of the District Judge, Moradabad, dated the 4th March 1921. The Hon'ble Mr. S. Raza Ali, for the Appel.

Mr. Saila Nath Muker;i, for the Respondent. JUDGMENT,-The suit out of which this appeal arises was for the redemption of a mortgage of the 7th of July 1891, the debt secured by which amounted to Rs. 1,357.4 0. The plaintiff admitted that the integrity of the mortgage had been broken up and that the first three defendants, impleaded as the heirs of the original mortgagee, have acquired one half of the equity of redemption. He asserted himself to be the owner of 7/8the of the remaining half share in the equity of redemption and sued to redeem the mortgage in respect of the said half share, that is to say, so much of the mortgage as affected property of which the mortgagee had not become the owner. He impleaded in the array of defandants all paraons sculd possibly be regarded as having a claim to any share in the equity of redemption along with himself. The majority of the defendants so impleaded supported the plaintiff's elaim and asked that his suit might be decreed as brought.

One defendant, by name Ehsan Beg, who was admitted by the plaintiff to be the owner of the remaining \(\frac{1}{8} \)th of the unredeemed half share in the mortgage, asked the Court to add him to the array of plaintiffs and to enable him to redeem in this very same suit his own \(\frac{1}{8} \)th share. The Trial Court refused to do this and Ehsan Beg has acquiesced in the decision against him. The Court of first instance gave the plaintiff a decree for redemption of one-half of the property originally mortgaged on payment of one half of the mortgaged debt, that is to say, Bs. 678 10 0.

The three defendants who were impleaded as heirs of the original mortgages appealed to the Court of the District Judge, along with another defendant who claimed to have acquired by purchase from some of the heirs of the original mortgagor a portion of the equity of redemption in the share scught to be redeemed.

The learned District Judge has set forth at some length the complicated series of transactions antecedent to the present suit. He has, however, arrived at no finding as to the legal effect of the facts found by him on the position of the parties. He has assumed that the legal effect must be something

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inconsistent with the decree passed by the Trial Court, though he does not say exactly in what respect that decree will require to be modified. He sets the decree aside and sends the case back to the Trial Court for the preparation of a new decree on the basis of the findings of fast which he has himself recorded. This was not a proper order for the lower Appellate Court to have passed. The learned District Judge, having found all the fasts, was perfectly competent to work out their legal consequeness himself and, if he came to the conclusion that the decree of the Trial Court required amendment, he should have amended it and brought the litigation to a close so far as his Court was concerned. respeat also the learned another In He District Judge is in error. 888 m8 that the plaintiff sould agaums not possibly redsem any portion of the mort. gaged property in respect of which he had not himself personally asquired the equity of redemption. No doubt the integrity of the mortgage has been broken up by reason of the fact that the mortgages has acquired at least one half of the equity of redemption. It is equally clear, on the findings of the learned District Judge himself, that the plaintiff has asquired at least some part of the equity of redemption in the remaining half share. He is entitled on the strength of his position as part owner of the mortgaged property to redeem just as much of it as does not belong to the mortgages themselves, and he is entitled to do so on payment of a proportionate share of the mortgage-debt. As a matter of fact, his elaim to redeem was supported by most of the defendants who might have set up an interest in the mortgaged property, and the defendant Ehsan Beg has acquiessed in the desree of the Trial Court, the effect of which would be to put the plaintiff in possession of the share of which Ehean Beg is the owner until such time as Ehsan Beg redeems his share by payment to the plaintiff of a proportionate amount of the mortgage debt. There is no objection whatever to this, and so far as this point goes, the decree of the Trial Court seems to have been correct.

The real question upon which the parties are at issue is, whether the mortgagees are the owners of one half only of the property originally mortgaged, or of one half plus

7/64ths of the other half share, that is to say. of 71/123ths in all. On this point the findings of the lower Appellate Court are slear enough, The mortgagee, Banarsi Day, held simple money decrees against various descendants of the original mortgagor. In execution of these decrees he attached and brought to sale various fractions of the equity of redemption in the property with which we are now concerned. In the year 1908 he attached, as the property of one Munawar Beg, a share of 7/64ths in the property in question, brought it to sale and purchased it himself. Later, in the same year, he attached and brought to sale a 2-/6 th share, of which 14/64th was specified as the property of Munawar Beg, and, having got it advertised for sale, it was purchased by the defendant, Ghazanfar Ali, who has since transferred his rights to the plaintiffe.

The District Judge's argument is that Manawar Beg never owned more than 14/34:hs in all in the property in suit; that, inasmuch as 7/6 the belonging to him had been brought to sale and purchased by Banarsi Das, he had only 7/64ths left, and, therefore, Ghazanfar Ali at austion purchase took 21/04ths and 28/64ths. If the contention of the mortgagees is correct, the only result would be that we should have to modify the deeree of the Trial Court by reducing the share sought to be redeemed by plaintiff and also the amount of mortgage-money to be paid by the plaintiff proportionately; that is to say, to the extent of 7/6 the in each case. We think, however, that on this point the Trial Court was substantially right and the learned District Judge wrong, Das, having himself attached and brought to sale the entire share of 14/64ths as the property of Munawar Beg and baving profited by the price bid at the auction by Ghazanfar Ali, inasmuch as the money realised by the auction sale was applied in satisfaction of Banarsi Das's own decree, he is not entitled to plead that Munawar Beg but he himself was, at the date of Ghazanfar Ali's austion purchase, the owner of 7/64ths out of the aforesaid 14/64ths.

In our opinion, therefore, the decree of the Trial Court was correct and did not require any amendment on the part of the

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lower Appellate Court. We set aside the order under appeal and substitute for it an order dismissing the appeal to the Court below and affirming the decree of the Court of first instance. The plaintiff is eptitled to his costs in this and the lower Appellate Court.

J. P.

Appeal allowed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 200 of 1921.
December 2, 1921.

Present: -Sir Norman Maeleod, Kt.,
Ohief Justice, and Mr. Justice Shah.
VENKATESH DAMODAR MOKASHI—
PLAINT: FF—APPELLANT

versus

MALLAPPA BHIMAPPA CHIKKALKI — DEFENDANT—RESPONDENT.

Sale, agreement for—Purchase money, payment of— Vendee in possession—Sale-deed not executed—Suit by vendor for possession—Agreement, whether valid defence.

D. agreed to sell certain property to M. which at the time was in M.'s possession, M. paid the purchase-money in full and continued in possession, but no sale-deed was executed, and the time for filing a suit to get a sale-deed executed had expired. In a suit by D. to recover possession of the property:

Held, that M. was entitled to continue in possession,

and to plead, as a valid defence to the suit, the

agreement to sell. [p. 869, cols. 1 & 2.]

Second appeal from the decision of the Assistant Judge of Belgaum, in Appeal No. 174 of 1919, reversing the decree passed by the Subordinate Judge at Athni, in Civil Suit No. 317 of 1917.

Mr. Ooyojee (with him Mr. A. G. Desai), for

the Appellant.

Mr. Nilkanth Atmaram, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiff's father, Damodar, got a decree against defendants. In execution of that decree the suit property was put up for sale and was purchased by one Jayappa in 1:05. In 1:06 Jayappa purported to sell the property to Layaram. But in 1909 it appears that

Jayappe, disregarding that sale, got symbolical possession, one must presume under his purebase at the Court-sale in 1905. In the same year (1909) Jayaram sold back the property to Damodar; and there seems good foundation for the suggestion that throughout Damodar, the execution oreditor, was the real purchaser, for in 1906 Damodar agreed to re-sell the property to the first defendant at a certain price, and the evidence shows that that price has been wholly paid, although Damodar at one time raised objections to receiving the balance of the purchase money owing to there being delay in paying it. The result is that Damodar has agreed to sell the property to the first defendant who was then in possession, and had all along been in possession since the time of the decree, and the defendant paid the purebase price. It is quite true that the defendant has not got a sale-deed, and the time has passed within which he could have sued Damodar to get a sale deed. But the equitable principles which should be applied to these facts are, in my opinion, perfectly elear.

In Gangaram v. Lozman Ganoba (1) the plaintiff sued for a declaration of title to and for possession of immoveable property from the defendant. He based his title upon a registered sale deed dated the 5th December 1911 from one Narayan. Prior to that date the plaintiff had notice of the execution of a contract of sale of the same property by Narayan to the defendant. It was held that the plaintiff having purchased with notice of the defendant's contract, his suit for possession must fail. The Court said (page 502*):

"The question is whether the defendant has a good defence to a suit by a purchaser from Narayan who can rely upon a registered saledeed and whether he can, notwithstanding the saledeed, retain possession of the property on the ground that the plaintiff purchased with notice of the defendant's contract

... It is not contended that in the defendant's contract any date is fixed for performance nor is there any evidence that before he learnt of the plaintiff's purchase, the defendant had any notice that the vendor would refuse performance. Therefore, at the date of the

(1) 37 Ind. Cas. 380, 40 B. 493; 18 Bom. L. R. 455.

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plaintiff's suit, namely, the 16th of April 1912, a suit by the defendant against his vendor for specific performance would have been within time and if the plaintiff was at the date of suit in the position of a trustee for the defendant, the latter is clearly entitled to enforce that position up to the end of the litigation. It must not be taken from the above remarks that the defendant would be in a worse position in relation to the plaintiff if at the date of suit his right to sue his vendor for epecific performance had been barred, since he is a defendant now relying upon his possession."

In Lalchard v. Lakehman (2) the facts were different. The defendant who was in possession bad filed a suit for specific performance against his vendor which had been dismissed, and accordingly it was held that the plaintiff who had executed a conveyance of the property without its being registered was entitled to recover against his

purchaser.

Then there is the Fall Bench dicision in Bapu Appzii v. Kashinath Sadoba (3) where it

was decided that :-

"Where the plaintiff being the owner of certain immoveable property seeks to recover possession of that property and there are no facts operating to his prejudice, it is a valid defence to the suit that the plaintiff has agreed to sell the property to the defendant, the agreement being at the date of suit still capable of specific enforcement, but there being no registered conveyance passing the property to the defendant, who has taken possession under the agreement for sale and is willing to perform his part of it with the plaintiff."

That decision was based on the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession. That argument must also apply where the vendee in possession has allowed the time for filing a suit for specific performance to

expire.

In this case, therefore, the defendant is entitled to remain in possession against the plaintiff. He will not be able to sue the plaintiff for a sale-deed, and so will have to

(2) 28 B. 468; 6 Bom, L. R. 510. (3) 39 Ind. Cas 103; 41 B. 488; 19 Bom. L. R. 100 (F. B.).

remain in possession for twelve years before be can acquire a good title, but in the light of our decision the plaintiff might now be well advised if he passed the sale-deed. The appeal will be dismissed with costs.

SEAH, J .- I agree.

W. O. A.

Appeal dismissed,

ALLAHABAD HIGH COURT. FIRST CIVIL APPRAL No. 239 or 1919. February 17, 1922.

Present: -Sir Grimwood Mears, Kr., Chief Justice, and Justice Sir P. C. Banerji, Kr., Mss. L. F. MARTEN - DEFENDANT -

APPELLANT

tersus

HIRDEY RAM AND ANOTHER-PLAINTIPP AND DEPENDANT-RESPONDENTS.

Will, construction of -Intention to create succession of life-estates - No words used to impose restriction - Estate taken - Absolute.

Where a testatrix fails to use words in the Will imposing any restriction, although she may have intended to create a succession of life estates, the done takes an absolute estate. [p. 871, col. 2.]

Byng v. Lord Strafford, (1843) 5 Beav. 558, 12 L. J. Ch. 169; 49 E. R. 694; 59 R R. 568, relied upon.

First appeal from a decree of the Subordinate Judge, Dehra Dun, dated the 9th April 1919,

Messre. B. E. O'Conor and Bhagwati

Shankar, for the Appellant.

Mr. S. P. Ghosh, for the Respondents.

JUDGMENT.—The decision in this appeal
turns entirely upon the view which we

turns entirely upon the view which we take of the proper construction of the Will of a Mrs. Margaret Jane Marten.

The following table will make clear the relationship of the Marten family:

THOMAS SINCLAIR MARTEN = MARGARET

JANE MARTEN, testratrix, died

December 10th, 1915.

Harry Kenneth
Marten=married,
childless, died
December 28,
1915.

Lily F. Marten. Frederick William Marten.
(Defendant in died unmarried August 20, 1917.

The testatrix and her husband had been separated for many years. The Will was executed on November 2, 1901. It at first

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purports to give to her two sons, Harry Kenneth and Frederick William, all her estates and effects in equal shares for their own use and benefit absolutely and for ever. Certain immoveable property is then more specifically set out. Then the Will proceeds:—

"I further direct that on the death of either of my sons above named his share of the property herein bequeathed shall go in the first instance to his children and grandehildren, etc. in the direct line, if there be any, at the time but not to the widow or any other person, but failing his children and grandchildren as aforesaid, the property herein bequeathed shall revert immediately to the children and grandshildren, etc., in the direct line of the surviving son, and failing the shildren and grand-shildren, etc. of the surviving son to the surviving son himself, and then ultimately failing him, it shall revert to the widow or widows of both of the deceased 80ne....."

"I further direct that if the said Harry Kenneth Marten and Frederick William Marten cannot live jointly and enjoy the estates herein bequeathed to them jointly, they will divide the property bequeathed into two equal chares and will enjoy their respective shares absolutely and as full owners for their lives and after that the property shall revert to their heirs in the manner and order indicated herein-before."

Whatever interest the deceased may have thought she was conferring in the earlier part of the Will, there can be no doubt that this latter clause is the governing one and, therefore, cut down and defined the interest of her two sone as a life-interest only. Neither Harry Kenneth nor Frederick William had children or grandchildren, and on the death of Harry Kenneth on December 23rd 1915, the property bequeathed to him passed to his brother, Frederick William.

That latter gentleman had in his lifetime, namely, on July 8, 1916 and June 23 1917, mortgaged part of the property which came to him under the Will. After his death the plaintiffs sued defendant No. 1 as administratrix and as being in possession of the property and defendant No. 2 as his heir.

If Frederick William obtained on his brother's death an absolute right to his brother's one-balf share, then the plaintiffs would succeed in the action. If he got a life-interest only, then the property would be freed from the mortgage on the determination of his life estate. The learned Subordinate Judge decided that the interest acquired was an absolute one. The appellants have laid emphasis on the fact that the husband and wife were not on good terms and that the whole structure of the Will shows that it was the intention of the testatrix to earve out a series of lifeestates so that under no assumable possibility could her husband come into any share of her property. On the other hand, Mr. Sital Prasad Ghose contended that the death of Harry Kenneth brought about a complete determination of any life estate and that the next donee took absolutely. For this proposition he relied upon the use of the word "failing" and that passage in the Will which says that "the property berein bequeathed" shall revert, etc. and the case of Byng v Lord Strofford (1). He argued that "failing" meant a skipping over of several successive claster, if in pursuing the order of succession ordained by the Will any should be found not to be in existence or to have ceased to exist. Thus in the actual circumstances the children and grandchildren of both Harry Kenneth and Frede. rick William were necessarily passed over as non-existent, the "property bequesthed" i e, the absolute interest in the one half share same to Frederick William and that the widow of Harry Kenneth only came in, if there had been at the death of Harry Kenneth no one of the persons in existence who by the terms of the Will took presedence of her.

Whilst we are aware that the construction of any particular document is rarely aided by referring to a judicial construction of another document, we are impressed by the case of Byng v. Lord Strafford (1).

In general outline it bears a striking similarity to the case under discussion and the same question, as to whether an absolute estate or a life interest was taken after

^{(1) (1843) 5} Beav. 55°; 12 L. J. Ch. 169, 49 E. R. 694, 59 R. R. 568.

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the determination, in that ease of two life.

estates, was considered.

The facts were that the Earl of Strafford gave by his Will a life interest in all his personal landed estates (apart from some absolute gifts) to the Countess of Strafford for life and then to Lady Anne Connolly for her life "and then to the eldest son of George Byng Esq. of Wrotham Park and afterwards to his second, third or any later sons he may have by my niess Anne. Mrs. Byng, and then to the eldest son and other sons suscessively of the Earl of Backingham by my neice Caroline."

The plaintiff was the eldest son of George Byng and, therefore, the first legatee. The Court decided that the subject of the gift was the whole interest of the testator, there being no words directly limiting the extent of interest, which the legatee was to take and declared the plaintiff entitled absolutely to the property, the subject of the previous life estates. The next-of-kin argued that for the purpose of giving effect to the intended succession the Will ought so to be construed as to limit in some way the interest of Mr. Byng and those who were to succeed him and that that restriction must be by successive esta'es for life. At page 536, the Master of the Rolls said :-

"If a testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees in a manner incompatible and inconsistent with the property plainly given to the first, will not authorise the Court to alter the effect of the words by which that property is given."

The Master of the Rolls pointed out that the testator, when desiring to give to his wife and Lady Anne Connolly estates for life, stated the intention in plain terms. That the gift to Lady Anne Connolly was preceded by the word "afterwards," as was also the gift to the second, third or any later sons of George and Anne Byng. He added that the insertion of the words for life in the gift to Lady Anne Connolly showed that the testator did not consider that the words afterwards and then had of them selves sufficient force to limit the interest

given to the eldest son to a mere life in-

There is a clear analogy between the case now under our consideration and that of

Byng v. Lord Strafford (1).

Mrs. Marten, the testatrix, ereated in clear words two life estates in equal shares of the property bequeathed. After their determination she chose first the children or grand-children of the deceased son—secondly the children or grandchildren of the surviving son, then the surviving son and, finally, the widow or widows of both the sons. She, therefore, as in Byng v. Lord Strafford (1) had in view a succession of legatess or interests after the first in the series.

In both cases the gift to the eldest son of George Byng and to Frederick William Marten was not limited as was the original bequest by the words "for life" or any equivalent words.

We are, therefore, of opinion that although the testatrix may have intended to create a succession of life estates, she has nevertheless failed to use words imposing any restriction and, therefore, the ordinary rule in such cases must be implied and the share of the estate which came to Frederick William on the death of his brother, must be deslared to be an absolute one.

Ws. therefore, affirm the desision of the lower Court and dismiss the appeal with easts including fees on the higher scale. From the casts incurred by the respondent in printing the paper book two thirds should be disallowed on the ground that evidence irrelevant to this appeal was included.

J. P.

Appeal dismissed.

MARADEV GAMESH JAMSANDEZAR U. SECRETARY OF STATE FOR INDIA.

BOMBAY HIGH COURT. FIRST CIVIL APPEAL No. 222 OF 1920. December 6, 1921. Present :- Sir Norman Maelecd, KT., Chief Justice, and Mr. Justice Shah. MAHADEV GANESH JAMSANDEKAR - PLAINTIFF - APPELLANT

versus.

SECRETARY OF STATE FOR INDIA-DEFENDANT-RESPONDENT.

Sea Customs Act (VIII of 1878), s. 182-Adjudica. tion of confiscation and penalties-Procedure.

Although the Sea Customs Act contains no provisions with regard to the adjudication of confiscation and penalties which can be made by the Customs Officers under section 182, those officers are bound to proceed according to general principles, which are not necessarily legal principles, for the purpose of arriving at a conclusion when such inquiries are instituted. The officers are not bound to act, however, according to the provisions of the Civil or Criminal Procedure Code, as if the matter were a proceeding in a Court of law. It is sufficient that they should deal in a careful and judicial manner. [p. 872, col. 2.]

First appeal from the desision of the District Judge, Ratnagiri, in Civil Suit No 2 of 1916.

Mr. A. G. Desci, for the Appellant.

Mr. S. S. Patkar, Government Pleader, for the Respondents.

JUDGMENT.

MacLEOD, C. J .- The plaintiffs are the sons of one Ganesh Mahadey Jamsandekar, ard inhabitant of Malvar, in whore house certain silver ingots were discovered by the Police. The silver was attached and sent over to a clerk in the Customs Department. It was suspected that silver was being imported into British India without paying duty, and accordingly an inquiry was instituted and a report was made to the Collector of Customs. Collector, on considering all the papers which were sent to him, came to the conclusion that the silver had been imported without paying the duty, being illicitly landed at Dandi from Goanese territory. Ganeah was. therefore, found guilty of an offence punishable under clause (3) of section 167 of the Sea Customs Act, VIII of 1878, and was fined Rs. 1,000, while the sliver was configested.

A suit was brought by Garcah for a declaration that the orders passed by the Collector of Customs were illegal, and to recover the value of the silver and the Page of 43 B.-[Ed.]

amount of the fine. The plaintiff's suit was dismissed by the District Judge of Ratnagiri on the ground that he had no jurisdiction to hear the suit. This decision was set aside by this Court : see Ganerh Mahadev v. Secretary of State for India (1), The Court said (page 232*): "The real question, therefore, to be determined in this litigation is whether there has or has not been a legal adjudication in accord. arce with the provisions of the Act. That will involve determining, after evidence has been recorded, what was the exact method adopted for the purpose of the adjudication and whether that method was in accordance with the express or implied provisions of the Ast," The suit was, therefore, remanded.

No further evidence was called by either side. On behalf of the defendants papers relating to the proceedings before the Oastoms Officers, Exhibits A 1 to 7, were put in. It is admitted that the Sea Customs Act contains ro provisions with regard to the adjudication of confiscation and penalties which can be made by the Cuetoms Officers under section 182. Therefore, the Customs Officers muct proceed secording to general principles, which are not recessarily legal principles, for the purpose of arriving at a conclusion when such irquiries, as the present one, are instituted. It appears to me, after perusing the papers, which were before the Collector of Customs, and which I presume were taken in accordance with the ordinary procedure, that various statements were recorded by the Sarkarkup, including the statement of Ganesh, there is also a lorg application on behalf of Ganesh which bas been placed before us, but which does not appear in the paper book, and I have no doubt that the Collector, who is not borrd to adjudge on confiscation and penalty as if the matter was proceeding in a Court of law according to the provisions of the Civil or Criminal Procedure Code, dealt with the various statements before him in a careful and judicial manner.

The learned Judge has referred to the case of the Local Government Board v. Arlidge (2) in which the Court said "that the

(1) 49 Ind. Cas. 427; 43 B. 221; 21 Bom. L. R. 2.. (c) (1915) A. C. 120 at p. 188; 84 L. J. K. B. 72; 111 L. T. 905; 79 J. P. 97; 12 L. G. R. 1109; 80 T. L. B. 672,

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indiciary should presume to impose its own methods on administrative or executive officers is a usurpation"; and again in the Board of Education v. Rice (3) the Court said: "They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

It is obvious from the record in this case that the plaintiff had ample opportunity to correct or contradict any statement prejudieial to his view which had been recorded. I have before me a petition signed by the Pleader of Ganesh Mahadev in which all the points that are placed now before us were entered. If it in any way appeared to me that there has been real injustice in this case, I would not besitate to entertain the appellant's elaim. But as far as I can see from the provisions of the Sea Customs Act, the appellants have no reason to complain that justice has not been dealt out to Mahadev by the Customs Authorities. Even dealing with the case on the merits, it seems to me absolutely certain that the story put forward by Ganesh with regard to the sarriage of this silver from Bombay tia Belgaum to Malvan was rightly a false one. In my be taken to this 6888 in opinion, therefore, under adjudication there has been an the Act with which no fault can be found. Therefore the appeal must be dismissed with costs.

SHAH, J .- I agree.

W. C. A. & N. H.

Appeal dismissed.

(8) (1911) A. C. 179 at p. 182; SO L. J. K. B. 796; 104 L. T. 689; 75 J. P. 393; 9 L. G. R. 652; 55 S. J. 410; 27 T. L. R. 378.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SOIT No. 1194 or 1919, September 6, 1921.

Present: -Mr. Raymond, A J. C.
FIRM OF GERIMAL HARIRAM PLAINTIPPS

versus

FIRM OF BUGHNATH KALIANJI AND ANOTHER-DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. 1, r. 10-"Wrong person as plaintiff," interpretation of—Bona fide mistake—Transposition from defendant to plaintiff—Limitation Act (IX of 1808), s. 22—Addition of new party.

The words of clause (1) to Order I, rule 10 of the Civil Procedure Code "where a suit has been instituted in the name of the wrong person as plaintiff" are comprehensive enough to include cases where the original plaintiff has no cause of action and their interpretation must not be restricted to cases where the plaintiff has some right to sue. [p. 874, col. 2; p. 875, col. 2.]

A certain firm was adjudicated insolvent and their estate was vested in the Official Receiver. Prior to their insolvency the firm had entered into contracts with various merchants for the sale and purchase of different commodities. Merchants were alleged to have committed breach and were alleged to be liable for damages to the firm. The Official Receiver sold by public auction the "outstandings due and payable to the estate of the insolvents" inclusive of the claims of damages. Plaintiffs purchased these rights and got a duly stamped assignment of these rights and sued the merchants within three years. It was pleaded that the assignment was wholly illegal and void so far as it involved a transfer of "a right to sue for damages" and the suits were not maintainable. Plaintiffs applied three years after the accruing of the cause of action for transposition of the Official Beceiver who was one of the defendants from the category of the defend. ants to that of the plaintiff :

Held, that as the suit was instituted in the name of the wrong plaintiff through a bona fide mistake of law and although the plaintiff had no cause of action, the Court could, under Order I, rule 10 of the Civil Procedure Code, transpose the Official Receiver from a defendant to a plaintiff. [p. 875, col. 1.]

Held, also, that although the transposition was beyond limitation prescribed for the suit it was not barred as a transfer of a party from a proforma defendant to plaintiff was not an addition of a new party within the meaning of section 22 of the Limitation Act. [p 875, col. 2.]

Mr. Dirchand Chandumal, for the Plaint-

Mr. Kalumal I ahlumal, for the Defendants.

JUDGMENT.—The firm of Tindanmal Totaram had been adjudicated incolvent by order of this Court and their estate was

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vested in the Official Receiver. Prior to their insolveney this firm had entered into contracts with various merchants for the sale and purchase of different commodities in respect of which it is alleged that the latter have committed a breach and are liable in damages to this firm. On the 27th June 1919 the Official Receiver sold at a public auction what were described to be the outstandings due and payable to the estate of the insolvents" inclusive of the claims of damager, and these were purshased by the plaintiff's firm in the present suit, Gerimal Hariram & Co., and a duly stamped assignment deed was executed in their favour on the 17th July 1919. Plaintiffs bave 6'ed several suits in this Court against the merchants who were the contracting parties with Tindanmal Totaram and a preliminary objection to the maintainability of the suits has been taken on the ground that the assignment is wholly illegal and void so far as it involves a transfer of "a right to sue for damages," and the suits must be dismissed on that ground alone without going into the merits. It must be here observed that in these suits plaintiffs have made the Official Receiver one of the defendants. Mr. Dipehand who for the plaintiffs, apparently appeared realised that the objection to the maintain ability of the suite as framed was fatal, and has in order to oversome the diffisulty filed an application graying for an amend. ment of the plaint by the transposition of the Official Receiver as a plaintiff in the suit. This application has been vigorously opposed.

Now, on the authorities Mr. Dipehand was forced to concede that the assignment was illegal I have no doubt that what the Official Receiver assigned to the plaintiffs was "a mere right to sue for damages" and under section 6 of the Transfer of Property Act a mere right to sue cannot be transferred. It is beyond my province at this stage to consider the question whether in view of section 60, Civil Proeedure Code which exempts from attachments "a mere right to sue for damages," and section 28 of the Provincial Insolvency, Act, V of 1920, and section 16 of the Provincial Insolvency Act, Ill of 1907, which was the enactment in force at the time when the firm of Tindanmal Totaram was

adjudicated insolvent and their property vested in the Official Receiver, the "right to sue for damages," also vested in him at the time of the adjudication.

Now, Order I, rule 10, elause 1, Civil Procedure Code sorresponding with section 27 of the Code of 1882 is as follows:-"Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, at any stage of the suit, if satisfied that the soit has been instituted through a bonn fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaint. iff upon such terms as the Court thinks The first objection taken to the just." joinder of the Official Receiver as a plaintiff is, that the plaintiffs have no right whatever to sue and their suit is not maintainable, the addition of a fresh party as plaintiff should not be permitted. In answer to this objection it is important to remember in the first place that the addition or substitution of the Official Reseiver as plaintiff does not introduce a fresh cause of action nor does it alter the character of the suit as filed. In the case of Krishna Boi v. Collect or and Government Agent, Taniore (1). it was held that under section 27, Civil Procedure Code, when a suit is instituted in the name of a wrong person as plaintiff by a bong fide mistake, the Court Las power to substitute the name of the right persons as plaintiffs and this power is not excluded in cases where the person originally sning has no right to institute the suit. The application for substitution in this case was made in the Court of first appeal and was in respect of certain persons being initituted as plaintiffs who are not originally parties to the suit, and the application was granted, as it was held that the Collector of Tanjore had through a bona fide mistake instituted the suit in his own name. It seems to me the words of clause (1) to Order I, rule 10 "where a suit has been instituted in the name of the wrong person as plaintiff" are comprehensive enough to include eases where the original plaintiff

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has no sause of action and their interpretation must not be restricted to easas where the plaintiff has some right to sue. In the ease of Hughes v. Pump House Hotel Co. (2), it was held on a consideration of Order XVI, rule 2, of the Rules of the Supreme Court which contains the ipsissima cerba of Order I, rule 10, clause 1, Civil Precedure Code that "where an action has, through a bona fide mistake, been commenced in the name of the wrong person as plaintiff, the fact that the original plaintiff hes no sause of action does not take away the juriediction of the Court to order the substitution of another person as plaintiff." This case has several points of analogy with the present case and the part of the judgment of Oczers Hardy. L. J. may be re-produced with advantage: "There has been a bona fide mistake of law as to whether there had been an absolute assignment of the plaintiffs' elaim or an assignment by way of charge only. It is said that the rule does not apply where it is shown that the plaintiff has no right of action; but there are abundant authorities to the contrary effect There is no difference ... between the addition and the anhatitution of a plaintiff. When once the case is shown to be within the rule, there is jurisdiction to add or to substitute." In my opinion, therefore, eccceding that the plaintiffs have no cause of action, that fact by itself does not debar the Official Receiver being added or substituted as plaintiff if it is proved that the suit has been instituted in the name of the wrong plaintiff through benz fide mistake.

It was next argued that as the cause of action in this suit arose more than three years ago, and there had been considerable delay in making the application under Order I, rule 10. defendants will be considerably prejudiced if the application is now granted which would involve a deprivation of substantive rights that have accrued to them. In considering the argument it is essential to bear in mind that the Official Receiver is already a party to the suit in the shape of a co defendant and whether there was any jurisdiction for bringing him on the record after the alleged assignment or whether he has been introduced merely as

(2) (1902) 2 K. B. 485; 71 L. J. K. B. 803; 50 W. B. 677; 87 L. T. 859,

a proforma defendant appears to me immaterial. Whether the Official Receiver be a proforma defendant or otherwise, bis transposition from the sategory of a defendant to that of a plaintiff does not introduce a new plaintiff within of sestion 22 of the Indian meaning Limitation Act. It is true that the suit is now time barred as the sause of action arose in October 1916, and the original suit was filed in September 1919, and where necessary parties are not joined within the period of limitation, the suit must be diemissed. But elause (2) of section 22, Indian Limitation Ast, exempts from the operation of clause (1) cases where plaintiff is made a defendant or a defendant is made a plaintiff. In the ease of Nogendra Bala Debya v. Tarapada Achar ee 13) where a pro forma defendant got himself transferred to the sategory of plaintiff and section 22 of the Limitation Ast was relied upon as barring the suit, as the change was made after the expiration of three years when the sauce of action arose, it was held that the added plaintiff was not a new plaintiff and section 22 had no application. This judgment was followed in the case of Narsinha Krishnani v. Vaman Ventatesh Deshpande (4) where certain eo-defendantswere transferred as so plaintiffs. A case closely applicable to the present is Husainora Begum v. Rahmannessa Begum (5) where it was held that the transfer of a party from proforma defendant to plaintiff is not an addition of a new party within the meaning of section 22 of the Limitation Act. The result, therefore, is that there is no substance in the plea raised as to limitation.

The important question remains whether there has been a bona fide mistake to render Order I, rule 10, clause (1), applicable.

Now, the mistake may be one of fact or of law. Mr. Dipehand confesses to an error of law on his part. He says that he was misled by certain decided cases which he cites, and on their perusal came to the conclusion that what was transferred by the Official Receiver was an "actionable claim" under section 3 of the Transfer of Property Act and not

^{(3) 4} Ind. Cas. 889; 85 O. 1085; 8 C. L. J. 286; 13 C. W. N. 188; 5 M. L. T. 91.

^{(4) 4} Ind Cas. 249; 84 B. 91; 11 Bom. L. R. 1103. (5) 8 Ind. Cas. 837; 38 O. 842; 18 O. L. J. 8.

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a mere right to sue in damages." The eases he eites are Nathu Gangaram v. Hinsray Morarji (6) and Jeffer Meher Ali v. Budge Budge Jute Mills Company (7) in both of which it was held that the right to claim the benefit of a contract for the purchase of goods is "a beneficial interest in moveable property " within the meaning of actionable elaim in section 3 of the Transfer of Property Ast and as such assignable. If Mr. Dipchand's statement is true and I have no reason to disbelieve the statement of a Pleader of his status and respectability, I must hold that there has been a bona fide mistake. I allow the application amendment as desired, and direct the Official Receiver, who, Mr. Dipehand assures me, is willing to be made plaintiff, be added as a plaintiff.

The other objections raised to the Official Receiver being made a plaintiff appear to me premature. They may and can be put forward when he is joined as a plaintiff.

Costs incurred by the defendants till this stage to be borne by the plair tiff.

J. P. Application allowed.

(6) 9 Bom. L. R. 114.

(7) 33 C. 702; 10 C. W. N. 755.

OALCUTTA HIGH COURT.

AIPEAL PROM APPELLATE DECREE

No. 1794 of 1919 with Rule

No. 186 of 1919.

July 12, 1921.

Present:—Sir Lancelot Sanderson, Kr.,
Chief Justice, and Mr. Justice Richardson.
IBHUBANESWAR BHATTACHARJEE
—APPELLANT AND PETITIONER

DWARAKESWAR BHATTACHARJEE

AND OTHERS—RESPONDENTS AND

OPFOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 120-Suit against co-sharer landlord to recover rent collected - Limitation.

The period of limitation applicable to a suit against a co-sharer landlord to recover a share of the rent realized by him is contained in Article 120 of Schedule I to the Limitation Act. [p. 877, cols. 1 & 2.]

Appeal against the decree of the Additional Subordinate Judge, Howrab, dated the 19th June, 1919, modifying that of the Munsif, Second Court, at Uluberia, dated the 8th February 1918.

Babus Girija Prosonna Roy Choudhuri and Sisir Kumar Ghosal, for the Appellant and the Petitioner.

Babus Manmatha Nath Roy and Asi Ran an Chatterjee, for the Respondents and the Opposite Party.

JUDGMENT.

RICHARDSON, J .- This is a second appeal in a suit for rent. Plaintiffs Nos. 1 to 3 and defendant No. 3 are co-sharer landlords under whom defendants Nos. 1 and 2 are tenants in respect of a certain holding. The plaint concludes with the following prayers "(a) That a decree may be passed against the principal defendants (meaning defendants Nos. 1 and 2) for Rs. 213 14 ancas in claim and all costs of the suit together with interest up to the date of realization; and (b) that in ease it be proved that the pro forma defendant No. 3 has realized any paddy, etc., due to the plaintiffs from the defendante, then a decree may be passed for the said sum together with damages and costs as against the pro forma defendant No. 3 on placing him in the eategory of principal defendants by amending the plaint."

There is a further prayer for general relief

with which we are not concerned.

The rent claimed directly from defendants Ncs. 1 and 2 and indirectly from defendant No. 3 was due for the years 1320 and 1321. I should also mention that the claim was for the money value of rent payable in kind.

Both the Courte below have concurred in finding that by far the greater part of the rent due for the two years was in fact collected by the defendant No. 3. The result is that the alternative claim against defendant No. 3 has been the principal subject of controversy throughout.

In the Trial Court the learned Munsif held that the claim against defendant No. 3 in respect of the years 1320 was barred by limitation under Article 62 of the Limitation Act. That article applies to suits for morey payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use" and the period of limitation is three years from the date when the money

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is received. The Munsif gave the plaintiffs a decree against defendant No. 3 for their share of the rent for 1321 collected by that defendant. The plaintiffs appealed and the learned Subordinate Judge, while he took practically the same view of the case on the merits, was of opinion that the claim against defendant No. 3 in respect of the year 1320 was governed not by Article 62 but by the residuary Article 120 under which the period of limitation is six years from the time when the right to sue accrues. The decree of the Subordinate Judge, therefore, makes the defendant No. 3 liable to the plaintiffs for their share of the rent of both years.

The appeal before us is preferred by the defendant No. 3 and discussion has turned mainly on the question of limitation. It has been conceded that on the facts found below the defendant No. 3 has no defence so far as the claim against him relates to the year 1321. As regards the claim for the year 1320 the learned Vakil for the defendant No. 3 has given us a number of articles to shocke from. He contends that if Article 62 does not apply then the article applicable is either Article 48 or Article 49 or Article 109. The period of limitation under all these Articles is three years counting from a date which would make the plaintiffs out of time. The learned Vakil for the plaintiffe, on the other hand, has argued that the lower Appellate Court was right in applying Article 120.

In my opinion, the claim in question is not a claim for specific moveable property within the meaning of Article 48 or Article 49. The difficulty about Article 62 is that, as that article is worded, it does not seem to be applicable to a claim in respect of rent collected by the defendant No. 3 in kind and in point of fact the case for the defendant No. 3 was rested mainly on Article 109.

Article 109 applies to a suit "for the profits of immoveable property belonging to the plaintiffs which have been wrongly received by the defendant." The artisle is in every day use in the class of suits which it primarily contemplatee, namely, suits for mesne profits against a trespasser. The defendant No. 3 is not a trespasser and without saying that the question is free from all difficulty, I very much doubt whether the article can have any application at all to a suit by one co-sharer against another for a share of the rent collected by the latter, the rent being due in

respect of land held by the so sharers not separately but jointly. It is said that it must be inferred from the findings of fast errived at by the Courts below that the defeudant No. 3 received the rent wrongfully. That is not the very meritorious argument urged on behalf of the defendant No. 3. It is true that the Courts below have found that the defend. ant No. 3 put pressure on the tenants to pay their rent to him. It is also true that the defendant No. 3 set up in defence to the suit an arrangement between himself and the plaintiffe under which the latter were to take the entire rent for a certain period and then he was to take the entire rent for another period, a defence which has been rejected. But this negative conclusion does not necessarily lead to the positive conclusion that at the time the defendant No. 3 collected the rent, be intended to defraud his co sharers. The pleadings suggest a quarrel between eo.sharers as to which of them should have the right to collect the rent due to all and as to the state of the accounts between them. At any rate, the applicability of Article 109 does not seem to have been suggested in the Courts below so that those Courts were given no opportunity to apply their minds to the presise question raised before us, whether as between himself and the plaintiffs the defendant No. 3 received the rent "wrongfully" within the meaning of the article.

The defendant No. 3 did not implead the defendants Nos. 1 and 2 as respondents to this appeal. On behalf of the plaintiffs, however, notice was given to the defendants Nos. 1 and 2 to appear at the hearing so that, if necessary, the plaintiffs might claim over against them. These defendants now ask for their costs. In my opinion, regard being had to the result, their costs should be paid by the plaintiffs. The plaintiffs will get their costs of the appeal from the defendant No. 3 and the defendants Nos. 1 and 2 will get their costs of to-day's hearing from the plaintiffs, the hearing fee in the case of the defendants Nos. 1 and 2 being assessed at one gold mohur.

The Rule brought up with the appeal is dis-

Sampesson, C. J.—I agree that the appeal should be dismissed and the Rule discharged and I agree also with the order as to easts as stated by my learned brother.

W. O. A. Appeal dismissed; Rule discharged.

SHIB CHARAN DAS O. RAM CHANDER.

ALLAHABAD HIGH COURT. EXECUTION SECOND APPEAR No. 650 of 1921.

February 28, 1922.

Procent: -Mr. Justice Stuart.
SHIB CHARAN DAS - DECREE. HOLDER

-APPELLANT

U67848

RAM CHANDER AND OTHERS—

JU GMENT DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1909), O. XXI, r.

16, provision of -Execution -Decree, who can execute.

No one can execute the decree except the decreeholder or a person to whom the decree has been transferred by assignment in writing or by operation of the law. The provisions of Order XXI, rule 16 must be complied with. [p. 878, col. 2.]

Execution second appeal against the decree of the District Judge, Meernt, dated the 9th March 1921.

Dr. K. N. Ect u and Mr. E. C. Mital, for the Appellant.

Mr. S. P. Ghosh, for the Respondents.

JUDGMENT,-Musammat Kirpa Devi filed three suits against Durga and others for possession of certain houses situated in She obtained decree for Meerut city. possession of the sites, the possession being conditional on her paying compensation to the judgment-debtors in respect of the materials of the houses. Appeals were filed to the District Judge who upheld the decrees of the Trial Court, Appeals were filed to the High Court which upheld the decrees of the Courts below. Before the passing of the decrees of the High Court Kirpa Devi transferred the property in those suits to Shib Charan Das. She transferred the property by a sale-deed dated the 14th of June 1917. The High Court decrees were passed on the 18th of July 1917. It would have been open to Shib Charan Das to apply to the High Court to have his name substituted for that of the plaintiff but he did not do so and the final decrees of the 18th of July 1917 were passed in favour of Musammat Kirpa Devi. Shib Charan Das then applied in execution for the ejectment of the judgment. The Courts below have refused to grant his prayer on the ground that he is not the assignee of the decrees. Before the present Code came into force, it was decided in Hansrai Pal v. Mukhar, i Kunwar (1) that

decree bolder bolding a decree for possession of immoveable property sold all the property or portions of such property, the sale does not, without express provision to that effect, give the purebaser any right to execute the decree bimself. Apart from authority, Order XXI, rule 16 would apparently make it clear that no person other than the assignee of a decree, where the assignment has been transferred in writing or by operation of law, can execute the decree. The learned Counsel for the appellant Shib Charan Das argued that execution can now be obtained by a transferee of a property under the authority of section 146. This section which introduced a new rule reads as follows :- "Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proseeding may be taken or the application may be made by or against any person claiming under him."

It is true that Shib Charan Das is elaiming under Kirpa Devi in a sense, but he is claiming as the transferee of the property, not as assignee of the decree. Apart from that, Order XXI, rule 16 in my opinion gives the saving provision. Order XXI, rule 16, lays down definitely that when a person other than the deeree holder wishes to execute a decree, that person must prove an assignment in writing or by operation of the law, and must adopt the procedure laid down in Order XXI, rule 16. If the argument of the learned Counsel for the appellant were assepted, it would not be necessary to invoke the provisions of Order XXI, rule 16 in any circumstances. It has further been argued that inasmuch a transfer took place before the decree of the High Court came into existence and while the appeal was pending before the High Court, the decree could not be assigned to Shib Charan Das, because there was no decree then in existence. I cannot accept this argument but even if accepted it could not help Shib Charan Das. The fact is that no one can execute the decree except the decree holder or a person to whom the deeree has been transferred by assignment in writing or by operation of the law. It was for Shib Charan Das to comply with the provisions of Order XXI, rule 16. It is immaterial what

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his difficulties may have been in complying with those provisions. The view which I take appears to have been taken by Chamier, J., in Dost Muhammad v. Alt if Huszin Khan (2). If Shib Charan Das desired to exeents the decress in question it was an essential preliminary that those decrees should have been assigned to him in writing. I accordingly dismiss these appeals with costs.

J. P.

Appeal dismissel.

(2) 17 Ind. Cas, 512.

CALOUTTA HIGH COURT. APPEAL FROM APPELLATE DECIEE No. 1952 or 1919.

December 19, 1921.

Fresent :- Justice Sir N. R. Chatterjea, Kr., and Mr. Justice Panton.

NAGENDRANATH PAUL-DEFENDANT

-APPELLINT

versus

Srimati SORAT KAMINI DASI, AND OF HER DEATH HER SONS AND HEIRS JAMINE MOHAN SORKAR AND OTHERS-

RESPONDENTS.

Limitation Act (IX of 1918), Sch. I, Art. 109-Suit for recovery of profits of immoveable property wrongfully received by defendant-"Wrongfully received," meaning of.

Subsequent to a mortgage-decree, in execution of which the plaintiff purchased the mortgaged lauds, the mortgagor granted a usufructuary mortgage in favour of the defendant who entered into possession and realised rents from certain tenants of those lands. The plaintiff after having obtained possession of these lands through the Court from the defendant brought a suit for recovery of the monies realised by the defendant from those tenants:

Held, that Article 109 of the First Schedule to the Limitation Act was applicable to the suit as the defendants' usufructuary mortgage was pendente lite and as such invalid as against the plaintiff. [p 881,

col. li p. 880, col 3.]

The words "wrongfully received" in Article 109 of the First Schedule to the Limitation Act include receipt of profits that cannot legally be substantiated. [p. 881, col. .]

Appeal against a decree of the District Judge, Bankura, dated the 3rd July 1919, affirming that of the Subordinate Judge of that District, dated the 11th Ostober 1917, -

FAOTS appear from the judgment.

Babu Nagenira Nath Ghose, for the Ap. pellant .- The defendant is the appellant. The appeal arises out of a suit to recover money. The facts are briefly these. A certain Zemindari which was an impartible estate was owned by Raja Indra Singh. He died in 1855. His surviving widow died in 1905. Balbhadra, the reversioner expectant, executed two mortgages of his reversionary interest in the lifetime of the Rapi in 1891 and 1904 in favour of Gopinath and Digambar. In 1909 the mortgagees sued Balbhadra. It ended in a compromise decree on 11th May 1910. The decree was made absolute on 1st August 1911. My elient obtained from Balbhadra an usufructuary mortgage of some of the properties on 25th August November 1912, Subsequently and 29th the Raj was brought to sale and was purchased in execution of the morigage. decree of 1911 by the predesessor of the respondent on 6th May 1313. The plaint. iff's cause of action is that I realised the Jeyst and Bhadra kists of 1320 due to the Raj. The present suit was instituted on the 16th September 1916. The question is whether Article 62 or Article 120 of the Indian Limitation Ast would apply to the case. The learned Judge has held that Article 120 would apply and, therefore, the present suit is within time. I submit that neither of those Articles are applicable, but Article 109 would apply. It also might come under Article 62. Refers to Bullen and Leake's Precedents of Pleadings (7th Elition) 202; Mahomed Wahib v. Mahomed Ameer (1). There is no finding when the money was received by The desision in Sutyendra Nath Thakur v. Nilkantha Singha (2) relied on by the lower Court does not apply. The sale did not transfer to the purchaser all the rente in arrears which were due to me. I am entitled to the rents of the Jeyst kist, up to the date of sale. Rent would accrue due from day to day as between landlords, Refers to Golam Mahomed v. Shibendra Pada Banerjes (3) where it has been held that Article 109 applies to cases like the present.

(1) 82 0, 527; 1 O. L. J. 167.

. (2) 21 C. 883; 10 Ind. Dec. (x. s.) 589.

(8) 85 C. 996 at p. 995, 18 C. W. N. 893,

MAGEND SANATH PAUL U. SORAT KAMINI DANI.

Baba Kalikinkar Chakra artty (with him Babus Panchanan Ghose and Monindra Kumar Pose), for the Respondent .- I submit neither Article 62 nor Article 109 applies. sale was on 6th May 1913 and was sonfirmed on 28th January 1914. There was an application for the setting aside of the sale. That matter came up to this Court. The plaintiff had no cause of action before sale was confirmed. When the defendant entered into the lands as usufructuary mortgagee his possession was wrongful. Refers to Article 109 of the Indian Limitation Act. I could not sue before 28th January 1914 when my purchase was confirmed. Although the usufrustuary mortgage has been found to be invalid, yet I submit his entry into the lands prior to my purchase was not lawful. Refers to Bhubaneswar Bhattacharjee v. Dwarakeswar. Bhattacharice (4). Article 109 contemplates eases of meane profits. Refers to Hollowoy v. Guneshwar Sing (5) and Nritya. moni Dassi v. Lakhan Chandra Sen (6). The case will have to go back if it be held that either Article 62 or Article 109 applies to the case.

Babu Tanchanan Ghose following said: One question remains, tiz, whether the period of limitation runs from the of receipts of profits. That implies that the party elaiming has a right to sue at that date. My title would relate back to the date of purchase. The period of would be suspended till the limitation sale is confirmed. Euppose my sale is confirmed more than three years after then I would have no remedy if Article 109 applies. I submit Article 109 would not The learned Subordinate apply. my position as very quaintly describes obild. If it of a posthumous held that my rights were suspended, then the other side has no sause at all. I adopt the arguments of my learned friend Mr. Chakravarty on all other points. Refers to Basanta Kumari Debi v. Kamikshya

Kumari Debi (7) and Rance Surno Moyee v. Shooshes Mookhee Burmonia (8).

Baba Nagendra Nath Ghosh replied in brief.

JUDGMENT.—This appeal arises out of a suit for recovery of rents realised by the defendant from certain tenants in respect of certain lands purchased by the plaintiff at a sale held in execution of a mortgage decree obtained by two persons. Digambar Pal and Gopinath Daripa.

It appears that subsequent to the decree obtained by the mortgagee, the mortgager gracted a usufructuary mortgage in favour of the defendant. The defendant entered into possession of the property under it and realised rent from certain tenants of the property. The plaintiff, after his purchase at the sale held in execution of the mortgage-decree, obtained possession of the property through the Court from the defendant, and then brought the suit out of which this appeal arises for recovery of monies realised by the defendant from the tenants for certain kists of Jeyet and Bhadra 1320, Fasli.

It is found that the defendant's usufructuary mortgage was pendente lite and, as such, invalid as against the plaintiff. The plaintiff describes the defendant in the plaint as a trespasser.

One of the questions raised in the case was, whether the suit was barred by limitation; and, if so, which Article of the Limitation Ast was applicable to the case?

The plaintiff contended that Article 120 was the proper Article; while the defendant contended that it was Article 82.

The Court of Appeal below held that Article 62 did not apply and that Article 120 was the proper Article applicable to the case.

The defendant has appealed to this Court and has contended that the proper Article applicable to the suit is Article 109, but even if that is not applicable, Article 62 should be held to apply, and in any case Article 120 is not applicable to the suit.

^{(4) 66} Ind. Cas. 876; 34 C. L. J. 508.

^{(5) 3} C. L. J. 182.

^{(6) 33} Ind. Cas. 452; 43 C. 660 (P. C.); 20 C. W. N. 522; 80 M. L. J. 529; (1916) 1 M. W. N. 332; 20 M. L. T. 10; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1.

^{(7) 33} C. 23; 2 C. L. J. 228 (P. C.; 15 M. L. J. 820; 7 Bom. L. R. 904; 10 C. W. N. 1; 2 A. L. J. 810; 32 I. A. 181.

^{(8) 12} M. I. A. 244; 2 B. L. R. P. O. 10; 11 W. R. P. C. 5; 2 Sar. P. C. J. 424; 20 E. R. 831; 2 Suth. Z. C. J. 178; 7 Ind. Dec. (N. s.) 499 (P. C.).

MUNCHI LAL O. BOHAN LAL.

We are of opinion that the first contention is correct, and that Article 109 is the proper

Article applicable to the suit.

That Article provides a period of three years' limitation for a suit for recovery of profits of immoveable property belonging to the plaintiff which have wrongfully been received by the defendant.

There is no doubt that the monies received by the defendant are profits of immoveable property and upon the finding, those profits

belong to the plaintiff.

It is contended, however, on behalf of the respondent that those profits cannot be said to have been wrongfully received by the defendant at the time they were received; because at that time, the defendant claimed to realise them as usnfruetuary mortgagee. But, as stated above, that mortgage was invalid as against the plaintiff; the words "wrongfully, received" in Article 109 include receipt of profits that cannot legally be substantiated.

In the case of Peary Mohan Roy v. Khela. ram Sarkar (9), a suit was instituted by the owner of a putni for recovery of mesne profits against the defendant who had purshased the putni at a sale under Regulation VIII of 1819 and had been in possession under the purchase which was subsequently est saids. It was held that the defendant wrongfully received the profits which were receivable by the plaintiff and that Article

109 and not 120 governed the case.

Our attention has been drawn, on behalf of the respondent, to the case of Bhubaneswar Bhattacharjes . v. Dwarakeswar Bhattacharjes (4). But that was a case in which a suit was brought by a co sharer landlord against another for a share of the paddy rent sollested by the latter, the paddy rent being due in respect of lands held by the co-sharers not separately but jointly, and different considerations would arise in a case of this kind as the receipt of rent by the co-sharer was not wrongful.

We are accordingly of opinion that Article 109 is applicable to the suit. That Article lays down that the period of three years is to be counted from the time when the profits

are received.

In this case there is no finding when the profits were received.

(9) 1 Ind. Cas. 157; 35 O. 996; 8 C. L. J. 181; 18 O. W. N. 15; 4 M. L. T. 419.

The case must accordingly be sent back to the lower Appellate Court in order that that matter may be inquired into.

If the profits were received within three years, the question of limitation must be

decided in favour of the plaintiff.

The learned Pleader for the respondent has contended that, even if the profits were received bayond the three years before the date of the institution of the sait, the Court should consider whether limitation was suspended or not; because the sale at which the plaintiff purchased was on a later date, te, on some date within three years of the suit. This question, however, was not raised in the Corr s below, and all the materials for desiding the question whether there should or should not be any suspension of limitation: in the ease are not before us. We, therefore, think that if the Court below finds that the profits were reseived more than three years: before the date of the suit, this question will. be gone into by that Court.

It is contended on behalf of the appellant: that even if the suit is not barred by limitation, the rent ought to be apportioned between the defendant and the plaintiff, having regard to the principle embodied in section 36 of the Transfer of Property Act. This. question will also be expedered by the Court

The case is assordingly sent back to the lower Appellate Court for disposal according to law, having regard to the observations made abovs.

Costs to abide the result.

Case sent back. . B. N.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 1957 of 1916. Dasember 14, 1920.

Present :- Mr. Justice Le Rossignol and Mr. Justice Wilberforce. MUNSHI LAL-DEFENDANT

-APPELLANT

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SOHAN LAL, MINOR, THROUGH BANNE LAL -PLAINTIFF-AND OTHERS-DEFENDANTS-BESPONDENTS.

Hindu Law-Joint family -Alienation by one co.

REMARGINI DEBI C. SAFAT SUNDARI DEBYA.

parcener, validity of-Appeal, second-New plea.

An alienation by a co-parcener in a joint Hindu family of the family property, which is not for the benefit of the family, is liable to be annulled in its entirety at the instance of another co-parcener.

The High Court will not entertain an argument which is raised for the first time in second appeal.

Second appeal from a decree of the District Judge, Gurgaon at Hissar, dated the 1st May 1916, affirming that of the Subordinate Judge, First Class, Gurgaon, dated the 11th December 1915.

Lala Moti Sagar, R. S., for the Appellant. Pandit Nanak Chand, for the Respondents.

JUDGMENT.—In this case the plaintiff sued for a declaration that an alienation made by his brothers, Mohan Lal and Hullasi, should have no effect against his reversionary rights. The lower Appellate Court has found that Mohan Lal had been adopted into another family and, therefore, was not competent to transfer plaintiff's rights and that, as far as the other brother, Hullasi, was eccepted, the cale was null and void as against the plaintiff, as it was not proved to have been effected for the family benefit.

Mr. Moti Sagar in arguing the appeal urges, first, that the sale should not have been set aside as far as the personal rights of Hullasi are concerned. Hullasi, however, is merely a so parsener in a joint Hindu family and it eannot be predicated that he has any share of his own until partition. A clear authority on this point is Piare Lal v. Ram Chand (1), The lower Court was, therefore, right in annulling the whole alienation. Mr. Moti Sagar also urged that the lower Court should have held that the sale was made by Hullasi as manager of the family and for the benefit of his minor brother, the plaintiff. On this point the lower Appellate Court has held that no benefit whatever has been proved to the family from this alienation, and this being a finding of fact eannot be contested on second appeal. Mr. Moti Sagar wished also to raise the contention that Hullasi and plaintiff did not constitute a joint Hindu family, but that

(1) 11 Ind. Cas. 243; 21 P. R. 1912; 112 P. W. B. 1911.

is an argument which is now urged for the first time and cannot be entertained. The other grounds of appeal were not argued. We dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

CALOUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 268 of 1921.

August 11, 1921.

Present:-Justice Sir Asutosh Mockerjee, Kr., and Mr. Justice Panton.

Rani HEMANGINI DEBI AND OTHERS-

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SARAT SUNDARI DEBYA AND OTHERS-DEFENDANTS-RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 50, 76, 8?, 92-General grant of Probate, operation of Judgment in rem, if can be collaterally attacked—Several executors, powers of, when can be exercised by some.

A general grant of Probate must be deemed to continue in force until the Probate or Letters of Administration shall have been re-called or revoked by the Court of Probate on one or other of the grounds enumerated in section 50 of the Probate and Administration Act. [p 8>3, col. 2: p. 884, col 1.]

Where a judgment operates as a judgment in rem
(as the decision of a Probate Court does under
section 41 of the Evidence Act; it is not subject to
collateral attack; while it remains in force, it is
conclusive not only on the persons who are parties
to the judgment but upon all persons and all
Courts [p *81, col. 2.]

Where there are several executors, the powers of all may, in the absence of any direction to the contrary in the Will, be exercised by any of them who has proved the Will. [p. 885, col. ..]

Appeal against a decree of the Subordinate Judge, Rajshahi, dated the 21st August 1920.

Babus Mohendra Nath Ray, Preo Sankar Majumdar, Phanindra Lal Maitra and Rama Prosad Mooker; es, for the Appellants.

Babus Dwarka Nath Chuckerbuty, Rama Kanta Bhattacharyya, Krishna Kamal Maitra and Jatindra Nath Lahiri, for the Respondents. HEMANGINI DEBI U. SARAT SUNDARI DEBYA.

JUDGMENT.-This is an appeal by the plaintiffs in a suit for contribution, which has been instituted by them as executors to the estate of the late Raja Jogendranath Ray of Natore. The case for the plaintiffs is that on the 19th September 1916, they satisfied a mortgage decree which was operative against the estate of their testator as also the properties of the defendants. They consequently pray for recovery of specified sums by way of contribution from different sets of defendants. The defendants repudiste the validity of the elaim and also contend that the plaintiff; are incompetent to maintain the action. The Sabordinate Jadze has dismissed the sait on the preliminary point on two grounds, namely, first, that before the institution of the suit, the exeantership of the plaintiffs must be deemed to have terminated when the heir at law of the deceased testator attained majority; and, assendly, that even if the executorship has not terminated, the plaintiffs, who are three out of four surviving executors, are not competent to maintain the action, as the Will contemplated that at least six executors should take joint action. On the present appeal, the plaintiffs have controverted the view adopted by the Sabordinate Julge on the adestion of the competency of the suit. We shall examine the two points raised by the appellants in the order stated above.

As regards the point, it is not disputed that Raja Jogendranath Ray made a testamentary disposition of his properties on the 11th May 1900, that after his death the Will was duly proved on the 2nd April 1902, and that on the 23rd June 1902, the District Judge granted Probate to seven paraons (named as exesutors therein) in the form pressribed by section 70 of the Probate and Administration Act. This grant is not in express terms limited in duration and, attracts the operation of section 82, which provides that after the grant of Probate, no other than the person to whom the same shall have been granted, shall have power to sue or prosecute any sait or otherwise act as representative of the deseased throughout the province in which the same may have been granted, until such Probate shall have been re-called or revoked. The plaintiffs contend that inasmuch as the Probate has admittedly been neither re called nor revoked, no question can arise as to their compe-

tenes to institute the present sait. The defendants urgs that as under sestion 3 of the Probate and Administration Ast the "Probate" means the copy of a term Will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator, the scope of the grant should be interpret. ed in the light of the provisions of the Will, and, further, that if this rule of sonstruction be applied, it will be found that the grant has esseed to be operative, because the clear intention of the testator, to be gethered from his Will, was that the execu. cease to hold offine on tors should the attainment of majority by the heir atlaw. This argument plainly raises two distinct questions, namely, first, is it open to a Court, other than the Court which granted the Probate, to investigate whether a grant expressed in general terms and not explicitly limited in duration, has expired by reason of the provisions of the Will and, secondly, if such collateral attack is permissible in a Court other than the Court of Probate, had the grant in the present eased to be operative before the commeneament of this litigation? As regards the first of these points, the plaintiffs have maintained that where a grant is not expressly limited in duration but is formulated in general terms, the Court of Probate and that Court alone is competent to determine whether it has essed to be operative, in other words, whether occasion has arisen to re call or revoke the graut. In support of this proposition, reference has been made to sections 50 and 82 of the Probate and Administration Act. Section 50 provides that a grant of Probate may be ravoked or annulled for just cause which is defined to include amongst others the contingency that the grant has become useless and inoperative through eireumstances. argument in substance is that a general grant made in terms of section 76 is operative under section 82 until the Probats shall have been re-salled or revoked for the reason, amongst others, specified in section 50 that the grant has become useless and inoperative through eireum. stances. In our opinion, this contention is well-founded. This view receives support from the principles which underlie the decisions in Surendra Nath v. Amrita Lat HEMANGINI DEBI C. SABAT SUNDARI DPBYA.

Pal (1) and Chandra Kumar v. Prasonna Rumar (2). In the former case, it was ruled that the phraseology of the fourth clause of section 50 is sufficiently general to make it applicable to eases where the eircumstances ecutemplated have bappened since the date of the grant. In the latter case, it was ruled, on the authority of the desision of the Judicial Committee in Ecmbay Burmah Trading Corporation v. Frederick Yorke Smith (3), that so long as the person entitled to the estate has not taken it out of the possession of the executors, they are entitled to ecutione in compation of the estate. The principle reed not be affirmed in an unqualified form that "once an executor always an executor"; it is sufficient to hold that a general grant must be deemed to continue in force until the Probate or Letters of Administration shall have been recalled or revoked by the Court of Probate on ore or other of the grounds enumerated in section 50. We are not now called upon to consider whether an order for revocation is necessary. when a grant has been, in express terms, limited in duration, and the time specified has elapsed. But we observe that even upon that question, there has been divergence of judicial opinion in other systems of law. Thus in Offley v. Fest (4), Freke v. Thomas (5), Slater v. May (6), Matcalfe, In re (7) and Howell v. Metcalfe (8), it appears to have been assumed that no revocation was recesgary, where the grant, on the face thereof, was limited in duration and the prescribes pericd had elapsed. Reference may also be made to the judgment of Sir John Nicholl in the case of Cassidy, In re (9) where, as Judge of the Prerogative Court, he did not revoke a grant of administration with Will annexed to an attorney of the executor who was abroad, but pronounced it to have seased and expired on application of the

(1) 51 Ind. Cas. 936; 23 C. W. N. 763; 29 C. L. J. 49f; 47 C. 115.

(2 64 Ind. Cas. 997; 33 C. I.J. 451; 25 C. W. N. 977: 48 C. 1051.

(3) 19 B. 1; 21 I. A. 139; 6 Sar. P. C. J. 498; 10 Ind. Dec. (N. 8) 1 (P. C.).

(4) (1643) 1 Sid. 370; 82 E. R. 1163.

(5) (1792) 1 Salk. 39; 1 1 d. Raym. 667; 91 E. R. 40.

(6) (1705) 1 Salk. 42; 2 Ld, Raym. 1071; 91 E. R. 42.

(7) (1822) 1 Add. 343; 162 E. R. 121,

(8) (1824) 2 Add. 345; 162 E. R. 321. (9) (1882) 4 Hagg, 860; 162 E. R. 1477.

excenter for Probate and on affidavit that ro suits were rending. It was further directed that future grants durante obsentia should be expressly limited until the execuparty entitled to administration should duly apply for and obtain a grant: ree also Webb v. Kirty (10), Rendell, In re. Wood v. Rende'l (11), Hewson v. Shelley (12)), Reinbow v. Kittoe (13), Suwerkrop v. Day (14), On the other hard, in Piron v. Wallis (15), Phillips, In the goods of (16) and Newton, In the goods of (17) the view was favoured that even in such cases, a formal order of revocation is recessary. Substantially to the same effect is the decision of Lord Elden and Sir William Grant, M. R., in Kaineford v. Taynten (18). A similar view bas been adopted in the United States as appears from the decision in Morgan v. Dodge (19). But whatever room for difference of opinion there may be elsewhere in cases of grants expresely limited in duration or made for a specific purpose, it is fairly clear that under our statutory provisions a grant made in general terms must be deemed to sontinue in operation till revoked or re called in an appropriate proceeding instituted before a Conrt competent to exercise juriediction in that behalf. This conelu. sion is in harmony with the elementary rule that where a judgment operates as a judgment in rem (as the decision of a Probate Court does under section 41 of the Indian Evidence Act) it is not subject to ocllateral attack; while it remains in force, it is conclusive not only on the persons who are parties to the judgment but upon all persons and all Courts. This view renders unnecessary an examination of the second point, namely, assuming, that the grant can be collaterally attacked in the present

(10) (1856) 7 De G. M. & G. 376; 26 L. J. Ch. 145; 3 Jur. (N. s.) 73; 5 W. R. 189; 44 E. R. 147; 109 R. R. 175.

(11) (1901) 1 Ch. 220; 70 L. J. Ch. 265; 83 L. T.

625; 49 W. R. 131. (12) (1914) 2 Ch. 13 at p. 43; 53 L. J. Ch. 607;

110 L. T. 785; 58 S. J. 397; 30 T. L. R. 402.

(13) (1916) 1 (h. 313 at p. 318; 85 L. J. Ch. 469; 114 L. T. 606; 60 S. J. 338.

(14) (1838) 8 A. & E. 624: 3 N. & P. 670; 1 W. W. & H. 463; 7 L. J. Q. B. 261; 112 E. R. 975; 47 B. R. 676,

(15) (1753) 1 Lee 402; 161 E. R. 148.

(16) (1824) 2 Add. 335; 162 E. R. 316. (17) (1843) 3 Curt. 428; 7 Jur. 219; 163 E. R. 780.

(18) (1802) 7 Ves. 460; 32 E. R. 186. (19) (1862) 44 N. H. 255; 82 Am. Dec, 218, GAYDA RAM t. SONAYYA BAM.

suit, did it in law expire on the attainment of majority by the heir at-law? It is manifest, however, that the construction of the Will as propounded by the defendants cannot be supported. The third slause of the Will does not lay down that the executorship would terminate on the attainment of majority by the grandson of the testator. It is elear, even on the terms of that elause taken by itself, that the executorship might continue after the beirat law should have attained majority. But the other clauses of the Will leave no room for doubt on this point; reference may be made specially to the provisions of clauses 9 and 10 which deal with the expenses of maintenance and education of the grandson, or in the event of his death, of the adopted son, and also the expenses of maintenance and marriage of the granddaughters and their cons and grandsons. We are of opinion that the testator did not intend that the executors should sease to hold office immediately on the atlainment of majority by his grandson. From both these standpoints, we must hold assordingly that the authority of the executors had not lapsed before the commencement of this litigation.

As regards the second question, the Subordinate Judge has held that in view of the direction in the Will that there should be at least six executors acting at the same time, three executors cannot maintain this suit. We have examined the provisions of the Will and we are unable to uphold the view taken by the Sabordinate Judge. We are fortified in our opinion as we find that this very Will was so interpreted by Holmwood and Imam, JJ., in another ease which came up to this Court, when they ruled that three executors out of the four who had obtained Probate were competent to carry on proceedings in execution of a rent decree. In our judgment, the Will affords no clear indication that the testator intended to supersade the rule enunciated in section 92 of the Proba's and Administration Act, namely, that when there are several executors, the powers of all may, in the absence of any direction to the contrary in the Will, be exercised by any of them who has proved the Will; Satya Prashad Pal v. Motilal Pal (20). In the (20) 27 C, 683; 14 Ind. Dec. (N. s.) 448.

executors; three of them have died and their places have not been filled up; three others have instituted this suit, and the remaining executor who refused to join as a plaintiff has been included in the category of defendants. We are not prepared to say that the provisions of the Will invalidate a suit so framed.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for re-trial on the merits. The plaintiffs are entitled to their costs in this Court. The costs in the Court below will be in the discretion of the Subordinate Judge. As the suit has been dismissed on a pre-liminary ground, we direct, under section 13 of the Court Fees Act, that the Court fees paid on the memorandum of appeal be refunded to the appellants.

B. N.

Appeal allowed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 1412 of 192).
December 4, 1920.

Present: -Mr Justice Wilberforce.

GANDA RAM AND OTHERS - DEPENDANTS

-APPRILANTS

versus

SONAYYA RAM-PLUNTIFF-

Partition Act (IV of 1893), s. 2-Partition, no formal objection to-Auction order, validity of.

It is not necessary that there should be formal objections by the parties as to the possibility of a satisfactory partition of the property before a Court puts it to auction according to the principles laid down in section 2 of the Partition Act, and the auction order cannot be upset in appeal on the ground of the absence of such formal objections.

Second appeal from an order of the Distrist Judge, Jhang at Sargodha, dated the 19th February 1920, reversing that of the Senior Sabordinate Judge, Jhang, dated the 27th November 1919.

Mr. M. L. Puri, for the Appellants.

NATHWAL D. GONASHMELL JIVANMULL.

JUDGMENT.-In this case a decree was passed for partition of a very small house, The Subordinate Judge first issued a commission for the partition but then apparent. ly at the oral request of the parties visited the spot and found that the partition on the lines ordered was impracticable. He, therefore, ordered the house to be put to auction according to the principles laid down in section 2 of the Partition Act. Against this order an owner of a fifth share appealed and the lower Appellate Court accepted the appeal as the respondents had not objected formally that the house was incapable of being partitioned. Against this decision a second appeal has been preferred.

Court took an unduly narrow view of the case in upsetting the order of the Trial Court on the ground of the absence of any formal objections by the parties as to the possibility of a satisfactory partition of the property. Moreover, the District Judge did not in any way attempt to meet the grounds given by the Trial Court for ordering the auction; nor has the District Judge attempted to show how any practicable partition can be effected of this small property. In these circumstances the lower Appellate Court was in error in setting aside the order of the Trial Court,

I, therefore, assept the appeal and set aside the order of the District Judge and restore that of the Trial Court. The parties can bear their own costs in this Court, as the appellants were somewhat to blame in not objecting to the partition earlier on the ground of its impracticability.

N. H.

Appeal octepted.

OALCUTTA HIGH COURT,
APPEAL FROM INSOLVENCY JURISDICTION No. 98
OF 1: 21.

August 8, 1921.

Present: - Justice Sir Asutosh Mookerjee, Kr.
and Mr. Justice Panton.
NATHMULL - APPELLANT

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GONESHMULL JIVANMULL-

RESPONDENT

Presidency Towns Insolvency Act (III of 1909), ss. 18 (31, 118 (1)—Omission to serve notice, if formal defect or irregularity—Waiver—Burden of proof.

The omission to serve the notice contemplated by sub-section 3 of section 13 of the Presidency Towns Insolvency Act is not a formal defect or irregularity within the meaning of section 118 of the Act. [p. 887, col. 2.]

An order of adjudication should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him. [p. 887, col. 1.]

The burden lies upon the creditor to establish that the insolvent has waived the defect caused by the omission to serve the initial notice prescribed by section 13. [p. 887, col. 1.]

Appeal against an order of Mr. Justice Greaves, dated the 13 h July 1921,

Mesers N. Sarkar and K. P. Khaitan, for the Appellant.

Mesers. A. N. Chaudhuri and B. L. Ghore, for the Respondent.

JUDGMENT .- This appeal is directed against an order of dismissal made on a petition to set aside an adjudication order Presidency Towns Insolvency pnder the Act. It appears that an application was made by a creditor of the alleged incolvent for an adjudication order. Notice of that application was served at 150 Cotton Street where it was, asserted the appellant carried on business. The case for the appellant is that his residence was at 4 Banstollah and that there was, in law, no service of notice, with the consequence that the adjudication order cannot stand. In this connestion, our attention has been drawn to rule 75 of the rules under the Presidency That rule con-Towns Insolvency Act, templates a personal service on the alleged insolvent, and substituted service is permissible only if personal service cannot be effected. If personal service cannot be effected, the Court may extend the time for hearing the petition, or if the Court is satisfied by affidavit or other evidence that the debtor is keeping out of the way to avoid such

NATAMULL C. CONESHMULL JIVANMULL,

service or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business or by registered letter or in such other manner as the Court may direct, and such petition shall then be deemed to have been duly rerved on the dobtor.

In the case before us, it is conceded on behalf of the respondent that the procedure prescribed in this rule was not followed. But it has been contended that the validity of the order for adjudication cannot be challenged on two grounds, namely, first, that the omission to serve the notice did not invalidate the adjudication order, because, it amounted to a formal defect or irregularity within the meaning of sub-section (1) of section 118 of the Presidency Towns Incolvency Act; and secondly, that the omission has been waived by the insolvent.

As regards the first ground, we are not prepared to hold that the omission to serve the notice contemplated by sub section 3 of section 13 of the Presidency Towns Insolveney Act is a formal defect or irregularity within the meaning of section 118. This notice is the first notice which the Legislature contemplated was to be received by the alleged insolvent before the proseedings sulminated in an adjudination order against him. It is of fundamental importance that an order of this description should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him. There is no authority directly in point, but our attention has been drawn to the ass of Jerningham, Ex parts, Jerningham, In re (1), which was decided under another Statute, but which indicates that a notice of this description at the initial stage should not be regarded as something the omission of which maybe treated as formal defect orirregularity. The cases of Rirkwood, Ex parte, Mason, In ro (2) and Vanderlinden, Ex parte, Pogose, In re (3) are (1) (1876) 9 Oh. D. 466; 47 L. J. Bk. 115; 89 L.

T. 186; 27 W. R. 157. (2) (1879) 11 Ch. D. 724; 40 L. T. 566; 27 W. B. 806.

(8) (1882) 20 Ch. D. 289; 51 L. J. Ch. 760; 47 L. T. 188; 80 W. R. 980.

elearly distinguishable. In the former case it was held a mere formal defest that the debtor was described in the petition as a sattle dealer and not sattle dealer and farmer. In the second case, it was held a formal defect that a petitioning creditor did not state in his petition his willingness to estimate his security, though he gave notice thereof to the debtor before the hearing. We are not prepared to hold that cases have any analogy to the ease before us. The decision in Kissory Mohan Roy, In re (4), that an order for discovery under section 36 may be made ex parte is elearly distinguishable, and does not support the contention that the adjudication order made in the present case without service of the initial notice prescribed by section 13 is a good order.

As regards the second ground, the burden lies upon the creditor to establish that the insolvent has waived this defect in the proceedings. Mr. Sarkar has maintained that there was no such waiver as the appearance before the Registrar at the subsequent stage was under protest, and we are not satisfied that there was in fact a waiver in this case.

We hold accordingly that this appeal must be allowed and the order dismissing the application to set aside the adjadication order reversed. The application will stand granted. But the consequence of this order will not be to dismiss the application of the retitioning creditor. The parties will be restored to the position which they occupied when the order for service was made under section 13, sub-section 3. The petition will stand revived and will be dealt with in accordance with law from that stage. The appellant is entitled to the costs of this appeal including reserved costs, if any.

B. N.

Appeal allowed.

(4) 36 Ind. Cas. 990; 20 C. W. N. 1155; 44 C. 286,

BIBI FATMA U. BAKARSHAH.

SIND JUDIOIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPLICATION No. 18 of 1920.

July 15, 1920.

Present: - Mr. Kinoaid, J. C.

BIBI FATMA-APPLICANT

versus

BAKARSHAH AND ANOTHER-OPPONENTS.

Muhammadan Law-Minor-Guardian-Mother, right of-Woman marrying stranger-Forfeiture of right.

Under Muhammadan Law the mother is the proper guardian of her infant boy, at any rate until the age of seven, and the burden of proving that, in the particular case, the mother is not entitled to be the guardian of her infant son lies heavily on anyone who would assert it. [p. 889, col. 2.]

Under the Muhammadan Law a woman who marries a stranger forfeits her right to the custody of her child by a former marriage. [p. 859, col. 2.]

Mr. Tahil Ram, for Mr. Lulchand Hasomal, for the Applicant.

Mr. Rurchand Billaram, for Opponent No. 1.

Mr. Wadhumal Oodharam, for Opponent No. 2.

JUDGMENT.—I have been asked in this case to take a good deal of evidence by both eider, especially by the side represented by Mr. Rupeband. It has, however, always been my practice to deal with summary proceedings in a summary way and not to take any evidence, if I think it unnecessary. In this practice I am fortified by the view of the Bombay High Court as set forth at page 44 of the Bombay High Court Civil Circulars:—

"Attention has been called to a case in which an enquiry under Act VII of 18:9 was protracted for a period of rearly two years. It is obvious how very disastrous such delay may be in the interest of the Section 7 of the Act family concerned. provides that open the day fixed for hearing or as soon thereafter as may be practicable the Court shall proceed to decide in a summary manner the right to the There seems to be uncertainty as to the meaning of summary procedure. The intention is that the Judge shall make such erquiry only as he thinks necessary to satisfy his mind. In making such erquiry the number of witnesses, whom he may think proper to examine on one side or the other, and the length of cross examination which he may

think right to permit, are matters entirely within his discretion which should be used in such a way as to prevent the object of the Legislature being defeated. Were it other. wise, any party desirous of delaying the order eculd easily do so by calling a large number of unnecessary witnesses or cross. examining at unreasonable length. There may be cases where the use of affidavits in place of oral evidence would be desirable, Where the evidence is taken on affidavit, the Court must be more careful to sheek any prolixity and to vieit any fault in this direction by deprivation or imposition of costs. There remarks apply to all Asia which direct a commany erquiry in civil mattere."

The facts of this case can only be styled as extraordinary. There are two families of Pire who are interested in these proceedings. On the paternal side of the minor there were two brothers. Bakarshah and Jebanshah. Jehanshan married Bibi Fatma, the applicant. By her he tad a son Ghulam Rascol. On the maternal side of the minor's family there were two brothers also Hydersbah, These two brothers Abmedshah. and married two sisters, Mir Zadi and Malik Bibi. Hydersbah by Mir Zadi had five, daughters, of whom Bibi Fatma married, as I have said, Jehanshah and two others, Zainat Bibi and Sabibzadi, married respectively Bakarshab's two sons, Vilayatshah, By Malik Bibi and Mahomed Bukib. Abmedsbah had two sons both of whom died as tiny children 28 to 30 years ago. Just after the death of Ahmedshah a certain person managed to get Malik Bibi to recognise him as Azimshah, one of the two infants, who died, as I have said, when tiry children. Following his recognition Malik Bibi, the self-styled Azimshah collected, alms or presents from the former diseiples of Ahmedstah and was on the 17th of February 1919 convicted by the learned, District Magistrate of Thar and Parkar under geetion 419 of the Indian Penal Code. Be was ordered to pay a fine of Rs. 50 or in default to suffer rigorous imprisonment for one month.

To return once more to the paternal side of the minor's family, his father, Jehanshab, died in December 1919 and shortly after his death his widew Bibi Fatma applied to this Court to be appointed guardian of the

BIBI FATMA U. BAKARBRAH.

minor son, Ghulam Rascol. This application has been opposed with great vigour both by Bakarshab, the paternal uncle of Ghulam Rascol, and by Babai, also the sister of Jehanshah and Bakarshah.

At the outset, it is clear that other things being equal, the mother is the proper guardian of her infant boy only two years old. has also been laid down in Muhammadan Law that the sustody of a boy until, at any rate, the age of seven belongs to the mother (Wilcon's Anglo Muhammadan Law, 3rd Edition, page 182). The burden, therefore, of proving that the mother in this osee is not entitled to be the guardian of ber infant son lies heavily on any one who would assert it. The learned Pleader for Bakarshah has relied on a Will alleged to have been made by the father, Jehanshab, on 12th of December 1919, that is to say, not long before bis death. In that Will Jebanshab, after reciting various grievaness that he had against his wife, has expressed the wish that the guardianship of his son should vest in the hands of his elder brother, Pir Bakarshah. This Will, however, has not been admitted as genuine by the other side, and it seems to me elear that, as by the Muhammadan Law the eustody of an infant boy until the age of seven vests in the mother, no Will sould have the power to take that right from her. The next point urged by the learned Pleader, and it is indeed his principal point, is that Bibi Fatma is not living in her hasband's house, but is likely to marry the pretender Azimshab. As regards Bibi Fatma's non-residence in her husband's house, I think this is only natural. She has evidently quarrelled with her husband's relations and it is not probable that they would welsome her there or make her happy. The question remains as regards the alleged projected marriage with Azimshah. As I have said, he has been recognised by Ahmedehah's widow. The sister of Ahmed Shah's widow is the mother of the applicant Bibi Fatma. It has been alleged that previous to her marriage to Jehanshah, Bibi Fatma wished to marry Azimehah and that she now again wished to do so. These allegations, however, have been strenuously denied and Mr. Tahilram has given an undertaking that his elient will renounce her claim as guardian if she ever doss marry Azimshah. All that the Court can say is that she has not so far done so; whether she will do so in

the future neither this Court nor any one else can say. But the Muhammadan Law, as I read it, makes it clear that a woman who marries a stranger-and a stranger, undoubted. ly, Azimsbah is-would forfeit her right to the enstady of her shild by a former marriage. Therefore, any order giving the applicant the guardianship of the shild must be weighed by the condition that she will forfeit that guardianship if she marries Azimshah or any other stranger to her husband's family. The next point raised by the learned Pleader is that there is a feeling in the community against taking the infant Pir away from his father's relatives. This may be the case. But I do not think it is one which should it flaence a Court when deciding the question of the minor's guardianship. The next point advanced by the learned Pleader is that the applicant does not reside within the jurisdiction of the Karachi Court. I quite agree with the learned Pleader that no one appointed as guardian by the District Court of Karashi should reside outside its jurisdiction and were the applicant, after being appointed guardian, to leave the jurisdiction of the Court, it would be open to Bakarshah or any other person interest. ed under section 39 clause (h) to ask that the applicant should be removed from the guardianship. The next point raised by the learned Pleader is that even under the Muhammadan Law the right of guardianship should after the age of seven some to Bakarshab. But under section 39 clause (j) of the Guardians and Wards Act it would be in the same way open to Bakarshah or any other person interested to claim that by reason of the minor boy being over seven. the right of Bibi Fatma to be her guardian bas seased.

I think that I have now dealt, at any rate, with all the important points raised in the learned Pleader's arguments. I appoint Fatma to be guardian of the person of her minor son, Ghulam Rascol, but she shall vacate the guardianship, should she marry Azimshah or any other stranger to her deceased husband's family. In view of all the circumstances of the case, I do not think that I should make any order as to costs. I will add one observation. It will probably be in the interest of the minor boy, Ghulam Rascol, if his "Dai" Karima goes to live with her mother. I have

SURBLAL RARMANI U. OFFICIAL ASSIGNME OF CALOUTTA.

been informed by the applicant's Pleader that his elient is quite willing that Karima should do so.

J. P.

Mother appointed quardian of her son.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER

No. 89 of 1-21.

August 23, 1921.

Present: - Justice Sir Asutosh Mookerjee, Kr., and Mr. Justice Panton.

SUKHLAL KARNANI-APPELLANT

versus

THE OFFICIAL ASSIGNEE OF CALCUTTA-REPPONDENT.

Presidency Towns Insolvency Act (III of 1902), s. 38

—Insolvency—Order for discovery—Wilful disobedience, consequence of.

An order for discovery made under section 36 of the Presidency Towns Insolvency Act may, if disobeyed, involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court In view of such possibilities the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that, at the time of the order, the things whose discovery was demanded, were either not in existence or were not under his control. [p. 891, col. 2.]

Appeal against an order of Mr. Justice Greaves, dated the 26th July 1921.

Messrs. N. Sarkar, S. K. Sen and Langford Jumes, for the Appellant.

Messrs. H. D. Bose and L. P. Pugh, for the Respondent.

JUDGMENT.

MODERIEE, J.—This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Greaves, directing the appellant to produce before the Registrar in Insolvency the rokurs and ledgers kept by him for the years 1974 and 1975 Sambat.

The facts material for the determination of the question raised before us lie in a narrow compass and may be briefly recited. One Seldana was adjudicated an insolvent on the 2nd July 1920. Seldana had carried on business in partnership with Sukhlal Karnani, the appellant before us, and the firm had transactions with the Munitions Board. On

the 18th August 1920, a complaint against Seldans was filed by the Munitions Board charging him with cheating, conspiracy to cheat and forgery. On the 26th August 1920, a complaint was lodged against Karnani charging bim with conspiracy to cheat. On the 29th November 1920, the Official Assignee made an application before the Registrar in Insolvency in the matter of the insolvency of Seldana. in that application, the Official Assignee alleged that Karnani could give information regarding the dealings and properties of the insolvent and prayed that Karnani should be summoned and examined by the Court and should be required to produce all books, papers, correspondence and assounts relative to transactions had between him and the insolvent in connection with their partnership and dealings with the Munitions Board from the 16th March 1918. This application was granted ex parte. Karnani appeared before the Registrar in Insolvency on the 15th, 17th and 21st Desember 1920, and was examined by Counsel, on behalf of the Offisial Assignee. The object of the examination was to ascertain whether or not Karmani was indebted to Siliana in a sum of Re. 2,64,(C). A petition was then presented by Karnani to Mr. Justice Greaves on the 4th January 1921, with a view to obtain eancellation of the order for discovery made on the 23th November 1920, under section 36 of the Presidency Towns Insolvency Act. The application was dismissed on the 7th January 1920. An appeal was preferred against this order, on the ground, amongst others, that the order for discovery had been made ex parte. This contention was overruledon the authority of the decision in Kissory Mohan Roy. In re (1), and the appeal was dismissed by Sanderson, C. J. and Richardson, J. on the 17th March 1921 [Sukhlal Karnani (Albert Felix Seldana) v. Official Assignee of Calcutta (2)]. The judgment then delivered also stated that the Court was not satisfied that really intended to the exmination was be used for an improper and ulterior purpose, namely, for the furtherance of the The matter was eriminal prosecution. then taken up again by Mr. Jastice Greaves and on the 28 h June 1921, he gave directions for the purpose of a fuller erquiry. An appeal was preferred against this order, and applica-

(1) 36 Ind, Cas. 990; 20 C. W. N. 1155; 44 C. 286. (2) 66 Ind, Cas. 715; 25 C. W. N. 750; 48 C. 1039. SURBLAL KARNANI U. OFFICIAL ASSIGNED OF CALCUTTA.

the enquiry pending the final disposal of the appeal. This application was refused on the 8th July 1921, and the appeal failed. The result was that the order of the 29th November 1920 stood as a good and valid order. Mr. Justice Greaves then held the further enquiry, and on the 26th July 1921, made the order which is the subject matter of the present appeal. The order directs Karnani to produce the roturs and ledgers mentioned and it is added that the order would be served upon Karnani personally as a peremptory order with the usual warning note.

note. In support of the appeal, it has been urged that the evidence does not conclusively show that the assount books are in existence and are under the control of Karnani, account-books were at one time in existence is clear from the statement of Karpani himself; it is true he did not write them and there is no evidence to show that he had them in his personal anatody. The hypothesis with which he started in the course of there proceedings was that during the raid of his premises by the Police on the 2 rd December 1919, when numerous assount-books and papers were seized by the investigating officers, the particular account books now required might have been se'zed and taken away by the Police. In view of the order which we propose to make, it is not desirable that we should discuss in detail the evidence adduced in support of this allegation; it is sufficient to state that, in our opinion, the theory has not been established. An examination of the books and papers still in the oustody of the Police has shown that the books required are not there and were not amongst those taken away by the Police at the time of the raid. This, however, does not by itself justify the inference that the only other possible alternative conclusion, to be deduced by an application of the principle of continuity, is that the books are still in existence and are under the control of Karnani. We cannot overlook the fact that during the whole of the time that this matter was under investigation, a criminal charge of a grave character was pending against Kernani, and that he apprehended, rightly or wrongly, that any statement he might make in connection with these proceedings, might be utilised by the prossection, even if not astually used against him. Indeed, Mr. Justice Greaves, in the course of the judgment delivered by him on the 7th January 1921, made the following observation which is pertinent in this connection : "Then, lastly, with regard to the alleged improper purpose of the examina. tion, it seems to me that it is for the witness to object to such questions as be considers are put for an improper purpose, and if necessary, I think he would be justified on the advise of Counsel in refusing to answer such questions even if directed to do so." We need not sonsider how far a refusal to answer questions might involve Karnani in serious trouble, if the principle reecapised in Fernandez, Ex parte (3) should be invoked. But a perusal of his statement does leave one under the impression that this observation was not lost upon him and his Counsel. The substance of the matter is that the enquiry has been conducted under eirsumstances which might very well prove seriously embarrassing to Karpani. Those eireumstances, we have been informed, have, however, now changed as the criminal charge against him is no longer pending. Under altered conditions, he may thus be able to make fuller disclosures than what was considered practicable by his legal advisers during the pendency of the eriminal proceeding; and we are of opinion that he should be afforded an opportunity to do so. An order for discovery made under section 35, may, if disobeyed, involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court, as happened in the same of Origanti Vankotarathnam v. Desikachari (4). In view of such possibilities the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that at the time of the order the books were either not in existence or were not under his control.

The result is that this appeal is allowed and the order made by Mr. Justice Greaves on the 25th July 1921 set aside. The case will be remitted, so that there may be a

^{(8) (1861) 10} C. B. (N. s.) 8; 128 R. R. 575; 30 L. J. C. P. 821; 4 L. T. 324; 7 Jur. (N. s.) 571; 9 W. R. 832, 142 E. R. 343.

^{(4: 53} Ind Cas. 419; 33 M. L. J. 161; (1919) M. W. N. 863.

BYAGWAT PRASAD U. MUHAHMAD SHIBLI.

fresh investigation of the question, whether the appellant is in a position to earry out the order made on the 29th November 1920, for the production of rokur and corresponding ledger of 1974 and 1975 Sambit. The costs of this appeal will be in the discretion of the learned Judge who may re-hear the matter.

B. N.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL AFPEAL No. 881 of 1920.

February 21, 1922.

Fresent:—Justice Sir P. O. Banerji, Kt.,

and Mr. Justice Stuart.

BHAGWAT PRASAD TEWARI

—Defendant—Appellant

versus

MUHAMMAD SHIBLI-PLAINTIFF-

Civil Procedure Code (Act V of 1908), O IX, r 7-Non-appearance of defendant-Suit ordered to be proceeded ex parte-Defendant, whether can appear subsequently.

Where on the first date fixed for hearing, a defendant is not present and the Court makes an order directing the suit to proceed against the defendant ex parte, the defendant is not precluded from appearing on a subsequent date and offering to file his written statement and to produce his witnesses.

Second appeal from a decree of the Distriet Judge, Gorakhpur, emfirming a decree of the Subordinate Judge.

Mr. Peary Lal Banerii, for the Appellant. Mr. S. M. Sulaiman, for the Respondent.

JUDGMENT.—In our opinion this case bas not been properly tried and must be sent back to the Court of first instance for a fresh trial.

The suit was brought to enforce two martgages against two persons, Bhagwat Prasad and his son Kalka Prasad. Bhagwat Prasad was alleged to be the executant of the mortgage deeds. The summors issued to the defendants was served personally on Kalka Prasad, but it was affixed to the house of Bhagwat Prasad, who

was not found. On the first date fixed for hearing, Kalka Prasad appeared and filed his defence. Bhagwat Prasad did not appear, and the Court recorded an order directing that the case should be heard against him ex parte. The case, however, was not heard on that date, and the hearing was postponed to a subsequent date. On that date, Bhagwat Pracad appeared and asked for an adjournment to enable him to file his written statement and to put forward his defense and to adduce his evidence. This application was refused, but the case was, for some reason, adjourned to another date. On that date Bhagwat Prasad again appeared and asked the Court to permit him to file his written statement; and he stated that his witnesses were present in Court and he was ready to adduce his evidence. The Court refused to listen to him and to receive his written statement on the ground that on the first date fixed for hearing, he was not present and the Court had ordered proceedings to be held ex parte against him.

This view of the Court of first instance was clearly erroneous and, strangely enough, it was accepted by the lower Appellate Court. No ex parte decree had been passed against Bhagwat Prasad. The mere fact that on the first date fixed for hearing he was not present, and the Court made an order directing that the suit should proceed against him ex parte, did not preclude him from appearing on a subsequent date and offering to file his written statement and to produce his witnesses. His application ought to have been granted and the case ought to have been

We allow the appeal, set aside the decree passed against Bhagwat Prasad, and remand the case to the Court of first instance with direction to re-admit the suit as against Bhagwat Prasad and to try it according to law. Costs here and hitherto will be costs in the cause.

J. P.

Appeal allowed,

PARIR MUHAMMAD C. AMIR CHAND.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 297 CF 1920.

July 16, 1920.

Present:—Mr. Justice Scott-Smith.

FAKIR MUHAMMAD-PLAIRT: FF-

versus

AMIR CHAND and OTHERS-DEFENDANTS-RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 67—Code of Civil Procedure (Amendment) Act (I of 1914), s. 8-Agricultural land, sale of—Commissioner, sanction of, whether necessary—Insolvency—Insolvent, death of—Legal representatives, whether should be impleaded.

In the absence of any notification as contemplated by section 3 of Act I of 1914 the sanction of the Commissioner of the Division is not necessary as a condition precedent to the sale of agricultural land under the provisions of section 67 of the Civil Procedure Code of 1908.

There is no law that upon the death of an insolvent, who has been adjudicated as such, his legal representatives should be brought on the record in

his place.

Second appeal from a decree of the District Judge, Sialkot, dated the 29th October 1919, confirming that of the Subordinate Judge, Second Class, Sialkot, dated the 21st June 1919.

Mr. Hag Nawas, for the Appellant. Lala Jagan Nath, for the Respondents.

JUDGMENT .- In the suit out of which the present second appeal arises, the plaintiffappollant elaimed possession of sertain agricultural land and a house which were the property of his deceased father, who had been adjudisated an insolvent, and which were duly sold by the Reseiver. The property in dispute was purchased by Prem Ohand deceased whose representatives are the defendants respondents. The plaintiff's elaim has been dismissed, it being held that the ruling Jagdip Singh v. Bawa Narain Singh (1) does not apply to this case because the property of the plaintiff's father vested in the Receiver prior to his death, that the debts incurred by the plaintiff's father were for valid necessity, and that there was no necessity in the insolvency proceedings to bring the plaintiff's name on the record as the legal representative of his deceased father.

The first point urged in appeal is that the agricultural land could not be sold without the sanction of the Commissioner of the

(1) 15 Ind. Cas. 866; 4 P. R. 1913 (F. B.); 160 P. W. R. 1912; 173 P. L. R. 1912.

Division. Now, no doubt under the rules framed under eection 327 of the former Code of Civil Procedure such land sould not be sold without such sanction, but in Kishore Chand v. Ishar Singh (2) it was teld that "irasmuch as in the Civil Precedure Code of 1908, section 67 re-enacts only the first paragraph of rection 327 of the old Code, and has omitted the second paragraph of that rection under which the erceial rule authorising the Commissioner to senstion sales of agricultural land in execution of the decree of a Civil Court had been framed, the special rule in question became inoperative from the date on which the new Ocde came into force and that the canction of the Commissioner of the Division is no longer required as a condition precedent to the sale of agricultural land in excention of a decree for money." Ocunsel admits the force of this authority but refers to Act 1 of 1914, section 3. This lays down that when, on the date on which 1908 Code same the into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may, by notification in the losal official Gazette, declare such rules to be in force. In accordance with this the Local Government might no doubt have notified that the special rules as to the sale of agricultural land framed under section 227 of the old Code were in force, but, so far as I am aware, no such notifieation has issued and Connsel cannot refer to any. I, therefore, hold that the sametion of the Commissioner was not necessary as a condition precedent to the sale of the Conneel for the appellant land in suit. does not arge that Jagdip Singh v. Bawa Narain Singh (1) is applicable to the present case and, in my opinion, it is obviously inapplicable. The insolvent by getting himself adjudicated insolvent caused his property to vest in the Receiver for the good of his ereditors; in other worde, by his own act he expressly charged the whole of his property for the payment of his debte.

Ground No. I of the appeal has, I consider, no force. There is no law that upon

^{(2) 19} Ind. Cas. 473, 89 P. R. 1918; 167 P. L. R. 1918; 123 P. W. R. 1918.

BARTIC CHANERA C. GOESIN PROTAP CHANDRA.

the death of an insolvert, who has been adjudicated as such, his legal representatives should be brought on the record in his place, On the contrary, section 10 of the Provincial Insolvency Act lays down that if a debtor by or against whom an insolveney petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive. There was, therefore, no necessity that the plaintiff should have been brought upon the reerrd as the legal representative of his descased father. As regards the house, I see no reason for holding that its sale was invalid. It was expressly put at the disposal of the insolvent's Estate Court by the insolvent himself and another house was exempted from attachment under the provisions of section 60 of the Civil Procedure Code because the insolvent was an agriculturist.

The appeal accordingly fails and is dis-

missed with costs.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 258

OF 1916.

APPEAL FROM APPELLATE DECREE No. 2119 of 1915

AND

RULES Nos. 1217, 12:8, 1219, 1220, 1221, 1222, 1223, 1224 or 1915.

May 12, 1920.

Present: -Mr. Justice Richardson, and Justice Sir Syed Shams ul-Huda, Kr. In . 0. 258 or 1916.

MARTIO OHANDRA CHAKRAVARTY
AND ANOTHER—DEFENDANTS Nos. 2 AND 3
—APPELLANTS

versus

GOSSAIN PROTAP CHANDRA GIR
PLAINTIFF AND ANOTHER—DEFENDANT
No. 1—RESPONDENTS.

In No. 2129 or 1915.

NANDA LAL-DEFENDANT - APPELLANT

KARTIK CHANDRA CHAKRAVARTY

PLAINTIFF - RESPONDENT.

Endowments - Debutter property - Accretions -

Custom-Gir Gossains-Dismissal-Punch, power of Bhat's book, admissibility in evidence of-Evidence Act (I of 1872), s. 32.

Properties acquired with the income of endowed property and treated by the shebait all along as properties belonging to the idol, form the property of the idol [p *9, col 1.]

During the lifetime of his guru, a chela who is of age may be a member of the punch. [p 897, col. 2]

Among Gir Gossains marriage is not allowed and by custom if any one of the Gir Gossain sect drinks wine or marries or becomes addicted to vice the Punch can dismiss him and instal another shebait in his place, [p. 896, col. 2.]

Succession amongst the Gir Gossains is governed by Gotia relationship and in the absence of a chela the nearest Gotia succeeds. [p 897, col. 2]

The Bhats are heralds who are interested in keeping family record which is evidence under section 32 of the Evidence Act if it comes from proper custody. [p. 897, col. 2.]

In No. 258 or 1916.

Appeal against the decree of the Subordinate Judge, Rajshabye, dated the 31st of May 1916.

IN No. 2119 of 1915.

Appeal against the decree of the District Judge, Rajshabye, dated the 29th May 1915, reversing that of the Munsif, Second Court at Malda, dated the 11th July 1914.

IN No. 258 of 1916.

Babus Ram Chandra Mazumdar and Ru-

Babus Mohini Mohan Charracorty, Krishna Kamal Moitra and Nishitha Nath Ghattak, for the Respondents.

In No. 2119 or 1915.

Babu Krishna Kamal Moitra, for the Ap-

Babu Phanindra Lal Moitra, for the Bes-

IN RULE Nos. 1217 to 1224 or 1915.

Babu Giri, a Prosunna Sanyal, for the Opposite Party.

JUDGMENT.

APPEAL No. 258 or 1916.

In this suit plaintiff claiming to be shebait of the Idol Khubaneswar Mahadeb prayed for declarations that properties ka, kha, ga and gha described in the schedule to the plaint belong to the said idol; and that the plaintiff was its shebuit, his predacessor, the defendant No. 1, having been removed from his office owing to missondast and the plaintiff appointed in his place by the Punch of the seet, in whom authority for the purpose was yested

KALTIC CHANDRA U. GOSPAIN PROTAP CHANDRA.

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Plaintiff further prayed that two pathic pattas dated the 8th May 1913, granted by the defendant No. 1 to defendant No. 2 in respect of properties kha and gha after his removal from office be declared void and inoperative. The date of the defendant's removal by the purch and the plaintiff's appointment in his place is alleged to be the 31st July 1912. On the 23rd December 1914 defendant No. 3 was impleaded on the ground that the defendant No. 1 had on the 5th Kartie 1321 (22nd October 1914) sold the dwelling-house in schedule ka to him.

There was a further prayer by the plaintiff for recovery of possession, should he be found to be out of possession of any of the properties.

While the trial was still pending in the First Court, on the 16th March 1915 the defendant No. 1 compromised the ease with the plaintiff, withdrew his written statements and admitted the plaintiff's claim and con sented to a decree being passed in favour of the plaintiff.

Upon the pleadings, fourteen issues were framed and the learned Subordinate Judge, having decided those issues in favour of the plaintiff, passed a decree granting him the desigrations he had asked for and also swarding him a decree for recovery of possession. There was an appeal by the defendants Nos. 2 and 3 to this Court. During the pendency of the appeal, the plaintiff having died, his heir and legal representative, his chela, Gossain Radra Nandan Gir, was substituted in his place as plaintiff. At the first hearing of the appeal in March 1919, it was agreed on both sides that the findings of the learned Subordinate Judge on the several issues were not sufficient and that proper findings should be made on the issues on which the Judge had not arrived at any definite findings. The appeal was accordingly kept pending on the files of this Court and issues Nos. 6, 7, 9, 10 and 11 were remitted to the Court below for proper findings after admitting such further evidence as the parties might shoose to adduce. Upon remand additional evidence was given on both sides and the learned Judge returned his findings on the issues in assordance

with the directions of this Court. Of the five issues remitted to the Court below the Subordinate Judge desided the 9th issue only in favour of the defendants. This issue related to the validity of an ikrarnama executed by the defendant No. 1 in favour of the plaintiff. All the other issues were decided in favour of the plaint. iff. The learned Vakil for the appellant has attacked most of these findings as well as some of the findings arrived at by the learned Subordinate Judge on the issues desided before remand, and we may state generally that after careful consideration of the arguments on both sides we are not satisfied that any of the findings are incorrect. The ease as it seems to us presents no great difficulty.

The arguments of the learned Vakils for the appellant have been mainly directed to three points:—

(I) whether the properties in suit are properties of the Math.

(2) whether the alienations made by the defendant No. 1 were for legal necessity, and

(3) whether the punch was properly constituted and had the power of removing the defendant No. 1 and appointing the plaintiff in his place.

If the first and the third questions are answered in favour of the plaintiff, it will not be necessary to consider the second question, as all the alienations took place after the removal of the defendant No. 1 from the office of slebait.

The first point need not detain us long. This question was raised in the fifth issue which the learned Judge decided in favour of the plaintiff, giving full reasons for his decision.

It seems to us that upon the evidence no other conclusion is possible. Of the four properties, ka and kha are included in the original deed of endowment executed by Lal Gir in favour of Niranjan Gir Gossain and another dated the 16th October 1854. As regards the other properties, it is clear upon the evidence that these were acquired subsequently with the income of the properties originally endowed. All the properties are included in the Will of Prosottam Gir whereby the defendant No. I was appointed shabait of the debutter properties. The learned Judge refers to

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numerous documents in support of the conclusion that the defendant No. 1, who came into possession of the properties in suit as chela of Prosottam Gir, all along treated these properties as properties belonging to the idol.

We, therefore, answer this question in favour of the plaintiff.

As to the third question the evidence is equally clear. That the plaintiff was guilty of gross misconduct has been established by ample evidence taken both before and after the remand. One of these witnesses says "Ajraj used to visit public women. Helplessly drunk in company of public women I found Ajraj at his own biri. Ajraj married a woman; I heard of his marriage once; I asked bim why did be marry: he said he openly married a woman and also drunk wine and he would not care whether the purch would eat him or not." To the same effect is the evidence of a number of other witnesses. It is not, however, necessary to examine this evidence in detail as Ajraj stands condemned by his own admission. It appears that in September 1913 there was a dasoity in his bouse and he lodged a first information at the Bamangola Police Station. In that docoment Ajraj Gir complained of a dacoity in his horse in which a considerable quantity of cash and ornaments were said to have been removed from his house by the dacoits. There ornaments are those ordinarily used by women. Subsequently on the 4th September 1918 Ajraj made the following statement to the Investigating Police Officer :-

"I was eleeping inside the surfain of a chapperkhat standing on the east of the walled room facing north at about 8 or 9 p. m., on 17th Bhadra 1320, Tuesday last, My head was towards the west. I was awake owing to being ill. Within the room near the door towards the west was Dooshini Gossaini who could not see with her eyes in the outside. On the east side of the door my mistress Soudamini Gossaini and at a little distance towards the west in the verandah was Marda Harini."

The learned Vakil for the appellant did not and could not seriously repudiate the charge of immorality brought against Ajraj.

There is no doubt again that his conduct disqualified Ajraj from holding the office of thebait, and it has next to be considered whether it was open to the punch to remove him and appoint a successor.

In the deed executed by Lalgir Gossain dated the 16th October 1854 which created the endowment it is laid down that of the shebaits appointed by him whoever shall waste the poon; or shall misbehave shall be ousted from the shebaitship and shall be driven out from the hateli (house of the Mahadev), and if he does not go away, the punch of my easte is vested with authority to drive him out of the house if they get proof of his making waste or doing any misdeed. It is also laid down that against the decision of the runch no complaint or claim shall be admissible in any Court. Reference need only be made to the eviderse of Mahanth Padmanand Bharat, a very respectable witness from Purnes, who is a Zemindar with an income of 20 or 15 thousand rupees, a member of the local and District Board and an Hono. rary Magistrate. This witness is the Mahanth of 4 or 5 Mathe; he deposes that he belongs to the seet of Giri Gossain, that among them marriage is not allowed and that by sustom if any one of the Giri Gossain sect drinks wine or marries or bescmes addicted to vice, the punch can dismiss him and instal another stebait in his place. This evidence has received ample support from the evidence of a number of other witnesses examined in the case before and after remand. The existence of the sustom is also recognised in the case reported as Amrita Lal Shaha v. Gossain Ganpat Gir (1). It was objected that Lal Gir's Will refers in terms only to the persons whom he appointed his successors. In our opinion, on the materials before us, the Will must be read as incorporating the general enstom and directing its appliestion in a particular instance. As the Subordinate Judge points out, there is no rebutting evidence for the defence and we have no hesitation in agreeing with him that the existence of the eastom is established.

(1) 51 Ind. Cas. 8:4; 28 C. W. N. 491,

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The next point that arises for consideration is whether the punch was duly constituted and asted in conformity with the rules. It appears from the evidence that the punch, when they assembled, invited Ajraj to appear before them which Ajraj deslined to do. The punchnama contains the following statement:—

"Having got good and reliable evidense and knowing for certain by making neces. eary enquiries that the said Ajraj, having been addicted to vices and having lost his character, had, contrary to the long standing enstom of the Sany sis, married a low easte woman and taken her food, etc. and lived with her in her father's house leaving his residence and had neglected and obstructed the performance of the Shebi of the Idol Khubaneswar Mahadev and that the Dab Sheba was about to be stopped, the punch ex communicated the said Ajraj, and after declaring him to be quite unfit to hold the post of Shebait made over the sharge of earrying on the Sheba of the said idol to Gossain Protab Chandra Gir of English Bazaar." That Protab Gir is a man of position and character has not been denied. The sittings of the punch are said to have taken place in the house of the plaintiff. The word "house" in the language of the gest means the same thing as a Math, It has been argued that all the Giri Gos. sains competent to sit as members of the punch did not attend the meeting. Upon the evidence of witness No. 25 for the plaintiff it appears that there were altogether seventeen persons who might possibly have had a claim to sit on the punch. That out of these one was a lunetic, four had been ex-communicated and three gone on pilgrimage and were absent. It is not shown for the defence that there were any other Gossains available at the time, The plaintiff himself was one of the members of the punch but he very parly abstained from taking part in their deliberations, he being personally interected.

It appears that one Balkishen Gir was present, though his signature is not appended to the punchnamu. The punchnamu is signed by five persons, Ganga Gir, Ganpat Gir, Mahesh Gir, Mangal Gir, Ajodha Gir,

We are satisfied that on the evidence as to the procedure observed on these casassions that there were a sufficient number of Gossaics present to form a proper and regular quorum.

Among the members of the punch were some chelas who sat along with their gurus. It has been argued that this is an irregularity. There is, however, evidence to show that, during the lifetime of his guru, a chela who is of age may be member of the runch.

It has next been contended that plaintiff was not the pearest goliz of Ajraj and could not, therefore, take his place as a shebait. On this point the Court below has relied on the kursinamah contained in the Bhats' book Exhibits 1 to 1 (6). The Bhats are beralds who are interested in keeping up such a record. The book in our opinion somes from proper sustody and is evidence under section 32 of the Evidence Act. There is no reason to doubt its gennineness. There is a slight conflict between the kursinamah and the oral evidence but in the first place the relation. ships in question are not blood relationships though they are avalogous thereto' and in the second place they are very distant. It is not surprising, therefore, to find some confasion or inascuracy in the oral testimony. We see no reason to distrust the written record. There is no other slaimant in the field and we find with the Subordinate Judge that the plaintiff is the nearest Gotia of the dismissed shebait Ajraj Gir.

There can be no doubt upon the evidence that succession is governed by gotia relationship and the point is not raised in the grounds of appeal. In the absence of a chela the nearest gotia succeeds,

The defendant No. 2 is a Pleader and something has been said as to the propriety of the transactions into which he entered with the defendant No. 1. In the view we take it is not necessary for us to consider the ease from that point of view.

. For the reasons indicated we dismiss the appeal and confirm the decree of the Coart below.

The respondent is entitled to his costs in this appeal. We assess the bearing

GHULAN MUHAMMAD U. MUHAMMAD SHAH.

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S. A. No. 2119 of 1915.

The main appeal (R. A. 258 of 1916) having been disposed of, it follows as the result of our decision in that case that the plaintiff in the present case who was the defendant No. 2 in the other case not having acquired any title to the property in suit under the two putni pottas exeented in his favour by Ajraj, is entitled to a decree for rent against the tenants. This appeal must, therefore, be decreed and the plaintiff's suit for rent dismissed with costs throughout.

Roles Nos. 1217 to 1224 of 19:5.

As regards the Rules, the question does not fell under section 115, Code of Civil Procedure. The Rules must, therefore, be discharged without costs.

J. P. & B. N.

Appeal No. 258 dismissed; Apreal No. 2119 decreed. Rules discharged.

LAHORE HIGH COURT. SECOND CIVIL APPEAL No. 1:69 CF 1919. May 13, 1920.

Present :- Mr. Justice Ohevis. GHULAM MUHAMMAD AND AN OTHER - DEFENDANTS-APPELLANTS

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MUHAMMAD SHAH AND AL OTHER-PLAINTIFF-GHULAM HUSSAIN-DEFENDANT - RESPONDENTS.

Sale-Consideration partly fictitious-Consideration

actually paid not inadequate-Sale, validity of.

In a suit by reversioners to set aside a sale for want of consideration, the lower Court found that although the price ostensibly received by the vendor was Rs. 700, the sum actually paid was Rs. 595 and that there was a fictitious entry in the sale-deed about the payment of Rs. 105. Thereupon it passed a decree that the sale would affect the rights of reversioners to the extent of Rs. 525 only. On appeal by the vendees it was found that the land in question, at the date of the sale, was not worth more than Rs. 595:-

Held, that as the sale would have been unobjectionable if the sum of Rs. 105 were left out of account altogether, the vendee should not be penalized merely because there was a fictitious entry in the sale-deed.

Wadhawa Mal v. Wadhawa, 8 P. R. 1908; 144 P. L.

R. 1906; 33 P. W. R. 1808, followed.

Kesar v. Sundar Singh, 1 Ind. Cas. 888; 27 P. R. 1909; 33 P. W. R. 1909; 46 P. L. R. 1909, dissented oum.

Second appeal from a decree of the District Judge, Sialkot, dated the 18th June 1919, reversing that of the Senior Subordi. nate Judge, Sialkot, dated the 13th March 1919.

Mr. Mukani Lal Puri, for the Appellants. Syed Mohsin Shah, for the Respondent,

JUDGMENT.-This is a suit by two plaintiffs for a declaration that a sale of certain land by their father shall not affect their reversionary rights. The land was sold for Rs. 700, details of consideration as shown in the sale-deed being as follows :-

1,	On previous mortgage	 396
2.	Sala-deed	 32
2.	Bond	 50
4.	Cash in advance	 105
5.	Registration expenses	 27
6.	Cash before Sab-Registrar	 90

700 TOTAL The question is whether the sale was

ior necessity and consideration.

Items Ncs. 1, 2 and 5 have rever been challenged by plaintiffe, whose Fleader admitted in the First Court that these items must be allowed. Items Ncs, 3 and 6 have been passed by both Courts, nessessity as regards item No. 6 being held to be shown by the facts that the alienor had a large family to support and had no land free of mortgage at the time of the sale. The First Court also passed item No. 4, and dismissed the suit. But the learned District Judge on appeal holds payment of this sum of Es. 105 not proved and has given a the sale shall only affect decree that plaintiff's reversionary rights to the extent of Re. 595. The vendees appeal. Their Countel tries to argue that there is sufficient evidence to prove payment of this cum of Re. 1(5, which is said to have been paid in advance one day before registra-But there is a finding of fact against him. But supposing this sum was not really paid, then the only possible conelusion seems to be that it was a fietitions item entered to deter pre emptors. Taking this to be the case I have to deside whether there is any anfisient reason to In Wadhawa Mal v. upset the sale. Wadhawa (1) it was held that a vendee

(1) 8 P. R. 1908; 144 P. L. R 1906 33 P. W. R. 1908.

MUNNU LAL U. BAJA BAM.

should not be penalized merely because he enters as part consideration an item which may possibly be fistitions in whole or in part, where that item is only a fraction of the purchase-money and where the sale would be anobjectionable if that item were left out of assount, There the item represented about 1.6th of the whole sale prise; here the item is only about 1.7th. A different view has no doubt been expressed in Keszr v. Sundar Singh (2) where the dispute was as to an item of Rs. 153, the sale being professed to be a sale for Rs. 950, but it may be observed that what is there said is after all merely obiter dictum as on review the elaim was dismissed on the ground that the plaintiffs were estopped by asquiessenses. (The final judgment, dated 16th December 1910, was delivered by Battigan and Kensington, JJ.). This greatly lessens the value of the view expressed in this judgment, and I have no hesitation in adopting the view expressed in the earlier judgment, which seems to me sound. It is to be noted that though the land in suit now has the benefit of canal irrigatior, it was only barani and chahi land in 1907 when it was sold, and I am not prepared to say that it was then worth more than Rs. 595. It is to be noted too that the plaintiffs waited nearly 12 years before bringing this suit and it may well be doubted whether they would have ventured to attack the sale even now, had they not been tempted to try their lack by the enhanced value of the land owing to its having become nahri land,

I accept the appeal and reversing the decree of the District Judge I restore the decree of the First Court dismissing the suit. The plaintiffs will pay costs in all

Courts.

X, H,

Appeal acceptel.

(2) 1 Ind, Cas. 888; 27 P. R. 1903; 33 P. W. R. 1909; 48 P. L. B. 1909.

SECOND CIVIL APPEAU No. 227 of 1919. March 9, 1922.

Present :- Mr. Justice Lindsay and Mr. Justice Ryves.

MUNNU LAL, MINOR, THEOUGH RAM LAL —PLAINTIFF — APPELLANT

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RAJA RAM AND OFFERS-DEPANDANTS-

Hindu Law - Woman's estate-Reversioner -Declaratory suit of reversionary title during widow's
lifetime, maintainability of.

A declaratory suit by a reversioner during the lifetime of an heiress that he will be entitled to get the property on her death is not maintainable.

Second appeal against a descee of the Additional Judge, Gorakhpur, dated the 30th November 1918.

Mr. K. N. Malaviya, for the Appellant. Mr. Galsari Lal, for the Respondents.

JUDGMENT.—This suit was brought by the plaintiff for a declaration that on the death of his mother he will be entitled to get a two-anna share in Mauza Malhipur.

There were three brothers, Sita Ram, Mata Din and Ram Lochan, the property in enit belonging to Ram Lochan. The plaintiff alleged that Ram Lochan was separate from his brothers. Ram Lochan died, the plaintiff said, 15 years ago, but it has been found that he died 27 years ago. He left him surviving a daughter, Musammat Bilasi. On the finding of the First Court that Ram Lochan was separate, she was his heir. The plaintiff is her son and presumptive heir.

In the plaint it is alleged, that after the ceath of Ram Lochan, Musammat Bilasi went to reside in Kulu and the names of Ram Lochan's brothers were entered in the revenue papers in place of Ram Lochan.

The plaint goes on to say:—"These brothers used to go to Kulu frequently and assured the plaintiff's mother that her property was safe. They also used to pay every year different amounts of money to the plaintiff's mother as profits."

In paragraph 5 the cause of action is stated as follows:—"This year the plaintiff (who was a minor) has come to know that the defendants have, after the death of Ram Losban, got their own names recorded against the property of Ram Losban instead

FIBM KADARI PERSHAD CHEEDI LAL U. HAR BHAGWAN.

of getting the name of the plaintiff's mother recorded against it. Hence the suit ". The main defence to the suit was, that Ram Losban and his brothers were joint, and consequently, that on Ram Losban's death the plaintiff had absolutely no right.

The First Court apparently found that although after Ram Lochan's death his brothers got their names recorded in the revenue papers, nevertheless they have been paying the profits of the property, at all events a portion of them, to Musammat Bilasi. It also found that the property was the reparate property of Ram Lochan, that the sons of Ram Lochan died in his life time and that Musammat Bilasi was his heir. It then granted the plaintiff the declaration he asked for. The Trial Court did not decide the issue which was raised, as to whether the plaintiff was entitled to maintain the suit in the life-time of his mother.

On appeal the learned Additional District Judge of Gorakhpur, relying on paragraph 642 of the 8th Edition of Mayne's Hindu Law and the cases therein eited, dismissed the suit on the ground that a declaratory suit during the life-time of the heiress was not maintainable. In car opinion this was correct. For all we know, all that she did to make arrangements by which WAS the brothers of Ram Lochan would be enabled to marage the property for her. The plaintiff himself admits that mother has been receiving at least some of the profits and she apparently made to complaint on this subject. It would be useless to give a decree to the plaintiff which might never have any effect. It will be open no doubt to the plaintiff if he survives his mother to sue for possession of the property if possession is denied him.

We dismiss the appeal with costs including fees on the higher scale.

J. P.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1739 OF 1916,

November 29, 1920.

Present:—Mr. Justice Abdul Racof and

Mr. Justice Martineau.

THE FIRM KADARI PERSHAD

CHHEDI LAL, THROUGH RAM NATHGOPI NATH—PLAINTIFF—APPELLANT

HAR BHAGWAN AND ANOTHER— DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 83-Suit by commission agent against his principal to recover amount of loss on re-sale of goods-Limitation.

Where a commission agent buys goods for a principal, but through the latter's default in paying for the same, they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses, must be brought within the period of limitation prescribed by Article 83 of Schedule I to the Limitation Act. [p. 101, col. 2]

Limitation in such a case operates from the date of the payment made on behalf of the principal and not from the date of the sale. [p. 901, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, District Ferczepore, dated the 8th May 1916.

The Hon'ble Pandit Sheo Narain, R. B., for Lala Moti Sagar, R. S., for the Appellant.

Bakbebi Tek Ohand and Lala Jagan Nath, for the Respondent.

JUDGMENT.

ABDIL RACOF, J .- The facts of the care giving rise to this appeal are few and simple. The plaintiffs are commission agents. At the request of the defendants they purchased two kothas of gram for them and paid the price out of their own pocket. Subsequently they sold them at a loss. The present suit is for the recovery of the loss together with interest and certain incidental expenses. The first kotha was purchased on the 28th July 1909, and it was sold on the 16th April 1912. The second kotha was purchased on the 23rd July 1910 and was sold on the 29th April The suit was instituted on the 27th July 1915. It was resisted on the plea of limitation and other grounds. The Court below has held that the Article of the Indian Limitation Act applicable to the suit is Article &3, and the suit is barred by time. The plaintiffs have some up in appeal to this Court, and three main pleas have been urged on their behalf, namely :-

(i) that having regard to the peculiar nature of the suit, no specific Article being

PIRM KADARI PERBUAD CHURDI LAL U. HAR BHAGWAK.

applicable, Article 120 of the Indian Limitation Act must be applied assorting to which the suit is well within time;

(ii) that Article 61 is applicable and the suit being within six years is within time under

the Panjab Loans Limitation Act.

(iii) that even if Article 83 is applicable the suit with reference to the second transaction is within time as the period ought to be calculated from the date of the second sale, which took place on the 29th April 1913.

In the ease of Mangii Ram v. Ram Saran Das (1) under similar eiroumstanses, a similar question arose and a Division Bench of the Panjab Chief Court held that Article 83 applied. The learned Counsel has tried to distinguish the present case from the one dealt with in the raling referred to above on the ground that the transaction which gave rise to the claim in the latter was of a wagering character, and the liability of the defendants had arisen by the operation of the law, and that in the present case the liability arises out of the contract itself. our mind in principle there is no such distinetion. The plaintiffs' slaim in both the cases was for recomper on the allegation that they had acted as the defendants' agents.

Article 120 of the Limitation Act can apply only to a suit for which no period of limitation is provided elsewhere in the Second Schedule of the Act. We have, therefore, to deside whether there is any other Article, which is applicable to the present case. The Division Bench has held that Article 83 applies and Article 61 does not apply. We are bound by this desision and must hold that the suit is governed by Article 83. It has, however, been contended that even if Article 83 applies the period of limitation should be calculated from the date of sale and not from the date of purchase. A reply to this argument is to be found in the judgment of the case of Kanlaswami Pillai v. Avayambıl (2). At page 17.* the following passage is to be found, which decides the very point in the following words :-

(1) 26 Ind. Cas. 415; 28 P. R. 1915; 100 P. L. R. 1915; 218 P. W. R. 1914.

(2) 7 Ind. Cas. 899; 84 M. 167; (1910) M. W. N. 316; 8 M. L. T. 194; 20 M. L. J. 989.

*Page of 84 M,-[Ed.]

"Now, when is the agent damnified as regards the advances made by him on assount of the principal in the course of his agency? In the absence of a contract to the contrary we think it must be taken that the agent is damnified when he makes the payment."

It has, however, been argued that possibly there was 's contract to the contrary' in the present case. This is a suggestion, however, which is made for the first time in appeal before us. There is no trace of any such suggestion to be found on the record. In our opinion the view taken by the Court below is correct and we dismiss the appeal with costs.

MARTINEAU, J .- I conour. The distinction bet ween the case of Manghi Ram v. Ram Saran Das (1), and the present case consists merely in the fast that in the former case the defendants were not legally liable to the third persons with whom their agents had entered into certain transactions, whereas in the present ease they were liable. This distingtion does not affect the question whether Article 61 or Article 83 is to be applied, In both cases the payments were made by the plaintiffs for the defendants, and the Article applicable in one case would apply in the other also. In Manghi Ram v. Ram Saran Das (1), there is no discussion as to the applicability of Article 61. Prima facie that Article would have been applicable, but the learned Judges held that Article 83 fitted the facts, and they apparently considered that preference should be given to it over Article 61, which was more general than Article 83. With regard to Article 83 the view they took was that the right given to the agent by section 222 of the Contract Act to be recouped by his principal in respect of losses sustained in the agency was a direct sonsequence of the agency contract, and that the suit was thus one upon a contract to indemni'y.

The same reasoning would apply in the present case. It must, therefore be held, following Manghi Ram v. Ram Saran Die (1), that the present suit is governed by Article 23 of the First Schedule to the Limitation Act.

I agree with my learned brother that the plaintiffs were damnified when they made the payments. The suit is consequent. ly barred by limitation, having been institut. BAO MARSINGH RAO D. BETT MAHA LAKSHMI BAI.

ed more than three years after the payments.

W. C. A. & N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT.
PRIVY COUNCIL APPEAL No. 48 OF 1921,
March 3, 1922.

Present:—Sir Grimwood Mears, Kr., Chief Justice, and Justice Sir P. C. Banerjee Kr.

RAO NARSINGH RAO-PLAINTIFF-

tereus.

BETI MAHA LAKSHMI BAI AND OTHERS
- DEFENDANTS- RESPONDENTS.

Evidence Act (I of 1872). s. 112-Paternity, proof of - Presumption when arises.

In a suit by plaintiff to establish his paternity in A, the defendant alleged that he was the son of B. The defendant failed to establish his allegation, but, on the other hand, there was nothing to prove that the wife of A had ever borne a child. Plaintiff urged that as the defendant had failed to fix his paternity in B, a conclusive presumption of his paternity in A arose under section 112 of the Evidence Act:

Held, that section 112 might have been applicable had the plaintiff been able to prove that about the time he might be supposed to have been born, the wife of A had given birth to a child. As the facts were the section had no application.

Application under sections 109 and 110 of the Code of Civil Procedure for leave to appeal to His Majesty in Council.

Messrs, Nihal Chand and S. P. Sinha, for

the Appellant.

Dr. K. N. Katju and Mr. L. P. Zotshi, for

the Respondents.

JUDGMENT.—This is an application by Rao Narsingh Rao for leave to appeal to His Majesty in Council.

The ease is a very important one and the position of the applicant is such as to enlist the sympathy of every one acquainted with

his history.

Rao Nareingh Rao ecmmenced an action against one Rani Kishori on the allegation that he was entitled to property of the value of upwards of fifty lakes because he was the son of Rao Balwant Singh and Musammat Dunaju. As Balwant Singh and Musammat Dunaju were husband and wife. He allegation that he was the son of Musammat Dunaju was the main essential

fact to be proved. The Rani Keshori denied it and set up that Rao Narsingh Rao was in fact the son of one Shekher Singh. In the lower Court and here Rao Narsingh Rao failed to prove that Musammat Donsju was his mother and there are thus two concurrent findings against him.

We have listened very carefully to Mr. Nibal Chand's arguments with complete readiness to grant the application if that could consistently and properly be done.

Mr. Nihal Chand argues that the Court ought to have applied the provisions of section 112 of the Evidence Act and he formulates his case in this way. He says that when the defendants had failed to establish the case which they set up that Rao Narsingh Rao was the son of Shekhar Singb, thereupon there arose a conclusive presumption that Rao Narsingh Rao was the son of Musammat Dunaju by her husband, Rao Balwant Singh. We have pointed out elesowhere that the defendants were under no obligation to prove the paternity of Rao Narsingh Rao. It was for him to prove that he was the son of Musammat Danaju.

He has sited to us the ease of Narendra Nath Fahari v. Ram Gobind Pahari (1) and Tirlok Nath Shukul v. Lachmin Kunwari (2). It will noticed that in both those cases the Privy Council found as a fact that the lady had in fact given birth to a child and then on proof that the other requirements of the section were complied with, the sonelusive presumption arose.

Had Rao Narsingh Rao been able to prove that Musammat Dunaju had on the 2nd March 1894 given birth to a child, practically all his difficulties would have disappeared, as it would, in our opinion, in the circumstances have been proper to conclude that he was in fact the child and that Rao Balwant Singh was the father. Section 1:2 could only have been relied upon by him after proof of the giving of birth to a child by Musammat Danaju

The weight of evidence was against the alleged child bearing by Musammat Danajo, and being of opinion that section 112 has no epplication, we are compelled to decide

(1) 29 C. 111: 23 I. A. 17: 6 C. W. N. 146, 4 Bom. L. R. 243; 8 Sar. P. C. J. 185 (P. C.).

(2) 25 A. 403; 7 C. W. N. 617; 5 Bom L. R. 474; 80 I. A. 152; 8 Sar. P. O. J. 481 (P. C.). AGENT, B. K. W. LT. CO., D. JAGANNATH AGARWALLA.

that the applicant has failed to show that there is any substantial question of law in the proposed appeal and, therefore, rejest the application as not fulfilling the requirements of section 110 of the Code of Civil Procedure.

N. H.

Application re ected.

CALCUTTA HIGH COURT. APPEALS PROM APPELLATE ORDERS Nos, 259 AND 300 of 1970. August 1, 1:21. Present:- Justice Sir Asutosh Mookerjee, Kr., and Mr. Justice Panton. AGENT, B. N. W. RAILWAY

APPELLANT

COMPANY - DEFENDANT -

tersus JAGANNATH AGARWALLA AND OTHERS-PLAISTIFFS-RESPONDENTA.

Procedure—Party to suit removed from record—Party prejudiced by order-Appeal.

A suit against the Agent of a Railway Company for recovery of compensation for short delivery of goods was dismissed with costs by the Subordinate Judge on the ground that the agent could not be sued as such. The District Judge on appeal also held that the suit could not be maintained against the Agent but on the petition of the plaintiffs ordered the Railway Company to be made a party defendant in place of the Agent and remanded the case for trial de novo. The order of the District Judge deprived the Agent of the costs allowed by the First Court and did not award him costs in the lower Appellate Court :

Held, that as the Agent had been prejudiced by the order of the District Judge, he was competent to question its propriety by way of appeal even though he was not competent to question the propriety of the order in so far as it directed the Company as such to be made a party.

Appeals against the orders of the District Judge, Bogra, dated the 31st May 1940, reversing those of the Subordinate Judge, Bogra, dated the 15th February 1919.

Babus Surendra Nath Guha and Ramendra Mohan Majumdar, for Appellant in No. 258 and Respondent in No. 300,

Babus Dwarka Nath Chukerbutty and Tarakeswar Pal Chaudhuri, for the Respondents.

Babu Ram Oharan Mitra, for the Appel-

lant in No. 300.

JUDGMENT .- These appeals are directed against an order of remand made in a suit for recovery of compensation for short delivery The first defendant was the of goods. Secretary of State for India in Council representing the Eastern Bengal State Railway and the second defendant was the agent of the Bengal and North Western Railway Company. The Subordinate Judge dismissed the claim against both the defendants. As regards the first defendant he held that the less was not due to the neglect of or theft by the servants of the Eastern Bengal State Railway. As regards the second defendant, he held on the authority of the decisions in Ram Dass Sein v. Oecil Etephenson (1), Nubeen Uhunder Paul v. Occil Stephenson (2), Campbell v. Jac'son, Manager of the Jokai Assam Tea Co. Limited (3), and India General S. N. R. Oo. v. Lal Mohan Saha (4), that the Agent could not be sued as such and that the suit as against him had been improperly framed. The plaintiffs appealed against the decree of dismissal made by the Subordinate Judge. As regards the first defendant, the District Judge held in consurrence with the Subordinate Judge that the plaintiffs had failed to prove negligence on the part of the Eastern Bengal State Railway. As regards the second defendant, the District Judge held, as the Subordinate Judge had done, that the suit could not be maintained against him. In this view. the District Judge should, prima facie. have confirmed the decree of dismissal made by the primary Court. But he proseeded instead, on the petition of the plaintiffe, to make the B. N. W. Railway Co. a party defendant in place of the Agent and to remand the case for trial de novo. Separate appeals have been preferred against this order by the two defendants.

On behalf of the Agent, the order has been attacked on the ground that the Company should not have been made a party. Theplaint. iffs have taken a preliminary objection on the ground that as the name of the Agent has

^{(1) 10} W. R. 866.

^{(2) 15} W. R. 534.

^{(3) 12} O. 41; 6 Ind. Dec. (N. s.) 28.

^{(4) 81} Ind, Cas, 85, 22 C. L. J. 241, 43 C. 441,

FIRM OF KARIM BAKRSH TAJ. UD-DIN U. NATHA SINGH.

been ordered to be removed from the record. he is not competent to appeal. This object tion is manifestly untenable. The Agent was a party to the suit and was allowed his costs by the Trial Court when the suit was dismissed against him. The order of the District Judge deprives him of the costs allowed by the First Court and does not award him costs in the lower Appellate Court. He has clearly been prejudiced by the order of the District Judge and is competent to question its propriety by way of appeal even though it be conceded that he is not competent to question the propriety of the order in so far as it directs the Company as such to be made a party. It has not been disputed before us and in face of the authorities mentioned by the Subordinate Judge it cannot be seriously disputed that the suit as framed is not tenable against the Agent. We are consequently of opinion that in the appeal preferred by the Agent (A. A. O. No. 258 of 1920) the proper order to make is to allow the appeal and to direct that the suit as against the Agent be dismissed with costs in all the Court.

On behalf of the Secretary of State the order of the District Judge has been assailed on the ground that in view of the consurrent finding of two Courts that there has been no negligence on the part of the Eastern Bergal State Railway, the suit as against him should have been dismissed, and that even if the suit should be tried de novo, against the newly added defendant B. N. W. Railway Co., he should not be put to further expense in connection with proceedings which cannot possibly affect him. There is plainly no answer to this argument. We are consequently of opinion that in the appeal preferred by the Secretary of State (A. A O. No. 300 of 1920) the proper order to make is to allow the appeal and to direct that the suit as against the Scoretary of State be dis. missed with costs in all the Courts.

We assess the hearing fee in this Court at

two gold mohurs in each appeal.

The result of our decision will be that the only residue of the order of the District Judge which will remain operative will be the order that the B. N. W. Railway Co, he made a party defendant and that the suit be tried against them de noto by the primary Court. This order, it may be noted, was made by the District Judge without notice to this

B. N. W. Railway Co., and we need not coneider at this stage what objections the Company may urge if and when plaintiffs proceed with the suit as against them.

B. K.

Appeals allowed.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No 2535 of 1919,
June 28, 1920.

Present :- Mr. Justice Chevis, Acting

THE FIRM ENGWA AS KARIM BAKHSH.

TAJ. UD.DIN OF RAWALPINDI THEOUGH

KARIM BAKHSH—DEFENDANT—

APPELLANT

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NATHA SINGH AND OTHERS—PLAINTIFFA AND GANPAT AND STREETS—DEFENDANTS—
RESPONDENTS.

Document, construction of—Lease, new—Registration Act (XVI of 1908), s. 17 (d)—Lease for indefinite period—Registration, whether necessary—Lease unregistered—Oral evidence, whether admissible.

One T. held an ordinary monthly lease of some shops on Rs. 3-8-0 a month. A dispute as to enhancement of rent was settled by the landlord executing a document as follows: "I have given the shops on a rental of Rs. 3-8-0 a month. So long as T. occupies the shops, the rent shall not be raised or lowered.... Accordingly this kirayanama is written for record in case of need". The document was unregistered.

In resisting a suit for ejectment, T. wanted to put in the unregistered document saying that it was not a new lease but merely a variation in the terms of

Held, that the lease was a totally fresh lease and not being limited to one year, was inadmissible in evidence for want of registration, and being inadmissible, it was not open to the tenant to resort to oral evidence to prove the original transaction. [p. 905, col. 2.]

Second appeal from a decree of the Senior Subordinate Judge, Rawalpindi, dated the 4th November 1919, mcdifying that of the Munsif, First Class, Rawalpindi, dated the 30th August 1919, dismissing the plaintiff's suit.

Dr. Nand Lal, for the Appellant, The Hon'ble Pandit Shee Narain, R. B., for the Plaintiffs-Respondents. FIRM OF KARIM PARASE TAJ-TD-DIN U. RATEA BIRG T.

JUDGMENT.—Taj-ud-Din and Karim Bakheb, who are appellants in the present ease, were tenants of two shops at Rawalpindi. They held an ordinary monthly lease on payment of Rs. 38 a month. A dispute as to enhancement of rent was settled on the 1st of January 1915 when the landlord, Gappat Rai, executed a dooument which runs as follows:—

"To day, let of January 1915, I have given the shops on rent to Taj ud-Din at a rental of Rs. 3 8 per month, rent to be paid monthly. So long as Taj ud-Din occupies the shops, the rent shall not be raised nor lowered, nor shall I eject him. But in ease of his refural to pay the rent then I shall have the right to turn him out. Accordingly this kirayanama is written for record in ease of need."

Sometime afterwards the value of the property having increased, Ganpat Rai sued for ejectment. This suit was dismissed for default under Order IX, rule 3, Civil Procedure Code. On the 8th of January 1919 Ganpat Rai sold the shops to the present plaintiffs who on the 13th of January 1919 served the defendants with notice and subsequently brought the present suit in which they claimed to eject the defendants, and also claimed Rs. 30 rent for one month at an enhanced rate. The old landlord, Ganpat Rai, is a pro forma defendant.

The First Court held the entry in defendants' bahi to be admissible in evidence, even though unregistered, and on the ground that defendants had a right of occupancy refused to eject them and merely gave a decree for Rs. 38 as rent for one month. The Senior Subordinate Judge on appeal held that the document was inadmissible for want of registration and gave a decree for ejectment and for Rs. 7 as rent for one month.

The defendants appeal to this Court and, on their behalf, Dr. Nand Lal urges that the document in question does not require registration. He urges in the first place that it is merely a memorandum of an agreement which had been arrived at orally between the parties. Looking at the terms of the document, I have not the least hesitation in holding that it is not a mere memorar dom but is itself the agreement arrived at crelly and then reduced to

writing. Then Dr. Nand Lal urges that this is really no new lease but is simply a variation in the terms of the old lease and so does not require registration. He eites the following authorities:—

Narain Coomary v. Ramkrishna Duss (1), Satyesh Chunder v. Dhunpul Singh (2), Obai Goundan v. Ramalinga Ayyar (3) and

Umar Bakhsh v. Baldeo Singh (4).

All of these seem to me elearly distinguishable. The ease of Narain Coomary v. Ramkrishna Dass (1) is merely one where an entry was made resiting the terms of the lease already existing, no alterations in that lease being made. In Satyesh Chunder v. Dhunpul Singh (2) the document in question was merely a writing by the tenant in which he agreed to allow an enhancement of rent. In Obai Goundan v. Ramalinga Ayear (3) the document in question was one given by the landlord to the tenant simply varying the terms of the tenancy as to the amount of rent payable, The case of Umur Bakhsh v. Baldeo Singh (4) is one of a lease terminable by either party at the end of any month. The lease in the present case is one which enabled the tenant to continue in possession so long as he paid his rent. This was, I holda totally fresh lease and not a lease limited to a year, and, therefore, it is inadmissible in evidence for want of registration; see Sheogholam v. Euddree Nath (5) and Mania v. Lallubhai (6). The dosument itself being inadmissible the defendants capnot fall back on the oral evidence.

Dr. Nand Lal now wishes to argue that even under the old lease the tenants had a right of occupancy but this seems to be an entirely new plea and I canot find any thing in the grounds of appeal to this Court which covers the point.

I may note in conclusion that, apart from the question of admissibility of the document, the Senior Subordinate Judge seems to have some to a finding that it is not

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^{(1) 5} C. 864; 6 C. L. R. 286; 2 Ind. Dec. (N. s.)

^{(2: 24} O. 20; 12 Ind. Dec. (N. s.) 678.

^{(8) 22} M. 217; 8 M. L. J. 256; 8 Ind. Dec. (N. s.)

^{(4) 82} Ind. Cas. 85; 97 P. R. 1915; 193 P. W. R.

^{(5) 4} N. W. P. H. C. R. 36.

^{(6) 2} Bom, L. B. 488,

PABAN KHAN D. BADAL BARDAR,

proved that Ganpat Rai, the former landlord, ever executed the alleged lease. Rai Bahadur Pandit. Shen Narain points to this as a finding of fact which cannot be attacked in second appeal, but, apart from this, I have no hesitation in holding that the document is inadmissible for want of registration.

The appeal is dismissed with costs.

N. H.

Appeal dismissed.

CALOUTIA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2605

OF 1919.

July 26, 1921.

Fresent: - Justice Sir N. R. Chatterjes, Kr., and Mr. Justice Panton.

PABAN KHAN-PLUSTIFF-

APPRILLANT

versus

BADAL SARDAR-DEPENDENT-

Mortgage—Proof of execution—Validity of bond— Transfer of Property Act (IV of 1882), s. 59—Evidence Act (I of 1877), ss. 68, 70—Scribe signing the name of the executant, if can be an attesting witness,

The proof of the execution of a mortgage with reference to the provisions of section 68 of the Evidence Act and its validity with reference to the provisions of section 59 of the Transfer of Property Act are two different things. Therefore, where in a suit upon a mortgage bond the defendant admits the execution of the bond but raises the defence that the bond should not be regarded as a mortgage bond, the plaintiff, although exempted from calling any attesting witness under section 68 of the Evidence Act by reason of the provisions of section 70 of the said Act, is still bound to show that the document was executed in the presence of attesting witnesses as required by section 59 of the Transfer of Property Act [p. £67, col. 1.]

Satish Chanara Mitra v. Jogendra Nath Mahalanobis, 34 Ind. Cas 862; 44 C. 845; 20 C. W. N. 1044; 24 C. L. J 175 and Nibaran Chandra Sen v. Nagendra Chandra Sen, 44 Ind. Cas 984; 22 C. W. N. 444, dis-

tinguished.

A scribe who signs the name of the executant on a mortgage-bond on his behalf is not a competent attesting witness. [p. 907, col. 1.]

Rajani Kanta Bhadra v. Panchananda, 48 Ind. Cas. 720; 23 C. W. N. 290; 46 C. 552, followed.

Appeal against a decree of the Officiating Additional District Judge, Khulns, dated the 9th September 1919, reversing that of the Additional Munsif, Khulana dated the 18th November 1918.

Babu Nalin Chandra Pal, for the Appel-

Babu Samatul Chandra Dutt, for the Res.

JUDGMENT.- This appeal arises out of

a suit upon a mortgage bond.

The defendant admitted the execution of the bond but pleaded payment and satisfaction of it. He also raised the defence that the bond should not be regarded as a mortgage bond.

The Court of first instance held that the execution of the bond not being challenged, the recessity of its proof did not arise. That Court overruled the other pleas of the defendant and gave a decree to the plaintiff.

On appeal by the defendant, the learned Additional District Judge was of opinion that the provisions of section 59 of the Transfer of Property Act had not been complied with. He held that the seribe having executed the deed on behalf of the appellant was not competent to attest his own signature, and there being no other evidence, allowed the appeal and dismissed the suit.

It has been contended on behalf of the plaintiff who is the appellant before us that, having regard to the provisions of section 70 of the Evidence Act, there was no necessity for calling any attesting witness under section 68 of the Act; and reliance was placed upon the cases of Satish Chandra Mitra v. Jogendra Nath Mahalanobis (1) and Nibaran Chandra Sen v. Nagendra Chandra Sen (2).

(2) 44 Ind. Cas. 684; 22 C. W. N. 444

^{(1) 34} Ind. Cas. 862; 44 C. 345; 20 C. W. N. 1044; 24 C. L. J. 175.

PIRM SARDAR MAL-HARDAT RAI D. FIRM SBEO BAKSH RAI-SRI NABAIN.

In those eases, however, the only question related to proof of execution of the mortgage-bond. No question was raised before, or decided by, this Court, in either of the two cases as to validity of the mortgage-bond with reference to the provisions of section 59 of the Transfer of Property Ast. The two questions are different, one being the question of proof of execution of a document required to be attested by calling one attesting witness under section 63 of the Evidence Act, which, however, is not required where the execution of the document is admitted by the executant as laid down in section 70 of the Evidence Act. The other question relates to the validity of the mortgage even though the document might be proved according to law. This distinction does not appear to have been kept in view in the Court below: and although the question of the validity of the mortgage-bond was set up in the written statement and put in issue, the Court of first instance, at any rate, does not appear to have appreciated the distinction between the two.

It appears that the mortgage bond, on the face of it, contained the names of four attesting witnesses of whom two were illiterate and the seribe of the deed says that he put down the names of those illiterate witnesses at their request. It is not clearly stated, however, whether they were attesting witnesses in the sense that the document was executed in their presence. There were, however, two other witnesses who signed their own names and although the seribe by reason of his having signed the name of the executant on the decoment on his behalf is not a competent attesting witness, as laid down in the case of Rajani Kanta Bhadra v. Panchamanda (3), there are, as stated above, other persons whose names appear as attesting witnesses in the document. Under the eireumstaness, the plaintiff should be given an opportunity of producing evidence to show that the document was executed in the precence of attesting witnesses so as to satisfy the requirements of section 59 of the Transfer of Property Act. This, however, must be on terme, as the point was taken in the written statement.

We ase rdingly direct that upon the (8) 45 Ind. Cas. 720, 23 C. X. N. 290, 46 C. 552.

plaintiff appellant paying to the defendantrespondent all the costs incurred up to this
stage within a fortnight of the arrival of
this order in the Court of Appeal below,
that Court will allow the plaintiff an
opportunity of adducing evidence to show
that the document was properly attested
within the meaning of section 59 of the
Transfer of Property Act and then dispose
of the case according to law. The Court
of Appeal below may direct the Court of
first instance to take fresh evidence under
Order XLI, rule 42.

If the afcressid costs are not paid within the time specified, the appeal will stand dismissed with costs.

M. H.

Appeal allowed: Case remanded

ALLAHABAD HIGH COURT. FIRST APPEAL FROM ORDDR No. 81 CF 1921.

March 2, 1922.

Present:—Mr. Justice Piggott and
Mr. Justice Walsh.

FIRM SARDAR MAL HARDAT RAI

-PLAINTIPF-APPRILLANT

versus

FIGH SHEO BAKSH RAI-SRI NARAIN-DEFENDANT-RESPONDENT,

Arbitration Act (IX of 18'9), Sch. I, cl. 8, meaning of—Award made three months after notice but within three months of entering on reference, validity of

FIRM SARDAR MAL-HARDAT BAI V. PIRM SHEO BAKSH RAI-SRI NARAIN.

An award made three months after the date of a notice calling on the arbitrators to act but within three months from the day when they actually entered on the reference and heard the evidence is within the time mentioned in Schedule I, clause 3 of the Arbitration Act and is consequently valid.

The provisions "entering on the reference" and "having been called upon to act by notice in writing" in clause 3 of Schedule I to the Arbitration Act are alternative in this sense that where no reference is entered upon at all, then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even although the arbitrators may be called upon to act by notice if they enter upon the reference, they have three months from that moment for making their award and for enlarging the time for making the award if the circumstances at the reference satisfy them that they cannot complete the award within three months.

First appeal from an order of the District Judge, Cawppore, dated the 21st February 1921.

Messrs. B. E. O'Conor, G. W. Dillon, Dr. S. M. Sulaiman, Dr. S. N. Sen and Mr. S. N. Mukerji, for the Appellant.

Dr. M. L. Agarwala, Dr. S. N. Kot u and Mr. Panna Lal, for the Respondents.

JUDGMENT.—We have some to the conclusion that this appeal must be allowed.

We think the learned Judge has placed too narrow an interpretation upon the words of clause (3) in the Schedule.

We are of opinion that the provisions "entering on the reference" and "having been called upon to act by notice in writing" are alternative in this sense, that where no reference is entered upon at all, then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even although the arbitrators may be called upon to act by entering upon the reference, if they enter upon the reference, they have three months from that moment for making their award and for enlarging the time for making the award if the circumstances at the refer. ence eatiefy them that they cannot complete the award within three months. To hold otherwise would seem to strike out from-elause 3 the words within three month after entering on the reference" in a case where one of the parties happened to call ujon the arbitrators to act before they began the reference.

This clause was considered by the English Court of Appeal in Baring Gould v. Sharping ton Combined Pick and Shovel Syndicate (1). And the view which we take seems to be that which was laid down by the Master of the Rolls, that late Lord Lindley, in a passage contained in page 91 of the report.

In addition to that, under the old clause in England, which was slightly different in form, an equally strong Court came to the conclusion in Baker v. Stephens (2) that "entering upon the reference" means "not when an arbitrator accepts the office, or takes upon himself the duty but when he actually enters upon the matter of the reference, when the parties are before him, or under some peremptory order compelling him to conclude the hearing ex parte."

The result is that the appeal is allowed and the award is ordered to be filed. The appellant will get his costs here and below. The costs in this Court will include fees on the higher scale.

This order as to costs does not include the respondent Sri Kishen. We direct that there should be no order as against him for costs.

J. P.

Appeal allowed.

(1) (1899) 2 Ch. D. 80; 68 L. J. Ch. 429; 80 L. T. 723; 47 W. R. 564; 15 T. L. R. 366; 6 Manson 420. (2) (1867) 2 Q. B. 523; 8 B. & S. 438; 36 L. J. Q. B. 236; 15 W. R. 902.

SURIYA NARAIN CHOWDHURY C. KUNJA BEHARY MAL.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 654 AND 664 A OF 1920.

April 8, 1921.

Present :- Mr. Justice Newbould and Mr. Justice Subrawardy.

SURJYA NARAIN CHOWDHURY—
DEFENDANT No. 2—PETITIONER

versus

KUNJA BEHARY MAL AND OTHERS— PLAINTIPPS AND KAILAS MANDAL—

DEVENDENT No. 1.—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLIII, r.

1 (w), O. XLVII, r. 7—Order granting review—Appeal

—Jurisdiction of Appellate Court.

Although Order XLIII, rule 1 (w) of the Code of Civil Procedure allows an appeal against an order granting a review, that clause must be read with rule 7 of Order XLVII by which the grounds, on which an order granting a review can be set aside on appeal, are limited. Unless the facts of a case are sufficient to bring the grounds of appeal within those limited grounds, an Appellate Court has no jurisdiction to set aside the order of review on appeal. [p. 909, col. 2.]

. Rules against the order of the District Jadge, Bankura, setting aside the order of the Muncif of Khatra.

Sarradhik iri and Panchanon Ghose, for the Petitioner.

Baba Manmatha Nath Mukharjee, for the Opposite Parties.

JUDGMENT.

RULE No. 664 or 1920.

This Rule is directed against an order of the District Judge of Bankura setting aside an order of the Muneif of Khatra granting an application for review. One Kanta Mal obtained a preliminary mortgage decres on 14th June 1916 against defendant No. 1, the mortgagor, and defendant No. 2 a subsequent transferes who is the petitioner in this Rule. Kanta admittedly died on 8th February 1917. On 18th November 1918 Kanta Mal's sons applied for a final decres in that mortgage suit, On 21st Dasember 1918 they applied for substitution of their names as plaintiffs in the place of Kanta Mal. This application was allowed without notice to either defendant and on 25th January 1919 a final mortgage-deeres was passed. On 24th February 1919 the defend. ant No. 2 applied for a raview of that mortgage desroo and that application was

allowed. Then the sons of Kanta appealed from that order granting the review. That appeal was sussessful and the present Rule is directed against the order passed in that appeal. We do not think it necessary to go into the merits of the case. The only question that arises in this Rule is whether the order of the District Judge was made with or without jurisdiction. Although Order XLIII, role 1 (w) allows an appeal against an order granting a review, that clause must be read with rule 7 of Order XLVII by which the grounds, on which an order granting a review can be set aside on appeal, are limited. We hold that unless the facts of the case were sufficient to bring the grounds of appeal within those limited grounds, the lower Appellate Court had no jurisdiction to set aside the order of review on appeal. The learned District Judge has held that clause (c) of that Rule is applieable and the order of review must be set aside on the ground that the application to the Monsif for review was made after the expiration of the period of limitation specified therefor. But, as already stated, the appliestion for review was made within one month of the order sought to be reviewed. To meet this objection the learned District Judge states that although the order sought to be reviewed is the order granting the final decree, it is really an application to review the order allowing substituof the sons of the plaintiff. We think that when, on the face of it, the application for review was clearly in time, the lower Appellate Court had no jurisdiction to treat the application as if it were for a review of the earlier order. By so doing it acted without jurisdiction and its order passed on appeal is illegal. We accordingly make this Rule absolute, set aside the order complained of and restore the order of the Mansif dated 21st February 1920 allowing the application for raview. The opposite party will pay the petitione: his costs, the cw.t te recesses goised est goiread mohurs.

RULE No. 664-A OF 1920.

The learned Vakil for the petitioner concedes that he can take no objection to the
order against which the Rule is directed, that
is to say, the order dismissing the appeal
against the order of abatement passed by the
Munsif on 13th March 1920. All that is

GOBIND PERSHAD C. KALIAN.

necessary to state is that, now that the Munsif's order granting the review is restored, the order passed on 13th March 1920 will stand good. In this Rule we make no order as to sosts.

B. N.

Rule No. 664 made absolute.

ALLAHABAD HIGH COURT. SECOND CIVIL APPEAU No. 1010 OF 1920. March 27, 1922.

Present: - Mr. Justice Lindsay. GOBIND PERSHAD AND OTHERS-PLAINTIFFS - APPELLANTS

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KALIAN AND OTHERS-DEFENDANTS-BESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 118-Partition-Revenue Court, whether can partition nouse.

A Revenue Court making a partition under the provisions of Chapter VII of the U. P. Land Revenue Act has no jurisdiction to make a division of houses by reason of the provisions of section 118 of the Act.

Therefore a plaintiff basing his title to a portion of a house under an order of partition of a Revenue

Court cannot succeed.

Second appeal against the decree of the District Judge, Farrukhabad, dated the 15th April 1920.

Mr. Gulzari Lal, for the Appellants. Mr. A. Sanyal, for the Respondents.

JUDGMENT .- In my opinion the suit of the plaintiffs has been rightly dismissed. The suit was to recover possession of a portion of a house said to stand on a plot, No. 52/1, in the village of Ninawa.

A reference to paragraph 4 of the plaint shows the title on which the plaintiffs were suing. The allegation was that in the course of a partition earried out by a Revenue Court and which took effect from the 1st of July 1918, a house standing on old plot No. 52 had divided between the parties. One portion of the house was allotted to the plaintiffs as No. 52/1 and the rest of the house was allotted to the other party as standing on No. 52/2. The cass for the plaintiffs was that subsequent to the desision of the partition Court the defendants had dispossessed them.

It appears to me to be absolutely clear that a Revenue Court making a partition under the provisions of Chapter VII of the Land Revenue Act has no jurisdiction to make a division of houses. That has been laid down in a Bench decision of this Court reported as Ashiq Husain v. Muhammad Jan (1). A similar ruling has been given in Oadh [see Igbal Narain v. Sura) Narain (2).] The learned Counsel for the appellants has referred me to a Full Bench ruling of this Court reported as Muhammod Salig v. Laute Ram (3) in which it was laid down that a Revenue Court making a partition under the Land Revenue Ast has jurisdiction to make a division of trees growing upon land. It is argued by analogy, that the same powers ought to be deemed to exist in the Revenue Court with respect to houses. In the Fall Banch desision it was very clearly pointed out that with regard to buildings there were special provisions contained in the Chapter relating to partition and a reference to the present Land Revenue Act also shows that those provisions in the earlier Act have been repeated. They are to be found in section 118 of the Act. No special provision is made with regard to the division of trees and consequently it was held by the Full Bench that the Revenue Court having authority to divide lands had also jurisdiction to divide the trees standing upon it. I must take it, therefore, that the law is definitely settled and that consequently the plaintiffs who found their ease upon the partition in order to put forward the title which they wished to vindicate, are out of Court. The order of the partition Court could not give them a title to the premises in dispute. The result is that the appeal is dismissed with costs.

Appeal dismissed.

(2) 27 Ind. Cas. 543; 18 O. C. 80; 2 O. L. J. 51,

(3) 23 A. 291; A. W. N. (1901) 86 (F. B.).

⁽¹⁾ A. W. N. (1900) 116; 22 A, 329; 9 Ind. Dec. (N. s.) 1251.

NOKBUL ALI BADAGAR B. BASABAT ALI.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 45 of 1920.

July 20, 1921.

Fresent:-Justice Sir Asutosh Mookerjee, Kr., and Mr. Justice Panton.

MOKBUL ALI SADAGAR -PLAINTIFF --

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BASARAT ALI AND OTHERS-DEFENDANTS-RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 37"Settlement," meaning of-Bajeapti taluk, settlement of.

The expression "after the time of settlement" in section 37 of the Bengal Land Revenue Sales Act does not mean "after the time of the Permanent Settlement of 1793." The word "settlement" as there used refers not to the Permanent Settlement but to the contract with Government under which the estate was held. [p. 912, cols. 1 & 2.]

In the case of a Bajeapti taluk the contract with Government is first made when revenue is assessed thereon and it is transformed into a revenue paying estate liable to be sold for its arrears, [p. 912, col. 2.]

Letters Patent Appeal against a decree of Mr. Justice Newbould, dated the 10th May 1920, in Appeal from Appellate Decree No. 1675 of 1919, against that of the Additional Subordinate Judge, Chittagong, dated the 2nd June 1919, affirming that of the Muusif, First Court at Satkania, dated the 19th February 1918.

FACTS appear from the following judgment of

NEWBOULD, J .- The plaintiff in this suit elaimed as purchaser of a dar-taluki right to certain land, his vendor having obtained a lease from the purchaser of a bajeapti taluk at a sale for arrears of revenue. He sued the defendant for establishment of his title to and resovery of possession of the land in suit. He obtained a decree deslaring his dar taluki right to the land in suit; but his prayer for khas possession was disallowed. Plaintiff's case is that the land in suit was held by the defendant No. 1 as a raigat and that he abandoned this raigati right in favour of the plaintiff and that consequently the plaintiff entitled to khas possession. The findings of both the lower Courts are that the defendant No. 2 had etmami right to the land and that that stmami right not annulled by the revenue sale. It is found that the bajeapti taluk was ereated in 1844 but the etmami right was in existence, at any rate, in 1837. It is contended that this finding is insufficient and that in order

to make the tenure exempted from annulment under section 37 of Act XI of 1859 the Court should have found that this etmami had been in existence from the time of the Permanent Settlement. support of this contention reliance is placed on the ease of Nagendra Lal Chowdhury v. Nazir Ali (1). It does not appear from the findings of the lower Court whether this etmam is covered by the first or the second of the exception classes to section 37; but the point does not seem to be really material. It it is covered by the first exception and is an istemrari or mokurrari tenure, then, as in the case which I have first cited, the facts now found are suffisient to justify the presumption that the tenure existed from the time of the Permanent Settlement. If, however, the etmami tenure is one which has not been held at fixed rent, then the finding that it was in existence at the time of the settlement of the bateapti taluk in 1844 is sufficient to make this exception applicable.

This appeal was argued at considerable length. The other point urged was that the evidence did not justify the findings of the lower Courts on the facts. It was suggested that there had been misconstruction of documents in coming to these findings; but there is no question of construction of documents in this case. A finding of fact based on documentary evidence or an inference drawn from documentary evidence is as much binding in second appeal as a finding of fact based on oral evidence.

The appeal fails and is dismissed with costs, Babu Narendra Kumar Das, for the Appellant.

Babu Probodh Kumar Das, for the Ra-

JUDGMENT.—This is an appeal by the plaintiff in a suit for ejectment on the basis of title acquired by purchase at a sale for arrears of revenue held under Act XI of 1859. The baicapti taluk purchased by the plaintiff was made an entire estate in 1844. At that time the lands comprised in the taluk were subject to the etnam tenure set up by the defendants which, it has been found, was in existence in the year 1837, that is, before the creation of the taluk in the year 1844. In these circumstances, the question arises whether (1) 10 C. W. N. 503.

MORBUL ALI SADAGAR C. BASARAT ALI.

the plaintiff is entitled to eject the defendante under section 37 of Act XI of 1859, which provides as follows: "The purchaser of an entire estate in the permanently settled districts of Bengal, Bibar and Orisea, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of Settlement and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants with the following exceptione: - First, istemrari or mokurrari tenures which have been beld at a fixed rent from the time of the Permanent Settlement; secondly, tenures existing at the time of Settlement which have not been held at a fixed rent: provided always that the rents of such tenures shall be liable to enbancement under any law for the time being in force for the enhancement of the rent of such tenures." On behalf of the plaintiff appellant, the argument has been put forward that the expression "After the time of set!lement" means "After the time of the Permuent Sattlement of 1793." In cur opinion, this contention is not The section taken as a well-founded. whole makes it abundantly clear that a distinction is drawn between the settlement of the estate which is brought to sale and the Permanent Settlement of 1793. The two expressions are not identical, This was pointed out by Mr. Justice Macpherson in the case of Raj Chunder Chowdhry v. Shaikh Busheer Mahomed (2), where he observed as follows: "We think that the Judge is wrong in the construction which he has put upon the word 'settlement' in the first paragraph of section 37 of Ast XI of 1859. The word as there used refers not to the Permanent Settlement but to the Settlement which took place after resumption by Government of the lands previously held as lakheraj. That this is so, is evident when the whole of the section is read together; and where the Permanent Settlement is referred to, namely, in the first of the exceptions immediately following, the words 'Permanent Settlement' are used." This exposition of the law was adopted in the case of Koowar Singh V. Gour

Sunder Pershad Singh (3), where it was held that the term 'settlement' means the contract with Government whenever that may have been made. In the case then before the Court the original estate had been created in 1/93, and had been subsequently partitioned under the Partition Act, so that the original entire estate was broken up into a number of independent estates. It was held that each of these new estates was an entire estate such as was contemplated by Act XI of 1859; and, further, that as the partition did not alter the amount of revenue payable but merely apportioned that amount, each fragment of the original estate must be deemed to have been ereated a permanently settled estate in 1793, that is, when the contract with Government was first made. See also Tamasha Bibi v. Ashutosh Dhur (4). In the case before us, there is no room for doubt or dispute that the contract with Government in respect of the ba capti taluk was first made in 1844, when revenue was assessed thereon and it was transformed into a revenue paying estate liable to be sold for its arrears. This view is really not opposed to the decision in Nagendra Lal Choudhury v. Nazir Ali (1). We hold accordingly that the view taken by Mr. Justice Newbould as to the construction of section 37 of Act XI of 1859 is sorrect.

If this interpretation be adopted, the plaintiff cannot possibly succeed. No doubt, the insidents of an et mami tenure, which were investigated by this Court in Jogesh Chandra. Roy v. Makbul Ali (5), have not been determined by the lower Appellate Court, and it has not been found whether the etman set up by the defendants is covered by the first or the second of the exceptions to section 37; but this is immaterial. If it is covered by the first exception and is an istimrari or mokurrari tenure, then, as in the case of Nogendra Lal Chowdhury V. Natir Ali (1) the facts found would justify a presumption that the tenure existed at. the time of the Permanent Settlement. On the other hard, if the elmam is one which has not been held at fixed rent, then the finding that it was in existence at the time of the original settlement of the bojearts

^{(3) 24} C. 887; 12 Ind. Dec. (N. s.) 1260.

^{(4) 4} C. W. N. 513, ..(5) 60 Ind, Cas. 984; 25 C. W. N. 857; 47 C. 979

PADAM WATH U. KANSHI FAY.

taluq in 1844 is sufficient to make the second exception applicable. In either view, the interest of the defendants cannot be annulled by the plaintiff and the suit has been rightly dismissed. The appeal is dismissed with costs.

B. N.

Appeal dismissed.

LAHORE HIGH COURT.

LEITERS PARKET APPEAL No. 103 of 1920.

October 8, 1920.

Present: -Mr. Justice Leslie Jones and

Mr. Justice Wilberforse.

PADAM NATH - DEFENDANT - APPELLANT

KANSHI RAM — PLAINTIPP — RESPONDENT.

Custom—Alienation—Appointed heir, right of, to
challenge—Appointed heir also remote collateral—
Rights as against nearer collateral.

An appointed heir as such has no locus standi to impeach an alienation of ancestral land. Where, however, he is also a collateral, he not only can impeach the alienation but, by reason of the appointment in his favour, is entitled to possession even in preference to others who are near collaterals.

Letters Patent Appeal against a decree of Mr. Justice Scott Smith, passed on the 11th May 1920 in Civil Appeal No. 2478 of 1919, affi ming that of the District Judge, Hoshiarpur, dated the 4th July 1919.

Lala Mehr Chand Mahajan, for the Appel-

T .

Lala Madan Gopal, for the Respondent. JUDGMENT .- The plaintiff in this case sued for possession of land alienated by Shib Dial who had appointed the plaintiff as his beir before the alienation took place. The plaintiff stated that the land was ancestral and that the sale was without legal necessity and the first point was found in his favour and the suit was decreed in The defendant alience appealed to the District Judge who upheld the finding. A second appeal was preferred to this Court and the main points raised were that the land was not anesstral, and that anyhow the plaintiff as the appointed heir sould not question the actions of Shib Dial. The earned Judge dismissed the appeal holding the land to be ancestral but not deciding

specifically the question whether the plaintiff eould succeed in his suit merely as the appoint. ed beir of the alienor. Against this desision an appeal nader eleuse 10 of the Letters Patent has been filed, and the only ground seriously argued before us is that the plaintiff did not sue as a collateral and that he had no locus standi to sue mere. ly as an appointed heir. We agree with the latter contention and also find that plaintiff's locus siandi as a collateral was not clearly raised in the Trial Court or Appellate Courts. We find, however, that the plaintiff is undoubtedly a collateral, though somewhat remote, of the alienor, and we consider that we are right in thicking that the lower Courts interpreted the meaning of the witnesses on the point to be that the land alienated was the ancestral land of the plaintiff as a collateral of Shib Dial. We may also notice that in the plaint a reference is made to the Will in the plaintiff's favour in which he is referred to as a collateral. The point, therefore, though not specifically raised, was before the lower Courts and sould have been adjudieated upon by them.

It is urged before us that even if the land is ancestral qua the plaintiff and the alienor and if he is a remote collateral, he still had no locus stands to sue in the presence. of many nearer reversioners even if he is also an appointed heir. We do not agree that this principle applies to the present case. The right of a reversioner to obtain a declaratory decree in the ease of an alienation of ances. tral property by a male proprietor depends. firstly, on his vested rights in the property alienated, and secondly, on the probability of the inheritance thereof opening in his favour. In the present case which is one for possession, the plaintiff has vested rights and by the appointment in his favour is entitled to possession before others though nearer collaterals.

The other grounds of appeal were not pressed seriously and we dismiss the appeal.

M. H.

Appeal dismissed.

RAM BATAN MANDAL U. NILMONI CHOWDHURY.

CALOUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2214

CF 1919.

January 13, 1922.

Present :- Justice Sir N. R. Chatterjea, Kr., and Mr. Justice Panton.

RAM RATAN MANDAL AND CTHERS—
PLAINTIFFS—APPELLANTS

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NILMONI CHOWDHURY PROPRIETOR

OF THE FIRM CHOWDHURY AND

COMPANY AND THE CENTRAL

NEDIA COAL COMPANY LIMITED

THEOLOGITPEIR AGERTS MESSES,

LINTON MILLER LIMITED; AND

MESSES. MOLEWORTH AND COMPANY

ALDED AS PARTY RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 142— Possession, suit tor—Property not incapable of acts of possession—Presumption of possession following title —Adverse possession—Appellate Court, duty of, before reversing decision of Trial Court.

Where in a suit for recovery of possession on a declaration of title the plaintiff asserts that the land is capable of possession and adduces evidence of definite acts of ownership, he must fail unless he proves possession within 12 years even assuming that the title is with him and he cannot rely upon the presumption that possession follows title. [p. 915, col. 1.]

An Appellate Court should not reverse the decision of the Trial Court only on consideration of some of the grounds upon which the decision of that Court

is based. [p. 914, col, 2]

Appeal against a decree of the Subcrdinate Judge, First Court, Burdwan, dated the 2nd August 1919, reversing that of the Additional Munsif. Asansole, dated the 20th of May 1918.

FACTS appear from the judgment.

Babu Bankim Chandra Manumdar (with him Babu Bankim Chandra Mooker;ee), for the Appellant.—The suit was for recovery of possession on declaration of title. The Munsif decreed the suit after an elaborate discussion of the whole of the evidence on the record. But the lower Appellate Court in reversing the Munsif's decision has not taken into consideration all the grounds upon which the Trial Court's decision was based. In dealing with the question of limitation the lower Appellate Court should have taken into consideration the fact that the lands in

suit were waste lands. So the plaintiffs should have been given the benefit of the presumption that in the case of such lands possession follows title. The learned Subcrdinate Judge has not also come to any clear finding on the question whether the plaintiffs got into possession again before their title was extinguished by the adverse possession of the defendants.

Babus D. N. Chakravarty, Jatindra Mohan Moolerjee and Mr. J. W. Chippendaio), for the Respondent.—It is not necessary that an Appellate Court should scrutinize every bit of evidence. It is sufficient for it to state the general grounds of its decision and the reasons for its conclusion as to the truth or otherwise of the party's case. The question of title having been found against the plaintiffs, the decision on the question of limitation is clearly immaterial.

Babu Ramchandra Majumdar replied.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of the disputed land on declaration of the plaintiffs' title to the same.

The Court of first instance decreed the suit, but that decree was set aside by the lower Appellate Court which dismissed the suit. The plaintiffs have appealed to this Court.

The Court of Appeal below has decided both the questions of title and limitation against the plaintiffs, but we think that it has not dealt with the ease properly. With regard to the question of title, the learned Sabordinate Judge observes " the Munsif has stated many things in his judgment regarding title and possession in respect of the lands, but most of his observations are based upon surmises ". He does not state, however, what they are. The Munsif elaborately discussed the evidence as to title. The learned Subordinate Judge refers to sertain dosuments but appears to have considered only some of the grounds upon which the Muneif based his decision. The judgment is one of reversal, and we do not think that he has dealt with the question satisfactorily.

As regards the question of limitation, the Court of Appeal below has held that the plaintiffs had failed to prove possession within

JHAMOLA KUNWAR C. HANWANT SINGE.

twelve years. That would ordinarily be sufficient to dispose of the case, as it falls under Article 142 of the Limitation Act, and the plaintiffs must fail unless they prove possession within twelve years, even assuming that the title is with them. It is contended that if the plaintiffs have got title and the lande are waste, there was a presumption that possession follows title. But the plaint. iffs asserted that the land was expable of possession and address evidence of definite acts of ownership. In these cirthe plaintiffs cannot eumstances. upon any presumption (assuming that they have title) and if the ovidence addaged is not accepted, the suit must be dismissed on the ground of limitation. It appears that both parties addaesd evidence of definite acts of ownership having been exercised upon the land. The Munsif held that Ails were raised by the Krishans of the -plaintiffs and that they also cultivated til and kali on the disputed land for some years. The defendants also adduced evidence of possession. The learned Subordinate Jedge, however, says that the lands are admittedly danga.

The plaintiffs alleged that their lessors were in possession through a tenant Bipin Napit. The learned Subordinate Judge in the earlier portion of his judgment seems to have disbelieved the allegation. He says The lease of this Bipin Napit is not produesd. The defendants' case is that Bipin was turned out by Lukbi Narayan." This Lukhi Narayan was the vendor of the defendants. If Bipin held the land as tenant before the settlement with the plaintiffs which took place in 1901, and if Bipin was dispossessed by the defendants' vendor, there could not be any continuance of possession of the plaintiffe' lessors or of the plaintiffs even if they had title, unless they subsequently resovered possession within 12 years of the suit, and the case might have been disposed of on this ground alons. But the learned Sabordinate Judge says-"The dicd ted tweeds breese ent no sanshive parties have been trying to oust each other of possession sines a number of years." This implies that the plaintiffs got into Dossession at any rate once, there can be no question of ousting unless a party is in possession. And if that 14 to the mere fast that Bigin was onsted

would not be conclusive: because if, before Lokhi Narayan or the defendants had acquired a title by adverse possession for twelve years after oneting Bipin, the plaintiffs again got into possession within twelve years before suit, and if they were the rightful owners, their claim would not be barred by limitation. The findings of the Court of Appeal below on the point are, therefore, not clear.

In these cirsumstances, we think that the case should go back to the lower Appellate Court in order that the appeal may be re heard and disposed of assording to law. Costs to abide the result.

J. P. & K. H.

Vase sent back.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPRAL No. 805 of 1920.

March 24, 1922.

Present:—Mr. Justice Lindsay and
Mr. Justice Stuart.

Musammat JHAMOLA KUNWAR -

versus

Thatur HANWANT SINGH AND OTHERS -- DEFENDANTS-RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 199, 201-Res judicata - Proprietary title, question of, determination, by, Revenue Court.

Ordinarily the Rent Courts in the Agra Province? have no jurisdiction to determine questions of title, but, under the provisions of sections 199 and 211 of the Agra Tenancy Act, special jurisdiction has been conferred upon Rent Courts by virtue of which they are empowered, in given circumstances, to decide questions of title. [p. 917, col. 2.]

The decision of a Rent Court under section 199 as well as under section 201 of the Agra Tenancy Act in the exercise of its jurisdiction to decide a question of title is resjudicate and prevents the trial in a subsequent suit in a Civil Court of any issue relating to the same proprietary right. [p. 917, col. 2.]

Second appeal against a decree of the Additional District Judge, Allahabad, dated the 3rd March 1920.

Mr. Gulsiri Lil, for the Appellant.
Messra. Hiribins Sahai, M. L. Santil.
I. B. Banerjes, Badri Narain and Yatish Chan.
dr. Roy, for the Respondents.

....

JAAMOLA KUNWAR C. HANWANT SINGH.

JUDGMENT .- These are cross-appeals against a decree of the Additional Judge of We have heard Counsel at Allahabad. length in both cases and have come to the conclusion that the decision of the Court below should be maintained and that both appeals should be dismissed.

The dispute between the narties relates to an area of 27 bighas and 8 biswas which is situated in a village salled Marza Ghosia, Mahal Turab Ali. The suit, which was filed by Musammat Jhamola Kunwar, plaintiff, was filed in consequence of certain directions given by a Revenue Court in which an application for partition of this village had been filed by Thakur Hanwant Singh and Thakur Raghuraj Singh.

The facts of the case are comewhat complicated, but the following statement of them will show the point which arises for deci-

sion :there are three sets In this village of co-shares. Hanwant Singh and Ragburaj Singh between them owned a 4-annas share. Formerly one Talaiyar and his wife Siddan Bibi owned a 6-annas share and Muhammad Igbal and his wife, Champa Bibi, another 6annas share.

It is found that in or about the year 1887 the co-sharers in these villager, in order to avoid suits against each other for profits, agreed to an allotment of certain lands which the co sharers were to hold in their own occupation. They were under this arrange. ment, to treat rents received from these areas so allotted as representing their share of the profits in the village.

Under this arrangement Hanwant Singh and Raghuraj Singh or their predecessors were allotted an area of 18 bighas and 5 biswas as owners of a 4 annas share.

It is an admitted fact that the 27 bighas and 8 biswas, now in dispute, were allotted under the same arrangement to Talaiyar and his wife, Siddan Bibi, as owners of a 6 annas share.

In the year 1896 the 6 annas share belonging to Talaiyar and his wife, Siddan Bibi, was sold by auction and was bought by one Kalyan Chand who was the father in-law of the present plaintiff, Musammat Jhamola Kunwar,

The result of this auction sale was that the owners of this 6 annas share became ex-proprietary tenants of the 27 bighas and 8 biswas now in dispute.

After the share had been sold, Ahmad Yar, sen of Talaiyar and Siddan Bibi, made a mortgage, with possession of the plots making up the 27 bighas and 8 biswas. This mortgage was made in favour of Hanwant Singh and the father of Raghuraj Singh, and in the mortgage deed the property mortgaged was described as the ex-proprietary holding of the mortgagors.

As the result of these transactions, it must be taken that Kalyan Chand besame the owner of the 6 annas share which had former. ly belonged to Talaiyar and his wife. Ahmad and Musammat Siddan Bibi beeame the ex-proprietors of the 27 bighas 8 biswas and Han want Singh and the father of Righard Singh became the mortgagees of the exproprietary holding of Ahmad Yar and Siddan Bibi.

After this mortgage of the ex-proprietary bolding was made, Sumer Chand, son of Kalyan Chand, as the purchaser of a 6-sunsa share of Talaiyar and his wife, brought a suit to ejest the mortgagees was dismissed. It was held in that litigation that the 27 bighas and & biswas in dispute were the sir lands of Ahmad Yar and Siddan Bibi and that consequently Samer Chand was not entitled to get possession. This matter was decided by a decree of the District Judge passed in the year 1599.

Samer Chand being defeated in his suit for possession made an application to the Rent Uourts for assessment of rent on these as against Ahmad Yar. The ar lands result of this was that rent was assessed and consequently Sumer Chand and Ahmad Yar stood thereafter qui these sir lands in the relation of landlord and tenant.

In the year 1902 Hanwant Singh and the father of Raghuraj Singh brought a suit against Sumer Chand for profits arising out of these lands measuring 27 bights and and 8 bismas.

At the time this snit was brought, the position of Hanwant and the father of Ragburaj was this :-

(1) Tasy were the owners of a 4-annas

share in the village.

(2) They had bought a 3 annas 4 pies share out of the remaining 12 annas share in the village and they were lesses of a l. anna 7-pies share out of this 12-annes share. JEANOLA KUNWAR C. HANWANT SINGH.

This share belonged to Alim-un-Nissa who had defaulted in payment of revenue. Her share was made over in form to Hanwant

and the father of Ragburaj.

In the suit which Hanwant and the father of Raghuraj brought for profits they elaimed as being co-owners in the 12-annas share. Obviously they could bring no claim for profits regarding their 4-annas share, for that claim was barrel under the arrangement which had been some to between the parties in the year 1857. We have already observed that, under this latter arrangement, Hanwaut Singh and the predecessor of Raghuraj were in possession of 18 bighas 5 biswas of sir land.

This suit for profits was ultimately decided by Mr. Rustomji, the District Judge. He was of opinion that the plaintiffs in that suit were not entitled to any share of the profits arising out of this area of 27 bighas and 8 biswas. The Judge was of opinion that Khalil, whose share had been purchased by Hanwant and Raghuraj, and Musammut Alim un Nissa whose share was held by them in farm had lost all right to claim a share in the profits of this area.

In the year 1905 Sumer Chand, the son of Kalyan Chand, brought a suit for ejectment of Hanwaut Singh and Rabgaraj Singh as mortgagees of this ex-proprietary holding of 27 biglas 8 biswas. That suit was based upon an allegation that the ex-proprietor, Ahmad Yar, had relinquished his exproprietary helding. This suit, however, failed.

In the year 1:10 in execution of a decree for arrears of rent Musammat Ibamola Kunwar who had succeeded her husband, Sumer Chapd, ejected Amhad Yar, the ex-proprietor, and his mortgagees Hanwant Singh and Raghuraj Singh. The result of these proceedings was that the ex-proprietary tenancy came to an end and the plaintiff Jhamola Kunwar sot possession of the 27 bighas and 8 biswas.

We some now to the year 1913. In this year Hanwant and Raghuraj again brought a suit against Sumer Chand for profits. Mr. Daniels, the District Judge, before whom the case came in appeal, dismissed the suit, holding that the previous decision of Mr. Rustomji was rescudicata.

In the present suit which has been brought by Musammat Jhamole Kanwar for a de-

and & birgs, it has been held by the learned Jadge of the Court below that by reason of the decision of Mr. Rustomji which was accepted as res judicata by Mr. Daniels the defendants Han want Singh and Raghuraj Singh are not entitled to put forward any claim to a share as proprietors of this area of 27 bighas 8 biswas so far as they purport to hold a share in the 12. annas share other than the 4 annas share, which originally belonged to them.

In the appeals now before us the argument has been taken that the decision of the learned Additional Judge is erroneous, and that the question of title of Hanwant Singh and Ragharaj Singh to a share in the 27 b'ghas 8 biswas is not restudicata.

In our opinion the decision of the Court below is perfectly correct. Ordinarily the Rent Courts in this Province have no inrisdiction to determine questions of title but under the provisions of sections 193 and 201 of the Agra Tenancy Act, special jurisdiction has been conferred upon Rent Courts in virtue of which they are empowered, in given cirsumstances, to decide questions of title.

It has been repeatedly held by this Court that the desision of a Rent Court under section 199 in the exercise of its jurisdiction to deside a question of title is res judicata and will prevent the trial in a subsequent suit in Civil Court of any issue relating to the same proprietary right.

As pointed out by the learned Judge in the Court below, the rulings to this effect have been given with reference to the language of section 199, but on the same principles the same view of the law must be taken with regard to proceedings under section 201 in cases where under that section the Rent Court is given authority to decide questions of title.

Section 201 lays down that if in any suit instituted under the provisions of Chapter XI of the Act the plaintiff is not recorded as having any proprietary right entitling him to institute such suits and the defendant pleads that the plaintiff has not such properietary right, the Court shall proceed mutatic mutantic as directed in section 199. Sab section 3 of this section lays down that if the plaintiff is recorded as having such proprietary right, the Court

JHAHOLA EUNWAR U. HANWANT BINGH.

shall presume that he has it, but that nothing in the sub-section shall affect the right of any person to establish by suit in the Civil Court that the plaintiff has

not such proprietary right.

It follows from the terms of this section, therefore, that if the plaintiff in a suit for profits, which is a suit under the provisions of Chapter XI of the Ast, is recorded as having the proprietary right, the Rent Court must presume that he has got that right and decree the suit. The decision of the Rent Court, however, in these circumstances does not bar the defendant in the suit from going to a Civil Court and obtaining a declaration regarding his proprietary title.

In the other case provided for by this section, that is to say, where the plaintiff is not recorded as baving a proprietary right, the Rent Court is given the option of following one or other of the courses laid down in section 199, that is to say, the Rent Court may direct the plaintiff to go to a Civil Court within a given period and sue for declaration of his title or it may, if it so shoses, try the issue itself, and when it elects to pursue the course, the Rent Court is deemed to be a Civil Court competent to try this issue of proprietary right and its procedure is to be regulated in accordance with the provisions of the Code of Civil Procedure.

In the litigation in the year 1902 which was terminated by the decree of Mr. Rustomji, the District Judge, it appears to us that the Rent Court exercised right of trying the issue regarding the proprietary title. So far as we are able to ascertain from the judgment (and that is the only dosument which is before us). the case was a case in which the plaintiffs there were not recorded as having proprictary right entitling them to institute the suit. We gather from what is set out in Mr. Rustomji's judgment that at that time this area of 27 bighas and 8 biswas was recorded in the name of Ahmed Yar who was described as the ex-proprietor of the lands in question,

Later on in 1913 when Hanwant and Raghuraj again attempted to sue for profite, this decision of Mr. Rustomji's was held to be res udicata, and we think rightly so.

It follows from all this that we must held that in the present suit the learned Judge of the Court below was right in saying that the claim of Hanwant Singh and Raghoraj Singh to a share of these 27 bighos and 3 biswos is untenable to the extent that they represent the share of Khalil which they purchased in the 12. annas share which was outside own share of 4-annas. In the concluding portion of his judgment the learned Judge states the position very elearly. He holds that in so far as Hanwant and Ragburaj claimed to represent by purchase the share of Kbalil, and in so far as they represent Alim.un. Nissa as lessees, they are estopped from maintaining now that they have any interest as co-sharers, left in the property in suit. The learned Judge, however, has made it clear that so far as their original 4 annas share is concerned, they are not so estopped.

The Cross Appeal No. 805 of 1920 appears to us to have no force. The contention in this appeal appears to be that inasmuch as the question of title to the 27 bighas and 8 biswas has been held by the lower Court to be res judicata between the parties, the position is that Musammat Jhamola Kunwar is entitled to the exclusive right over this area, and that in making the partition of this village she is entitled to keep this area in addition to the share which would be allotted to her in proportion to the interest which she holds in the village. In our opinion that contention sannot be maintained for the reasons we have stated The decision which is res judicota between the parties is a decision only as against Hanwant Singh and Raghoraj to the extent to which they represent the shares of Khalil and Alim un Nissa. There is nothing in the previous litigation between the parties which would prevent Hanwart and Ragburaj from claiming in the partition that they were entitled to their full share of the village lands in proportion to their original share of 4 arnas which they have had all along.

Judge has rightly held that no question of res judicata can arise as against her. She was no party to the suit which was decided by Mr. Rustomji, and as the learned Judge

TOTI U. MALUKA.

properly observes, a lessor doss not claim under his lessee.

The result of all this is that we find the decision of the lower Appellate Court to be perfectly correct. We dismiss both the appeals with costs in each case to the respondents on the higher scale. In Second Appeal No. 805 separate sets of costs will be awarded to (1) Hanwant Singh and Raghuraj Singh and (2) Ataullah, defendant-respondent. Costs in this Court will include fees on the higher scale, if any.

J. P.

Appeals dismissed.

SECOND CIVIL APPEAL No. 1689 OF 1916.
November 25, 1926.

Present: -Mr. Justice Shadi Lal, Chief Justice and Mr. Justice Laslie-Jones.

Musammat TOTI AND ANOTHER - DEPENDANTS
- APPELLANTS

versus

MALUKA — PLAINTIFF — RESPONDENT.

Punjab Tenancy Act (XVI of 1837), s. 59—Succession to occupancy tenancy, how governed.

Succession to an occupancy tenancy is governed not by Customary Law but by the provisions of section 59 of the Tenancy Act, and unless a plaintiff can prove that the land was occupied by the common ancestor, he has no locus standi to contest an alienation by the widow of an occupancy tenant, because he is not her heir and is in no botter position than any stranger, even though he may be a collateral of her deceased husband; so far as he is concerned, the consent or otherwise of the landlords is immaterial.

Second appeal from a decree of the District Judge, Gurdaspur, dated the 28th April 1913, reversing that of the Senior Subordinate Judge, Gurdaspur, dated the 20th January 1916.

Mr. Badri Nath Kapur, for the Appel-

Bakbshi Tek Chand, for the Respondent.

JUDGMENT,—Musammat Toti, who inherited an ossupancy tenancy from her husband,

Kirpa, gifted the property to her illegitimate

Kirpa, Amar Singh, who obtained a mutation,

The present suit was instituted by one Maluka who alleged that he was a collateral of Kirpa descended from a common ancestor who occupied the land and, therefore, claimed a declaration that the alienation by Musimmat Toti should not affect his reversionary rights after her death.

The First Court dismissed the suit on the ground that the plaintiff had failed to prove that the property in suit was occupied by the common ancestor of himself and

Kirpa.

The plaintiff appealed to the District Judge who held that the plaintiff was a collateral of Kirpa and without coming to any finding on the question whether the land was occupied by the common ancestar—a point, which in his opinion, did not arise—decreed the claim on the ground that Musammat Toti baving only a limited estate could not alienate except for necessity unless she obtained the consent of all the landlords.

Musammat Toti and her son have now preferred a second appeal to this Court. The District Judge apparently failed to understand that succession to an oscupancy tenancy is governed not by Oustomary Law but by the provisions of section 59 of the Tenancy Act, and that unless the plaintiff ean prove that the land was occupied by the common ancestor, he has no locus standi to contest an alienation by the widow of an pecupancy tenant, basanse he is not her heir and is in no better position than any stranger, even though he may be a collaterel of her deseased husband; so far as he is conserned, the consent or other wise of the landlords is immaterial.

We allow the appeal, and as the District Judge has some to no finding on the question whether the common ancestor occupied the land, remand the case under Order XLI, rule 23, Oivil Procedure Code, to the District Judge for disposal according to law. Ocats will be costs in the cause.

W. C A.

Appeal allowed: Oase remanded, SHANKER LAL D. MOHAMMAD AMIN.

ALLAHABAD HIGH COURT.
FIRST APPEAL FROM ORDER NO. 196 OF 1921.
March 21, 1922.

Present: - Mr. Justice Walsh and Mr Justice Ryves.

SHANKER LAL AND ANOTHER—DEFENDANTS
-APPRILANTS

tersus

MOHAMMAD AMIN AND OTHERS-

Civil Procedure Code (Act V of 1909), s. 165— Interlocutory order—Appeal dismissed—Decree, appeal from—Interlocutory order, when can be questioned.

Where there is some unappealable interlocutory order, its irregularity or any defect in it, may be raised when the decree is appealed from, so far as it affects the decision of the case, although an appeal from the order has been dismissed on the ground that no appeal lay from it. [p. 920, col. 2.]

First appeal from an order of the Subor-

dinate Judge, Meerut.

Mr. Ka:lash Chandra Mital, for the Appellants.

Mr. Hamid Hasan, for the Respondents.

JUDGMENT

WALSE, J .- This is an appeal from an order of remand. The suit is brought by certain alleged minors through the guardianship of their mother in an effort to redeem property which has been already sold over their heads as the result of a decree for sale obtained in a suit by the mortgagee against their father, the original mortgagor. It has the aspects of being a proceeding of a somewhat suspicious character, but nonetheless these surpicions have to be confirmed and not inferred. In some respects the attempt which they have made resembles the case referred to in the judgment of the Court below, namely, Ganpat Lal v. Bindbasini Frashad Narayan Singh (1), where the Privy Conneil pointed out that after the sale has taken place, (they are speaking of a mortgage), the owner holds as purchaser and is entitled to raise all the defences belonging to him as such, and unless the elaim to set aside the sale is made in a astion and properly properly constituted raised in suitable pleadings in that action, the Court cannot interfere with the posses. sion given to him by his purchase. The plaint. iffs, finding that the mortgages had purchased, applied to the Trial Court, before the hearing, (1) 56 Ind. Cas. 274; 18 A. L. J. 555; (1920) M. W.

(1) 56 Ind. Cas. 274; 18 A. L. J. 555; (1920) M. W. N. 382; 12 L. W. 59; 47 I. A. 91; 39 M. L. J. 108; 9 U. P. L. R. (P. C., 103; 24 C. W. N. 954; 28 M. L. T. 330;

47 O. 824 (P. C.).

for liberty to amend their pleadings, so as to challenge the sale, very much on the lires of their Lordships' opinion which I have just quoted. The First Court refused leave to amend. There was an appeal from that order, and, as the order was unaprealable, the appeal was not unnaturally dismissed. One of the points orged upon us by the appellants is that the question of amendment has been concluded by that unsuccessful appeal. We do not agree with that. We think it is one of those eases which section 105 provides for, namely, where there is some unappealable interlegatory order, its irregularity or any de'est in it, may be raised when the decree is appealed from, so far as it affects the decision of the ease. There is no doubt that the refusal to amend affected the decision of the plaintiffs' case by shutting them out from the alternative elaim which the Privy Council has pointed out is really a condition precedent. We entirely agree with the general observations of the lower Appellate Court in reference to the refusal to amend. Whatever the merits of the case may be, which is sought to be made out, it is just one of those cases in which the Court ought to allow amendment, if it is satisfied that the application is made bong fide. As the lower Appellate Court says, it would not aller the nature of the suit, to use a somewhat popular but vague expression, because the original prayer and the amended prayer stand together and one leads to the other and the new prayer would be a new and additional elaim, but not an irconsistent one. The order for remand was, therefore, right. We would further point out that it still remains to be desided whether the sale ought to be set aside. That derends on two questions. First, whether the minors are really the persons who ought to have impleaded at all. Their claim to have been impleaded arises out of a deed of wakf subsequent in date to the mortgage deed of which the mortgagees apparently were not in the least aware. As is pointed out in Mr. Agarwala's notes to the Code, it is by no means clear that, although the final provision which used to be contained in section 85 of the Transfer of Property Act has been removed, rule I of Order XXXIV which has taken the place of section to means anything more than BEANKER LAL C. MURAMMAD AMIN.

that the defendant orght to raise the question whether all the parties have been properly impleaded. If the plaintiff omits to do so, and the plaintiff can hardly do so if he has no knowledge of the existence of the persons alleged to be interested, it does not nessessarily follow that the desres is not binding where the defendant, in the interest of the person who subsequently complains, (in this case it is merely the case of a father and his minor children), abstains from raising the objection. Secondly, there is the further question, whether on the form of the deed, the present minor plaintiffs had any interest in the equity of redemption. The deed does not, in my opinion, purport to be a transfer of the property to them. It is a declaration of trust vest ing in them a contingent future interest subject to their father's life, and, as a matter of strict interpretation, it is to my mind doubtful whether they were persons who had an interest in the equity of redemption at the time of the suit so as to make them persons contemplated by this rule. Thirdly, the question will have to be decided whether the suit, including the application for amendment, are honestly brought. The deed of wakf is subsequent in date to the mortgage. The existence of the decree and the sale of the property were ignored. It is possible that the pardanashin guardian of the two minors knew nothing about them, and that their Pleader only learnt the existence of the sale and the decree from the written statement. That opens up the question whether they knew anything about the mortgage either. If they knew nothing of the decree and the sale, it is probable that they knew nothing about the mortgage, and, therefore, the question will have to be considered, whether this suit is really a suit brought by the minors through their guardian in the honest assertion of their natural rights and in order to test this question, or whether it is a cham suit brought in their names by the father in order further to re-open the litigation which has already taken place and has been decided against him. Upon this question it is to be borne in mind that the deed of waif which has been read to un recognises the existence of the mortgage. That is a point which might possibly, when the matter somes to

be fully considered, out both ways, and shows that the existence of the mortgage was not concealed. On the other hand, it rather indicates that the security for the was excluded from mortgage-debt operation of the trust. I have eaid this much because I think it possible that the order of remand will not result in anything substantial to the plaintiffs; although I recognise that it is still an open question, but it is obvious that when the amendment is allowed, the nature of the suit is altered to this extent that it will require a re settlement of a large number of issues, some of which I have already indicated in the observations I have made in the scuree of this judgment. I would accordingly dismiss the appeal and would modify the order of the Court below as regards costs to this extent that I direct the ecess in the lower Appellate Court and in this Court to abide the result of the amended suit.

Rives, J.—I agree with the order proposed, but the suit must be tried out on the merits. I express no opinion as to the interpretation, validity or effect of the wild deed or as to the bona fides of the plaintiffs or any body else connected with this litigation. These are all matters which have to be decided on evidence which has not yet been produced on either side.

EYTHE OCCRT.—The order of the Court is that the appeal is dismissed, the order of remand confirmed, and the emendment as directed by the lower Appellate Court must be allowed by the Trial Court. But this involves, and we direct, that the defendant must be allowed to make such amendments in his written statement as are rendered necessary by the amendment in the plaint, and both parties must be allowed to produce any material evidence with regard to the amended claim. The costs in the lower Court and in this Court up to date will abide the result of the suit.

J. P.

Appeal dismissed.

NURUL GUNI U. A. S. A. RAZAMAINI.

OALCUTTA HIGH COURT.

APPRAL FROM ORDER No. 135 of 1921.

January 24, 1922.

Present: - Justice Sir Richardson, Kr., and Mr. Justice Ghose.

NURUL GUNI, ONE OF THE HEIRS OF LATE GOLAM AKBAR - DEFENDANT No. 1— APPELLANT

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A. S. A. KAZAMAINI Mulwalli - PLAINTIPP-RESPONDENT.

Civil Procedure Code (Act V of 1903), O. XLI, rr. 23, 24, 25 - Suit decided on merits - Appellate Court, whether can remand under r. 23 - Procedure.

Where a Trial Court has decided a suit on the merits, it is not open to an Appellate Court to remand the case under rule 23 of Order XLI of the Civil Procedure Code as though the suit has been decided on a preliminary point but it should take the coarse indicated in rule 24 or the course indicated in rule 25.

Appeal against an order of the District Judge, 24 Parganas, dated the 4th of April 1921, reversing that of the Munsif, Third Court at Alipur, dated the 28th of August 1919.

FACIS appear from the judgment.

Dr. Sarat Chandra Basak (with him Babu Kanai Lal Fol), on behalf of the Respondents, took a preliminary objection that no appeal lay as the order of remand was not under rule 23 of Order XL!, Civil Procedure Code.

Babu Mohendra Nath Ray, (with him Babu Kanai Lal Pal), for the Appellant, submitted that though the Trial Court had disposed of the suit on the merits, still the lower Appellate Court remanded the whole suit as though it had been decided on a preliminary point. The Appellate Court should have dealt with the case under any of the other provisions of Order XLI, which might be applicable, rule 25 for instance. In such cases, where an order of remand has been erroneously made under rule 23, it has been held that an appeal would lie.

[RICHARDSON, J.—We shall treat the order as one made under rule 23, and then send the case back to be dealt with under rule 25 or rule 24]

JUDGMENT —This appeal is from an order of remand dated 11th April 1921. We refrain at this stage from dealing with the question of law discussed by the learned Judge in his judgment. It is sufficient now to say that we cannot resist the con-

AHMAD BARHSH U. PALI

tention urged for the appellants, that the Trial Court having decided the suit on the merits, it was not open to the learned Judge to remand the case under rule 23, of Order XLI, as though the suit had been decided on a preliminary point. The learned Judge should have taken the course indicated in rule 24 or the course indicated in rule 25.

We may explain that we do not deal with the question discussed by the learned Judge because it is unnecessary at the present stage to do so, and at a later stage when the outstanding issues have been desided it may still be unnecessary to deal with that question.

We may further say that orders of remand made by lower Appellate Courts in eases which do not fall within rule 23 of Order XLI are likely to lead to difficulty and unnecessary discussion in view of the provision contained in clause (2) of section 105 of the Code.

We set aside the order of remand and direct that the case be remitted to the lower Appellate Court in order that the appeal thereto may be further dealt with and disposed of according to law, costs of this appeal to abide the result, hearing fee one gold mohur.

J. P.

Order set aside; Case remitted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 688 of 1920.

December 1, 1920.

Present:—Mr. Justice Wilberforce.

AHMAD BAKHSH—PLAINTIFF—

APPELLANT

persus

Musammat PALI-DEFENDANT-RESPONDENT.

Easement -Parnala, old -Easement, whether estab-

The mere finding that a parnala is old is no finding in law that an easyment has been established with respect thereto, [p. 923, col, 1.]

MANABAJA OF COOCH BEHAR U. MASENORA RANJAN RAI CHAUDBURI.

. Second appeal from an order of the District Judge, Jullandar, dated the 30th January 1920, affirming that of the Monsif, let Class, Jullandar, dated the 9th August ·1919.

Kunwar Dalip Singh, for the Appellant. Mr. Abdul Rasay, for the Respondent.

JUDGMENT,-In this case the plaintiff sued for the removal of a new parnala put up by the defendant. The claim was dismissed by the First Court which held the parnala to be an old one. The District Judge also held the parmals to be old and plaintiff-appellant's dismissed the Against this he has preferred a second appeal and it is urged that there is no finding that defendant had proved any easement in respect of this piralia. Counsel for the respondent admits this to be correct. The mere finding that a parala is old is no finding in law that an essement has been established with respect thereto. I am, therefore, compalled to remand the ease to the lower Appellate Court for a desision on the merits whether the defendant had acquired a right of easement in respect of the parnals in dispute. Costs of this appeal will be costs in the cause.

W, C. A.

Appeal accepted; Case remande 1.

OAL JUITA HIGH COURT. APPEALS FACE OR GIVAL DEGREES Nos. 229 CF 1919 AND 93 OF 1920.

August 19, 1921. Present: - Justice Sir Asutosh Mookerjee, Kr. and Mr. Justice Panton.

H. H. MAHARAJA OF COOCH BEHAR AND OTHERS - APPELLANTS

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BAJA MAHENDRA RANJAN RAI OHAUDHURI-RESPONDENT.

AND

ABDUL MAJID BASUNIA AND OTHERS-APPELLANTS

versus

RAJA WAHENDRA RANJAN RAI CHIUDHURI AND OFBERS-RESPONDENTS. Bengal Survey Act (P B. C. of -1875), e. 41, order under-Limitation Act (IX of 1908), Sch. I, Art. 46, applicability of-Statutes of Limitation-Rule of construction-Survey map, whether to be preferred to Thak map-Adrerse possession, requisites of-Lands submerged every year during rainy season-Wrong-doer-Doctrine of constructive possession-Suit, when instituted.

Article 46 of the First Schedule to the Limitation Act has no application to an order made under section 41 of the Bengal Survey Act. [p. 925, col. 1.]

It is contrary to sound canons of construction to enlarge the scope of the provisions of a Statute of Limitation, by importing into them words which are not to be found there. [p. 924, col. 2.]

There is no inflexible rale that a Survey map must have preference over a Thak map. The Thak and the Survey maps should, as a rule, agree, where they differ, the one that more nearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other, the Court may, if it considers the Thak map more reliable, follow that in preference to the Survey map. [p. 926, col. 2.]

Where the Thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to a suit, that map must be treated as valuable evidence in the suit between the successors of the persons who were present. [p. 927 col, 1.

Where lands are submerged every year during the rainy season, acquisition of title to them by adverse possession is impossible. [p. 927, col. 2]

Where the land is submerged, the possession of the adverse holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner. [p. 928, col. 1.]

Adverse possession must be possession adequate in continuity, in publicity and in extent of area, in order that it may be effective to destroy the title of the true owner. [p. 928, col. 1.]

Possession to be adverse must be actual, visible, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass. [p. 928, cols. 1 & 2.]

The doctrine of constructive possession cannot be applied in favour of a wrong-doer, where possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed only as regards the portion of the land in suit of which he proves actual possession for the statutory period. [p. 928, col. 2.]

A suit must be deemed to have been instituted on the date when the plaint was filed in Court and not on the date when it was ordered to be registered.

[p, 925, ool, 2.] ·

MAHARAJA OF COOCH-BEHAR U. MAHENDRA RANJAN BAI CHAUDHURI.

Appeals against the decisions of the Subordinate Judge, Jalpaiguri, dated the 2nd July 1919.

Babus Ram Oharan Mitra and Atul Ohandra Dutt, for the Appellant.

Babas Dwarks Nath Chuckerbutty and Kali Kinkar Chuckerbutty, for the Respondents.

JUDGMENT.-The subject matters of the litigations which have led up to these two appeals are two tracts of land in the District of Jalpaignri. The rival claimants are the Raja of Kakina and the Maharaja of Cooch-Behar. The lands, which have been formed by the resession of the river Snaniajan, are claimed by the former as included in his village Sibram and by the latter as comprised in his village Jamgram. The first suit was instituted in the Court of the Munsif of Jalpaiguri and the second in the Court of the Subordinate Judge of the same District; but the former suit was transferred, for the sake of convenience, to the Court of the Subordinate Judge, and the two suits were tried together on the same evidence. The suits were ultimately decreed in part on the basis of a report made by a Civil Court Amin. decrees made by the Subordinate Judge have been assailed in this appeal, substantially on four grounds, namely, firet, that the suits were barred by the three years rule of limitation under Articles 46 and 47 of the Schedule to the Indian Limitation Act; secondly, that the trial of the sait instituted in the Court of the Subordinate Judge is barred by the provisions of Order 11, rule 2 (2) of the Oivil Procedure Code; thirdly, that the boundary between the two villages has not teen correctly ascertained; and fourthly, that the defendants have acquired a statutory title by adverse possession for more than twelve years.

In support of the first ground, reliance has been placed as well upon Article 46 as upon Article 47. Article 46 provides that a suit by a party bound by such award, that is, an award mentioned in Article 45, to recover any property comprised therein must be instituted within three years from the date of the final award or order. The awards mentioned in

Article 45 are awards under the Bengal Land Revenue Settlement Regulation, 1822, the Bengal Land Revenue Settlement Regulation, 18/5 and the Bengal Land Revenue Regulation, 1833. It is not disputed that in the cases before us there is no award under any of three Regulations mentioned. What is set up as a bar is an order under section 41 of the Bengal Survey Act, 1875, made on the 1Cth June 1912 by an Assistant Superintendent of Survey. That order is of no assi-tance to the appellants for two reasons. In the first place, the order is not an award under any of the three Regulations mentioned. The nature of a possessory order under section 34 of Regulation VII of 1822 was explained by the Judicial Committee in Jovala Buksh v. Dharum Singh (1) and heigh Sahib Ferhlad Sein v. Rajender Kishore sing (2) and need not be investigated here. it be someeded that a possessory order under section 40 (1) of the Bengal Survey Act, 1875, bears an analogy to a desision under section 34 of Regulation VII of 1822; it would still be contrary to sound sanons of construction to enlarge the scope of the provisions of a Statute of Limitations, by importing into them words which are not to be found there. An attempt of this description was made in the cases of Ibrahim Ali v. Hadi Ali (3), Sheo Das v. Benihu (4) and Zamulabdin v. Durg: Dai (5), when it was argued that an order or award under the N. W. P. Land Revenue Act, 1873, which was similar in scope to the Regulations, attracted the operation of Article 45, even though that Statute was not one of the three Regulations expressly mentioned. This contention was rightly overruled, for extension by analogy is elearly not permissible in such a sace. A similar view was adopted in Oodey Singh v. Paluck Singh (6) where the three years rule was attempted to be

^{(1) 10} M. I. A. 511 at p. 534; 2 Sar. P. C. J. 189;

¹⁹ E R. 1067.
(2) 12 M. I. A. 292 at p. 334; 2 Suth. P. C. J. 225 at p. 23; 2 Sar. P. C. J. 430; 12 W. R. P. C. 6 at p. 18; 20 E R. 349.

⁽³⁾ A. W. N. (1841) 15,

⁽⁴ A. W. N. (1881 91.

⁽⁵⁾ A. W. N. (882, 131,

^{(6) 16} IV. B. 271.

MAHARAJA OF COOCH-BEHAR C. MAEENDRA BANJAN BAI CHAUDHUR.

made applicable to an order of a Collector in partition proceedings. The decision of the Judicial Committee in Boj th Sahib Perhiad Bein v. Rojender Kishore Sing (21 does not militate against this view, as the order in that case was in essence made under Regulation IX of 1825. In the second place, as pointed out in Babu Kasturi Singh v. Kajkumar Babu Bissun Pragus Narain Singh (7), a decision under the Bengal Survey Act, relating to a boundary dispute, was conclusive as to possession only, and would not bar a suit for recovery of To the same possession based on title. effect is the decision in Bisseswari Koer v. Ram Protap Singh (:). A Similar view had previously been adopted in Mouffur Ali v. Grish Chunder Doss (9) where the three years rule was considered inapplicable to a suit for resovery of possession upon establish. ment of title. We are of opinion that these suits cannot be treated as barred by limitation under Article 46, merely because when they were instituted more than three years had elapsed from the date of the order under section 41 of the Bengal Survey Act. That order has, until reversed or modified by competent authority. the force of an order of a Civil Court deslaring the parties to be in possession of the land in assordance with the boundary as determined by the Collector. Article 47 is equally of no avail to the appellants. That article provides that a suit by any person bound by an order respecting the possession of immoveable property made under the Criminal Procedure Code, 1893, or by any one elaiming under such person, to recover the property comprised in such order, must be instituted within three years from the date of the final order in the ease. In respect of the land comprised in the first suit, an order under section 145 of the Criminal Procedure Code was made on the 15th May 1912. The plaint in that suit was lodged in Court on the 14th May 1915, as was found on an examination of the original document. There was some

question as to the verification which had been made by the reargnised agent of the Raja of Kakina, the first plaintiff, on the 12th May 1.15. On the 17th May, order was resorded that the agent be permitted to sign and verify the plaint which was thereupon directed to registered. It is obvious that the suit must be deemed to have been instituted the date when the plaint filed Was in Court and not on the date when it was ordered to be registered. was no defeat in the verification; even if there had been a defect, the Court could allow an amendment at any stage; such amendment would not have made the suit open to objection on the ground of limitation : Rojit Ram v. Katesar Nath (10); Fateh Chand v. Mansab Rai (11); Bisheshar Nath v. Emperor (12); Basiles v. John Smidt (13), Mohni Mohun Das v. Bungsi Budlan Saha Das (14). As regards the second suit which was instituted on the 24th February 1916, the order under section 145, Criminal Prosedure Code, in respect of the land ecmprised therein, was made on the 2nd June 1913. Consequently both the suits fulfil the requirements of Article 47, if that article be assumed to be applicable. The objection of limitation consequently proves untenable in both its branches.

In support of the second ground, reliance has been placed upon Order II, rule 2, Civil Procedure Code. That rule provides as follows:

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards

^{(10) 19} A. 336; A. W. N. (1896) 102; 8 Ind. Dec. (N s) 971.

^{(11) 20} A. 442; A. W. N. (1898) 110; 9 Ind. Dec. (N. s.) 643.

^{(12) 44} Ind. Cas. 28; 40 A. 147; 16 A. L. J. 64; 19 Cr. L.J. 865.

^{(13, 22} A. 55, A. W. N. (1899) 172, 9 Ial. Dec. (N. s.) 1069.

^{(14) 17} C. 580; 5 Sar. P. C. J. 498; 91qd, Deo. (N. s.) 926.

^{(7) 8} O. W. N. 876.

^{(6, 4} Ind, Cas. 547; 14 C. W. N. 338.

^{(9) 10} W. B. 71; 1 B. L. R. A. C. J. 25; 1 Ind. Dec. (7, 6.) 187.

MAHARAJA OF COOCA-BBHAR U. MARRNDRA RANJAN RAI CHAUDHURI.

sue in respect of the portion so omitted or relinquished."

It is plain that if the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. What the rule requires is that every suit shall include the whole of the elaim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant. Pittapur Ra a v. Suriya Rau (15); Amanat Bibi v. Imdad Husain (16); Hanuman Komat v. Hanuman Muniur (17); Saminothan Ohetty v. Palaniappa Chetty (18). the eases before us, the two tracts of land were distinct; it is conceivable that the elaim of the plaintiff to one of the tracts might be well-founded while the other might be groundless; and evidence appropriate for the one might not be relevant for the other; Sonu Khushal Khadake v. Bahiniba: Krishna (19). The parties also were not entirely identical; the Maharaja Coosb-Behar, for instance, was a party to the second suit but not to the first. The dispute as to possession had taken place at different times and the orders under section 145 had been made on different dates separated by an interval of more than one year. In such circumstances, the causes of action might reasonably be considered distinct; they were clearly not unified by the fact that the Assistant Superintendent of Surveys included both the tracts in one order. We must look to the substance and not to the form of the proceedings; if he had recorded his decision in separate orders, the contention of the defendants would have lost all semblance of the reasonableness. It is consequently needless to attempt a definition of the expression "sause of action" or

(15) 8 M. 520; 12 I. A. 116; 9 Ind. Jur. 274; 4 Sar. P. C. J. 638; 3 Ind. Dec. (N. s.) 356.

(16) 15 I. A. 106; 15 C. 800; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique and Jackson's P. C. No. 403; 7 Ind. Dec. (N. s.) 1117 (P. C.).

(17) 18 1. A. 158; 19 C. 123; 6 Sar, P. C. J. 91;

9 Ind. Dec. (N. s.) 527 (P. C.).

(18) 26 Ind Cas. 228; 41 I. A. 142; 18 C. W. N. 617; 17 New Law Rep. 56; 83 L. J. P. C. 131; (1914) A. C. 418; 110 L. T. 913 (P. C.).

(19) 33 Ind. Cas. 950; 40 B. 351; 18 Bom L. R.

45.

Murti v. Bhola Ram (20) and Binde Bibi v. Kam Chandra (21), where a distinction was drawn between properties held by different persons under different titles and properties held by the same person though under different titles. We are of opinion that in the case before us, the second suit is not barred under Order II, rule 2, and the plaintiff cannot be said, in the events which have happened, to have split up one entire cause of action into different fragments.

In support of the third ground, the appellants have advanced a two-fold argument, namely, first, that preference should not have been given to the Thak map over the Survey map, and, secondly, that the boundary line, between the villages of S.bram and Jamgram, as depicted on the Thak maps produced, is incorrect. No objection, we may add, has been taken to the assuracy of the work of the Civil Court Amin who prepared the ease map in these litigations. As regards the first branch of the contention, it is sufficient to observe that there is no inflexible rule that a Survey map must have preference over a Thak Map. As observed in Abid Hossein v. Dowcurry Pal (22) the Thak and the Survey maps should, as a rule, agree, where they differ, the one that more nearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other, the Court may, if it considers the Thak map more reliable, follow that in preference to the Survey map. This view is not opposed to the decision in Burn v. Achumbit Roy (23) and was approved in the cases of Nawab Badadur of Murshidabad v. Gopinath Mandal (24) and Amrita Sundari v. Sherajul. din Ahamed (25). In the case before us, there are solid grounds for the preference given to the Thak map. The Thak map of Sibram was prepared on the 25th June 1856; the survey operations were conducted during

^{(20) 16} A. 165; Δ. W. N. (1894) 65; 8 Ind. Dec.

⁽N. s.) 106 (F. B.). (21) 50 Ind. Cas. 905; 41 A. 593; 17 A. L. J. 653; 1

U. P. L. R. (A.) 78.

^{(22) 6} C. W. N. 629.

^{(23) 20} W. R. 14. (24) 6 Ind. Cas. 392; 13 C. L. J. 625 at p. 632.

^{(25) 29} Ind. Cas. 166; 19 C. W. N. 565 at p. 576,

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the season 1857 58. In the interval, there was a dispute between the proprietors of the neighbouring estates as to the correctness of the boundary as delineated on the Thak map. The dispute was decided by a Deputy Collector on the 14th December 1857, when it was ordered "to confirm the Thak, under which balf of the flowing river (Shanisjan) appertains to this Mouza (Sibram) and the other half to Jamgram." An entry to this effect war, after the desision of the dispute by the Thakbast Deputy Collector, made op the Thak map. The Thak proceedings and the decision of the dispute took place in the presence of the predecessors of the parties to these suite, and, consequently, that map must be treated as valuable evidence in a suit between the successors of the persons who were present. Dunne v. Diarani Kanta Lahiri (26) which is not only in conformity with the decisions in Collector of Ra shahye v. Doorga Loondurses Debia (27), Gunga Narain V. Radhika Mohun Roy (28), Omirta Iall v. Kales Perchad (29), Nobo Coomar Gobind Chunder Roy (30), Joytara Dassee v. Mahomed Mobaruck (31) and Abdul Hamid v. Kiran Chandra Rcy (32) but is also in harmony with the pronouncement of the Jadieial Committee in Surja Kanta v. Sarat Chandra Foy (33). The decision of the Mevenue Authorities was neither ex parie nor without any enquiry, as appears to have happened in the case of Jagadindra Nath Roy v. Hemanta Kumari Debi (34), and, in such circumstances, the application of an abnormally exacting test of assuracy was depressied by the Judicial Committee in Monmohini Debi v. R. Watson & Co. (35). We sannot, sonsequently, give effect to the contention of the appellants that the Survey map should have been preferred to the Thak map.

(26) 85 0, 621, (27) 2 W. R. 210. (28) 21 W. R. 116. (29) 25 W. R 179.

(EO) 9 C. L. R. 205.

(31) 8 C. 975; 11 C. L. R. 399; 5 Shome L. B. 13; 4 Ind Doc. (N. s.) 629.

(32) 7 C. W. N. 849.

(33) 25 Ind. Cas 200, 20 O. L. J. 563; 18 C. W. N. 128'; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 18 Bum. L. R. 925 (P. C.).

(81) 11 Ind. Cas 542; 14 C. L. J. 819; 15 C. W. N. 837; (1911) 2 M. W. N. 101; 10 M. L. T. 157; 13 Bum, L. R. 803, 8 A. L. J. 1176 (P. C.).

(86) 4 C. W. N. 113; 27 C. 836; 27 I. A. 44, 7 Sar.

P. O. J. 562; 14 Ind. Dec. (N. 8) 222.

As regards the second branch of the conten- , tion of the appellants, in connection with this . point, it has been arged that the boundary shown on the Thak map is inaccurate and does not in fact give effect to the decision of the Revenue Authories that the true boundary is peither the one nor the other back of the river but is an imaginary line midway between the two banks. This argument seemed at one stage to have an appearance of plausibility, but, upon eloser examination, turned out to be unfounded. It is negatived, in fact, by the entry on the Thak map which was made in the presence of the agents of the rival proprietors who had estates on the river banks, The entry is unambiguous and states distinct. ly that the Thak boundary line was kept intact as drawn, and half of the disputed river was shown as within the ambit of Mouza Sibram. while the other half was within the ambit of Mooza Jamgram. If the boundary as delineated on the Thak map was in fact incorrect, the entry would have been made in different terms. We are of opinion that there is no reasonable doubt as to the meaning of the entry and that the defendants have failed to give adequate reasons why that ertry should be disturbed after it had been aequiesced in by all the parties interested for such a length of time. We hold accordingly that the Subordinate Judge has rightly held that the common boundary line is that shown on the map,

In support of the fourth ground, the. defendants have urged that they have acquired a good title by adverse possession for the statutary period. Here the case of the defendants is beset with grave difficulties as the major portion of the disputed lands is unsulturable sandy waste. The defendants. have, consequently, concentrated their efforts upon two parcels kha and ga. The latter parcel is said to have been cultivated by one Masu; there is no reliable svidence. however, that his possession extended beyond ten years before the institution of the suit; such occupation is clearly inadequate for the. purpose of acquisition of title by adverse possession. The former plot is said to have been held by one Khada who admitted in eross examination that the lands were submerged every year during the rainy season. In such eirenmetaness, acquisition of title by adverse possession is impossible. In the MANARAJA OF COOCH-BEHAR C. MABEEDRA RANJAN BAI CHAUDEURI.

OARO of Secretary of State v Krishanmoni Gupta (33) Lord Davey referred to the decision in Trustees and Agency Co. v. Short (3) in support of the view that land after submersion besomes dereliet, and so long as it remains submerged. no title can be made against the true owner. This view was affirmed in Basanta Kumar Roy v. Secretary of 'tite (38) where Lord Sumper observed that no rational distinction sould be drawn between submergence for a few years and submergence for a few months, and that the principle enunciated in the earlier decision was applicable where the re flooding was seasonal and occurred for several months in each year. When the land is re-submerged, the possession of the adverse holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner. This view destroys the foundation of the title possession set up by the by adverse defendants. We may add that the defendants claimed title by adverse possession not always by occupation and cultivation, but sometimes also by recovery of jalkar khutagiri dces; the former and dues shape of levy of money or took the share of fish from fishermen who saught fish in submerged areas; the latter assumed the form of levy from boatmen during rainy season tied their boats to pegs driven into the bank. These acts cannot be treated as adverse possession, which, as explained by Lord Robertson in Radhamoni Debi v. Collector of Khulna (39), must be possession adequate in continuity, in publicity, and in extent of area, in order that it may be effective to destroy the title of the true Possession to be adverse must be actual, visible, exclusive and hostile, and

a distinction must be made between con. tipuose adverse occupation and isolated acts of trespace. To use the language of Bramwell, L. J. in Leigh v. Jack (40) which is quoted with approval by Lord Sumner in Basanta Kumar Roy v Secretary of State (33) to defeat a title by dispessession of the true owner, asts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it, and, therefore, it is necessary to look at the position in which the true owner stands towards the land as well as to the acts done by the alleged discosses. sor. There is this additional difficulty in the case before as that even if the acts mentioned could be treated as acts of adverse possession, there is no evidence to show that the spots where the acts were exercised (for instance, where the fish was caught or the boats were moored) were identical from year to year. Indeed, as the land was periodically submerged, attempt at identification would fruitless. In this connection, it is in portant to bear in mind that the dostrine of constructive possession cannot be applied in favour of a wrong doer, whose possession must be confined to actual possession, that is to say, if he relies on adverse posses. sion, he can succeed only as regards the portion of the land in suit of which he proves actual possession for the statutory period; Mohini Mohan Ray v. Iromoda Nath Roy (41) approved by the Judicial Committee in Bosanta Kumar Roy v. Secret ry of State (38). From whatever point of view the claim of the defendants as to acquisition of title by adverse possession is approached, it is thus found to be beset with insuperable difficulties and cannot consequen ly prevail,

The result is that the decrees made by the Subordinate Judge are affi med and the appeals dismissed with costs. We assess the hearing fee in First Appeal No. 93 of 1920 at one gold mobur.

R. N. & M. H.

Appeals dismissed.

(36) 29 I. A. 104; 29 C. 518; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar P. C. J. 269 (P. C.). (37) (1889) 13 A. C. 79 ; 58 L. J. P. C. 4; 59 L. T.

677; 37 W. R. 433; 53 J. P. 132. (38) 40 Ind Cas. 337; 44 I. A. 104; 44 C. 858; 25 C. L. J. 487; 1 P. L. W. 593; 82 M. L. J. 505; 21 C. W. N. 642; 15 A L. J. 398; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310 (P. C.).

(39) 27 I A. 136; 27 C. 943; 4 C. W N. 597; 2 Bom L. R. 592; 7 Sar. P. C. J. 714; 14 Ind. Dec. (N. s.) 617 (P.O.).

(40) (1880) 5 Ex. D. 264 40 L. J. Ex. 220; 28 W. R. 452; 42 L. T. 46 ; 44 J. P. 498. (41) 24 0, 256; 1 C. W. N. 304; 12 Ind. Dec. (N. 8.)

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JASMOHAN SINGH C. BACSCHA.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANGOUS CIVIL APPEAL No. 16 or 1921. December 12, 1921.

Present:—Pandit Kanbaiya Lal, J. C.

JAGMOHAN SINGH-OPPOSITE PARTY

—APPELLANT

WEYSUS

BACHOHA—APPLICANT
RAJA PARTAB BAHADUR SINGH,
C. I. E., OF FORT PARTABGARH—
OPPORTE PARTY—RESPONDENTS.

Oivil Procedure Code (Act V of 1908), O XXI, rr. 89, 92, O. XLIII, r. 1 (j), s. 104(2)—Possessory mortgagee, status of—Right to apply to set aside sale—Appeal, second—Sale, order setting aside.

A possessory mortgagee holds an interest in immoveable property sufficient to justify the application of Order XXI, rule 89, Civil Procedure Code, to his case.

Shah Muhammad Yusuf v. Lachhmi Narain, 50 Ind. Cas 157; 21 O. C. 400; 6 O. L. J. 49, distinguished from.

No second appeal lies from an order setting aside a sale under Order XXI, rule 92, Civil Procedure Code.

Appeal against a decree of the District Judge, Rae Bareli, dated the 26th January 1921, reversing that of the Assistant Collector, Partargarh, dated the 15th September 1921.

Mr. H. K. Ghosh, for the Appellant.

Pandit Gokaran Nath Misra, for Respondent No. 1.

JUDGMENT .- There is no force in this appeal. The judgment debtor possessory mortgagee whose rights and interests as such were sold in execution of a decree for arrears of rent and purchased by the appellant. The judgment-debtor applied under Order XXI, rule 89, of the Ucde of Civil Procedure to set aside the sale and deposited the amount mentioned in the proclamation of sale with the necessary penalty wi bin the time allowed The Court executing the decree held that Order XXI, rule 89, of the Code was not applicable and refused to set aside the sale, but the lower Appellate Court relying on the principle of the desision in Manilal Banchhed v. Motibhai Hemabhai (1) otherwise.

The auction-purchaser has filed this appeal. But no appeal can lie from an appellate order, setting saids a sale, because section 104, sub section (1), clause (1), (1) 10 Ind, Cas. 812; 85 B. 288; 13 Bom, L. R. 283,

NOWROST HORMASTI D. SHRISTVAS.

read with Order XLIII, clause (1) of the Oode allows only a single appeal from the order passed by the Court executing the decree of the kind referred to therein. Section 104, sub section (2), clearly says that no appeal shall lie from any order passed in appeal under that section. In Asimuddi Sheskh v. Sundari Bibee (2) it was held in somewhat similar circumstances that no second appeal lay from an appeallate order in a case of that kind.

The learned Counsel for the appellant requests that the appeal might be treated as an application for revision. Bat even if that were to be permitted, there is no ground for interference because a possessory mortgagee holds an interest in immoveable property sufficient to justify the application of Order XXI, rule 89, of the Oode of Civil Procedure to his case. The decision in Shah Mohammai Yusuf v. Lichhmi Nurain (3) relates to a case of a simple mortgage and is distinguishable from the decision in Manilal Ranc'shod v. Mottbhai Hemabiai (1) on which the lower Appellate Court relied.

The appeal is, therefore, dismissed with

(2) 10 Ind. Cas. 345; 88 C. 339; 15 O. W. N. 814; 14 C. L. J. 221.

(3, 50 Ind Cas 157; 21 O. C. 470; 6 O. L. J. 49.

O.VIL EXTRAORDINALY APPLICATION No. 305 OF 1920.

Ostober 13, 1921.

Fresent: -Sir Norman Maeleod, Kr. Chief Justice, and Mr. Justice Stah.
NOWROJI HORMASJI PATHAK-PLANTING -PETITIONER

Dersus

SHRINIVAS V. PRABHU—OPPONENT.

Bombay Rent (War Restrictions) Act (II of 1918),
s. 9—Landlord carrying business in rented premises—
Eviction of landlord—Landlord, right of, to eject tenant
—Requirements of landlord, how to be judged—Juris.

diction of Court.

A landlord, who carries on business in premises rented by him, is entitled on eviction to occupy, in

MANZURAN BIBI U. JANKI PRASAD.

premises of his own, by ejectment of a tenant there. from, a space equal to the space previously rented by him, and it is not within the jurisdiction of a Court to decide upon the amount of space which would be adequate for the purposes of the business.

Appeal against the decision of the Chief Judge of the Court of Small Causes at Bombay, in Suits Nos. 4338 and 4339 of 1920.

Mr. D. R. Patwardhan, for the Petitioner.

JUDGMENT.—The plaintiff filed this suit in the Small Causes Court to eject his tenants (the defendants) from certain shops in Lamington Road belonging to him which he wished to use for his own purposes. plaintiff had previously rented certain premises in Hornby Road, the floor space of which was 2000 square feet. He had to vacate these premises and consequently he wanted to occupy his own premises in order to store his goods and expose them for sale. It is not suggested that he is asking the Court to eject the defendants from a greater space than the space he occupied in the premises he rented in the Hornby Road. But the learned Judge considered that it was for him to decide how the plaintiff's business should be sarried on and what amount of space in the plaintiff's premises would be adequate for that purpose. He thought that it would not be profitable to the plaintiff if he occupied the whole of the premises, and so he ordered that the plaintiff should only get possession of a part, as it might take time to accustom the population of that locality to purchase the kind of goods which the plaintiff was selling. As a result he held that the space which was occupied by the defendants in this suit was not reasonably required for the plaintiff's use.

Now we do not say that there may be cases in which if a plaintiff doing business in rented premises on a small wanted to occupy premises of his which were far larger than those rented by him, the Court would not have power to decide that the plaintiff was asking more space than was reasonably required. But in this case the plaintiff is not asking for more space than he had previously been in occupation of for the purpose of his business. It is true he had to move from one part of the city to another. But in our cpinion the plaintiff was the person to decide

whether he should occupy as much or less space for his business in his own premises. There was nothing unreasonable in his thirking that the goods which be had stored in the premises in Hornby Road sould, with equal advantage, be stored in the premises in Lamington Road. If he had been asking the Court to give him an ejectment order against tenants occupying a far greater space than he had ccoupied in the rented premises, then to doubt it might have been a different matter. It seems to us that to prevent the plaintiff from occupying a space in his own premises equal to the space previously rented by him on the ground stated by the learned Judge would be going entirely beyond the jurisdiction of the Court in cases falling under the Rent Act. We make the Rule ab. solute.

There will be a decree for possession with. in one month of the service of this order on the occupants of the shop with costs throughout.

W. C. A.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 43, 82 AND 183 or 1921.

August 9, 1921.

Fresent :- Mr. Deviele, J. C. Musammat MANZUBAN BIBL AND OTERS -DEVENDANTS-APPELLANTS

ter sus

JANKI PRASAD AND OTHERS-PLAINTIFF:-SALIG RAM-DEFENDANT-

RESPONDENTS HARCHARAN DAS-DEFENDANT-

APPELLANT

t ersus

GUR PRASAD AND ANOTHER-PLAINTIPPS-RESPONDENTS.

S. MAZHAR HUSAIN AND OTHERS-PLAINTIFFS - APPELLANTS

DSTEUS

RAM OHANDRA AND OTHERS-DEPENDANTS

-BE-PONDENTS.

necessity-Pre-Hindu Law-Alienation-Legal sumption-Deed mentioning purpose of

MANEURAN BIBI U. JANKI PRASAD.

Consideration, portion of, for legal necessity, effect of-Family benefited, effect of-Antecedent debt—Usufructuary mortgage creating personal liability, whether antecedent debt.

Where a sale deed, although jointly executed by the heads of all the branches of a family, mentions the purpose for which the sale was made, there is no room for raising any presumption with regard to legal necessity for the transaction. The Court has merely to examine whether that purpose is one which Hindu Law recognises as valid. [p. 933, col. 1.]

Balvant Santaram v. Babaji, 8 B. 602 at p. 609; 9 Ind. Jur. 217; 4 Ind. Dec. (N. s.) 778, considered.

Where it is found that a portion of the sale consideration was taken by a father for legal necessity and that the family benefited by the transaction to that extent, the sons can recover the property sold only by re-paying the said portion of the sale-consideration. [p. 234, col. I.]

In order to validate a transaction entered into by a father in consideration of antecedent debt, there must be not only antecedency in time but also true dissociation in fact. Once it is proved that the sale took place in consideration of such antecedent debt, the sons are precluded from attacking it, but they are not precluded from raising the prior question whether the sale really was in consideration of such a debt. [p. 933, col. 2; p. 934, col. 1.]

A clause in a deed of usufructuary mortgage executed by a father, making the mortgagor personally liable for the mortgage money in case the mortgagee be dispossessed from the mortgaged property, does not constitute a personal liability such as may be treated as antecedent debt. [p. 983, col. 1.]

Sahu Ram Chandra v Bhup Singh, 59 Ind. Cas. 18°C; 44 I. A. 12°F; 89 A. 437; 21°C. w. N. 698; 1°P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 49°F; 26°C. L. J. 18°S M. L. J. 14; (1917) M. W. N. 43°P; 22° M. L. T. 22; 6°L. W. 218°(P. C. N. Ramman Lal v. Ram Gopal, 47°Ind. Cas 987; 21°C. 20°C; 5°C. L. J. 62°P and Ram Dei v Suraj Bakhsh, 60°Ind. Cas. 177; 23°C. C. 204°7°C. L. J. 60°P; 2°C. P. L. R. (J. C.) 15°B, considered.

Appeal No. 43 from a decree of the Subordinate Judge, Sultanpur, dated the 2 rd December 1920, reversing that of the Munsif, Sultanpur, dated the 22nd September 1919.

Appeal No. 82 from a decree of the Subcrdinate Judge, Sultappur, dated the 2 frd December 1920, reversing decree of the Munsif, Sultappur, dated the 21st February 1920.

Appeal No 183 from a decree of the Subordinate Judge, Sultanpur, dated the 12th April 1921, confirming decree of the Mansif, Sultanpur, dated the 4th December 1920. Mr. A. P. Sen, for the Appellants in Appeal No 43.

Mr. Niamat Ullah, for Respondent No. 5 in Appeal No. 43.

Mr. Bisheshwar Nath Sri astava, for the Appellant in Appeal No. 82.

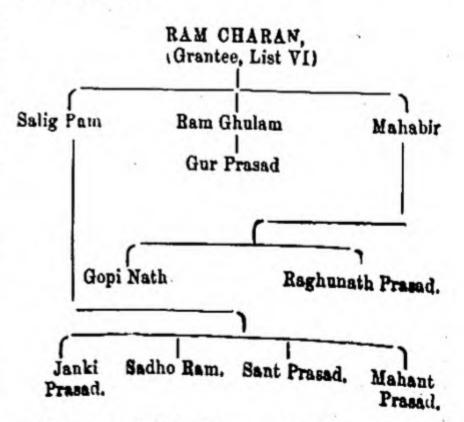
Mesers. Haider Husain and Niamat Ullah, for the Respondents in Appeal No. 82.

Messie. Haider Hussin, Ehsanurrahman and Niamat Ullah, for the Appellants in Appeal No. 183.

Mr. A. P. Sen, for Respondents Nos. 1 and 2 in Appeal No. 183.

Mr. Bisheshwar Nath Srivestava, for Respondent No. 3 in Appeal No. 183.

JUDGMENT.—These three connected appeals arise out of three separate Suits Nov. 10 of 1919, 243 of 1919 and 118 of 1919 instituted in the Court of the Munsif of Sultanpur. These suits were brought respectively by the sons of Salig Ram, Ram Ghulam and Mahabir, three brothers, to set aside cer'ain transfers made by the three brothers jointly and to recover their respective shares in the joint family property. The following pedigres will show the position of the parties.



The sons of Salig Ram and a transferee from them were plaintiffs in Suit No. 10 of 1919. Gur Prasad and a transferee from him named Mazhar Husain were plaintiffs in Suit No. 246 of 1919. The two sons of Mahabir and the same Mazhar Husain as transferee were plaintiffs in Suit No. 118 of 1919.

MANZUPAN BIBI D. JANEI PRASAD.

The suits have already been before this Court in appeal. Ram Charan was a grantee whose name was included in List Vi of the lists prepared under Act I of 1859. The suits were originally dismissed on the ground that his sons held the property as absolute proprietors with full power of disposal. This finding was upheld by the lower Appellate Court. On appeal to this Court it was held that "the property deseended to Ram Charan's sons in the same way and subject to the same rights as if it had been the self acquired property of Ram Charan under Hindu Law. As soon as the grandeons of Ram Charan in the male line were borr, they became co heirs with their fathers." The appeals were, therefore, remanded to the lower Appellate Court for desision of the remaining issues under Order 1V, rule 23.

learned Subordinate Judge bas decided Suit No. 10 of 1919 wholly and Suit No. 246 of 1919 mainly in favour of the plaintiffs. In the latter case he made the decree for possession of the one sixth share elaimed, subject to payment of one sixth of a sum of Rs. 521 which he found to be binding on the plaintiffs. These desisions passed on 23rd December 1920. The third suit has been wholly dismissed. The appeal in this suit was decided by the learned Subordinate Judge on 9th April 1921 and he took a different view of the law from that which he had taken in deciding the appeals in the connected suits. He held on the authority of two Beach rulings of this Court, apparently were not eited before which him in the earlier cases, that the suit was barred by the principle that when once joint family property has passed out of the family under a sale executed to satisfy a previously existing debt, the sons could only question it by showing that the debt was either illegal or immoral. The rulings of this Court to which reference has been made gave effect to a principle long ago laid down by their Lordships of the Privy Council.

of 1921 is a sale deed executed on 10th July 1903 in favour of persons who are now represented by the appellants Musammat Manzaran Bibi, Muhammad Ibrahim and Musammat Kariman for a sum of Rs. 5,500 made up as follows:—

	Rs.
Payable to Har Charan Das	. 10
under prior mortgages	4,700
Payable to Musammat Bhagwan	
Dei under a prior mort.	****
gage	600
Paid in cash for expenses of	
sale, ets	200
TOTAL	5,500

None of the younger sons of Salig Ram were born on the date of the alienation and there was a question in the Courts below whether the eldest, Janki Prasad, was born. This point has now been decided in his favour, and as it is a finding of fact the decision is final. The appellants contest the decision of the Court below on two main grounds.

The first is the plea which has been accepted by the learned Subordinate Judge in the later suit, namely, that when once property has passed away from the family under a sale to pay off previously existing debt, the sons can only challenge it by showing that the bebt in question was of an illegal or immoral character. This issue is common to all the three appeals.

The second ground is that the mortgages which were paid off by means of the saledeed in suit were for the most part executed before the birth of Janki Prasad, the eldest son of Salig Ram. At that time Salig Ram was sole and absolute owner of his share in the property in suit and had unrestricted power to sell or mortgage it. These mortgages were, therefore, binding on the property and Salig Ram was fully justified under Hindu Law both on the ground of legal necessity and of benefit to the family in raising money to pay them off by selling a portion of the joint family property. The property sold was a half share of the entire property covered by the mortgages.

These are the substantial issues in the case. It was faintly urged in the course of the argument in this and the other appeals that the Court should on the authority of the ruling in Balvant Santaram v. Babaji (1), presume legal necessity for the transactions on the ground

(1) 8 B. 602 at p. 609; 9 Ind. Jur. 227; 4 Ind. Dec. (N. s.) 778.

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that the heads of all three branches of the family concurred in them; but where the purpose for which the sale consideration was made is known, there is no room for any presumption. The Court has merely to examine whether that purpose is one which Hindu Law recognises as valid.

The principle on which the appellants rely was first fully stated in Suraj Bunsi Koer v. Sheo Persad Singh (2) in these terms:—

First. That where joint anesstral property has passed out of a joint family, either noder a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted, and

Secondly. That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make exquiry beyond what appears on the face of the proceedings."

It was thus restated by Sir John Stanley, C. J., in Chandradeo Singh v. Mala Prasad (3) in words to which the Privy Council have given the sanction of their approval:—

The first of these propositions, it will be observed, deals with eases where joint anestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antice lent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family and with no other cases, and the words 'antecedent debt' seem to have been used advisedly."

Both these passages were quoted in Lord Shaw's judgment in Sahu Ram Chandra v.

Bhup Singh (4). Before quoting them he loosely same up the position as follows:—

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

I use the word "loosely" because this summing up read literally might apply to a sale for each where there was no antecedent liability. All the authorities are agreed that in such a case sons can question the sale. Lord Shaw was not laying down any new principle. He was merely summing up the effect of the previous authorities.

The argument of the appellants is that the words "antecedent debt" in the passages quoted above include any prior debt, and are used in a different sense from that in which the same words are used in the later portion of their judgment where their Lordships say that it must be a debt incurred independently of the credit afforded by the joint estate.

The argument has only to be thus explicitly stated for it to be seen that it is untenable. It is impossible that their Lord. ships should have used an expression, which they were engaged in interpreting and on the meaning of which the decision turned, in different senses in suscessive paragraphs. The appellant was relying on an exception in favour of a sale or mortgage made in consideration of antecedent debt and the whole of the latter part of the judgment is devoted to discussing the limits of the exception, ending up with the statement that in order to validate the transaction there must be not only antecedency in time but also true dissociation in fact. Once it is proved that a sale has taken place in consideration of antecedent debt as thus defined, the sons are precluded from attack. ing it, but they are not presluded from

^{(2) 6} L. A. 88; 5 C. 148; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 8 Suth P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Bec. (N. s. 705 (P. C.).

^{(3) 1} Ind. Cas. 479; 81 A. 176; 6 A. L. J. 268.

^{(4) 39} Ind. Cas, 280; 44 I. A. 126; 89 A. 437; 21 O. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 487; 19 Bom L. R. 498; 26 C. L J. 1; 33 M. L.J. 14; (1917) M. W. N. 439; 28 M. L. T. 22; 6 L. W. 218 (P. O.).

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raising the prior question whether the sale really was in consideration of such a debt. None of the cases cited in argument conflict with this view.

The appellants in Appeal No. 43 are, however, entitled to succeed as to a large part of the consideration on the second plea. The mortgages to the payment of which the consideration of the deed was applied were as follows:—

Mortgagee.		Amoun	t. D	ate.			
		Re.					
Musammat Bhagwani Dei.		600	13th Decem- ber 1899.				
Har Charan Das		2,000	13th	June			
do.		700	(ło.			
do.		1,500	6th 196	June			
do.	•••	500		do.			

All these morigages were usufructuary, but, all but the last two of them were exeouted before the birth of Janki Prasad. The learned Subordinate Judge finds that he was born before the date of the sale. deed of 10th July 1903, but had not considered the question whether he was born on the date of these mortgages. He has, however, ascepted the statement of the plaintiffs' witnesses that Janki Prasad was about nineteen years old at the time when their evidence was given, which was in July 1919. According to this, he was born in the latter half of the year 1900. The burden of proof of minority lay on the plaintiff, and if his witnesses are not exact as to the date of his birth, their evidence cannot be strained in his favour. It is, therefore, proved that at the time of the sale deed the property had passed into the hands of mortgagees under mortgages which were valid and binding as against the plaintiff to the extent of Rs. 3,300. To recover possession of the property by paying off these mortgages was a purpose for which the father could legitimately raise money as head of the joint family, and the family benefited by the transaction to the extent of the mortgages which were paid off. The plaintiff can, therfore, in any event only recover the property by re-paying this smount, No interest is allowed as the de-

fendants have held possession of the property recently.

Similar questions are raised in Appeal No. 183. Suit No. 243 of 1919 (Appeal No. 82 of 1921) relates to a sale-deed dated 15th May 1911 executed by the three brothers in favour of Har Charan Das for a sum of Re. 4,000. Rupees. 1,500 of the coneideration was paid in each but it has been found that Rs. 521 out of this was for legal necessity. The remainder was taken in satisfaction of two prior usufructuary mortgager, Exhibits A16 and A17. These prior mortgages are of the year 1904 long after the birth of the plaintiff, Gar Presad. They are pure usufrustuary mortgages carrying no personal liability. Exhibit A16 was in satisfaction of a still earlier usufrustrary mortgage of 18 5 but even this is subsequent to Gur Presad's birth. The only ground of appeal in this case, therefore, is the first of the two grounds stated in connection with Appeal No. 43. There is a elause in these prior mortgages making the mortgagor perconally liable for the mortgage money in case the mortgagee should be dispossessed from the mortgaged property, and it was suggested in the course of the argument that this might be held to constitute a personal liabitity within the meaning of the ruling in Sahu Ram Chandra v. Bhup Singh (4) as interpreted by this Court in Ramman Lal v. Ram Gopal (5) and Ram Dei v. Suroj Bakhsh (6), but, as the respondents point out, this. liability is imposed by law in the case of every usufructuary mortgage, and if this argument were accepted, the distinction drawn in the rulings of this Court between a purely usufrustuary mortgage and the mortgage which carries with it liability to a personal decree for a mortgage-debt would become entirely meaningless.

Suit No. 118 of 1919 (Appeal No. 183 of 1921) relates to the same sale deed of 13th May 1911 for Rs. 4,000 which is in issue in Appeal No. 82 and another sale of 7th May 1912 for Rs. 3,000. It is enrious that in this case the learned Subordinate Judge has some to an opposite conclusion from that which he arrived at

^{(5) 47} Ind. Cas. 987; 21 O. C. 200; 5 O. L. J. 629. (6) 60 Ind. Cas. 177; 23 O. C. 204; 7 O. L. J. 509; 2 U. P. L. R. (J. C.) 156.

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of Rs. 521 which forms part of the consideration of the deed for Rs. 4,000. In the earlier suit he held it to be for legal necessity. In the latter suit he held that legal necessity was not proved. As the evidence was separately recorded in the two cases, it was open to him to do this, but it is perhaps surprising that he should have made no reference to having previously come to an opposite conclusion on the same facts.

Although the first deed in suit is same as in Appeal No. 87, the legal poeition is substantially different. As has been already showr, the dead was executed to the extent of Rs. 2,500 in satisfaction of two earlier mortgages of 1904 for Rs. 1,200 and Rs. 1,300 respectively; and one of these, that for Rs. 1,200, was executed in satisfaction of a mortgage of 1895. Neither of the sons of Mahabir was that time born. The age of the elder given in the plaint as 21 so that he was born about the beginning of 1898. The mortgage of 1895 was, therefore, a valid mortgage which the plaintiffs could not question and they could only recover possession of the property which had passed away from the family by paying it off.

The sale-deed for Rs. 3,000 was executed partly for each and partly in satisfaction of four earlier mortgage deeds. of these usufrueluary mortgage-Were deeds, excepted in 1903 and 1904 time when the elder son of the executant was already born. The fourth mortgage was a simple mortgage for Rs. 175 carry. ing a personal liability and this constitutes genuine anteredent debt sufficient to support the subsequent alienation. The amount set off in the sale deed on this account was Rs. 216, and this amount the defendants can rightly claim,

The result is as follows. In Appeal No. 43 the decree of the Court below is modified by directing that as a condition of recovering possession the plaintiffs must pay to the defendants Rs. 3,300. Appeal No. 82 is dismissed. Appeal No. 183 is allowed and the plaintiffs are given a decree for possession of the property subject to their rs-paying to the defendants the sum of Rs. 1,416.

As the law was understood at the time when the transactions were entered into,

the defendants had reason to suppose that they were valid, and in view of this fact and of the length of time after which they have been challenged. I allow the plaintiffs no easts of the appeals to this Court. In Appeals Nos. 43 and 183 in which the defendants have been partly successful, the parties will bear their own costs throughout. As Appeal No. 82 has failed, the Sabardinate Judge's order as to costs will not be disturbed.

J. P.

Appeals Nos. 43, 183 partly allowed;
Appeal No. 32 dismissed.

SECOND CIVIL APPEAL No. 1029 OF 1919. October 14, 1920.

Present :- Mr. Justice Abdul Racof. RAJA-PLAINTIFF-APPELLANT

tersus

SALABAT AND OTHERS--DEPENDANTS -- RESPONDENTS.

Mutation, party consenting to, effect of -Appellate Court, whether bound to give findings on every plea in memorandum of appeal-Appeal, second-Question of law, new.

Where a person consents to land being mutated in favour of another, it is a clear indication of the relinquishment of his rights in it. [p. 937, col. 2]

An Appellate Court is not bound to record a finding upon every plea entered in the memorandum of appeal unless it is urged before it. An appellant may take as many pleas as he likes, but a Court is bound to give a decision on those pleas only which are urged and argued before it. [p. 937, col. 2.]

A pure question of law, though not raised in a memorandum of second appeal, may be raised and argued at the hearing of the appeal. [p. 937, col, 2.]

Second appeal from a decree of the District Judge, Lyallpur, dated the 3rd February 1919, affirming that of the Munsif, First Class, Jhang, dated the 7th January 1918.

Mr. M. S Bhagat, and Sheikh Nia: Ali, for the Appellant.

Dr. Mohamed Iqual, for the Respondents.

JUDGMENT—The facts giving rise to
this second appeal may be summarised as
below. One Jalla had three sons, Raja, Gada

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(Sada) and Dalla. Dalla had three cons, Salabat, defendant No. 1, Mohabbat, defendant No. 2 and defendant No. 3. Gada (Sada) baving died without any issue his widow, Musammat Saban entered into possession of the property left by him. She having married Dalla her rights in the land are said to have come to an end. Raja same into Court alleging that after the death of Gada (Sada) he and Musammat Saban, wife of the deceased, remained in possession of the land, but that recently he discovered that the land had been mutated in the names of his ne phews, Salabat, Mohabbat and Fazal. applied without success for the correction of the entry. On these facts the plaintiff claimed possession of the land. The suit was resisted by the defendants on the ground that the mutation of the defendant's father's name had been effected with the consent and knowledge of the plaintiff. The reason given for the consent was that Jalla had separated from his two sons, Gada (Sada) and Dalla, and had remained joint with the plaintiff, that on the death of Jalla Lis entire estate of which he was then possessed went to the plaintiff, and that Gada and Dalla raised no objection on the agreement that the plaintiff would have nothing to do with the land in their possession. It was alleged that in parsuance of this compromise the plaintiff expressly consented to the land in dispute being entered in the name of the defendants' father. The defendants further set up the pleas of adverse possession, estoppel, limitation and want of jurisdiction. Issues were framed by the Court of first instance on all these points, and the decisions on all these issues was given against the plaintiff. He was found to have been out of proprietary possession of the land for more than 12 years. His possession over some portion of the land was found to be that of a tenant atwill under the defendants. The sait was held to be barred by time and the possession of the defendants as proprietors was found to be adverse for more than 12 years. The plaintiff was held to be estopped from setting up the elaim, and it was elearly determined that the plaintiff had abandoned his rights in favour of the defendant's father and had willingly allowed the name of Dalla to be entered as the proprietor of the land in dispute. During the trial of the suit before the learned Munsif, it was also hinted that at the

date of the mutation of names and the alleged abandonment the plaintiff was a minor and was not bound by the abandonment, even if established. As no clear evidence as to the plaintiff's age was giver, no effect was given to the plea and the plaintiff's suit was dismissed. An appeal was preferred by the plaintiff to the lower Appellate Court and in the memorandum of appeal pleas were raised impugning the decisions of the First Court on almost all the issues. Argument, however, appears to have been advanced only questioning the validity of the abandonment on the ground of the minority of the plaintiff. The lower Appellate Court found the following facts :-

(1) Gada died sometime after 1897 without any issue, and his widow, Musammat

Sabar, succeeded to his land.

(2) On her marrying Dalla, the father of the defendants, the patwari made an entry in the register of mutations on the 8th of October 1902 showing that Dalla had been in possession of Musammat Saban's land and that Raja, the plaintiff, did not claim a share in it. In the ordinary course this mutation same before a Naib Tahsildar, and he with his report sent it up to the Collector for sanction with the remark that Raja had no objection to the mutation of the land in favour of Dalla.

Assistant Colonization Officer, who sent these to the Collector with the following remarks:—
"Musammet Saban's half equare should go in equal shares to Raja and Dalla, but Raja whose statement is on the file, does not wish to take his share of this half equare and he wishes that the whole balf equare may go to Dalla. Dalla and Musammat Saban, of course, likewise desire this. This is an alienation inter vivos and would require the exection of the Financial Commissioner."

The Collector forwarded the papers to the Financial Commissioner, who, on the 28th of July 1904, granted the necessary sanction and mutation was effected in the name of Dalla accordingly. On these findings the question of the alleged minority of the plaintiff became very material, and as no evidence had been recorded on the point and final decision had not been given on it, the lower Appellate Court referred an issue on the point under Order XLI, rule 25, to the Court of free

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instance for decision. Evidence was produced by both the parties before the learned Muneif who, after considering the entire evidence on the point recorded the following

finding :-

"The birth entry Exhibit P.A. filed by the defendant amply shows that Raja, son of Jalle, was born on the 5th November 1884 in village Khanshandwals, and I think this is a weighty piece of evidence to show that in 1904 when the mutation was sanctioned by the Naib Tahsildar the plaintiff was about 20 years old. He cannot be said to be micor at that time."

On the Sinding being returned to the lower Appellate Court objections were urged against it, one of the objections being that the Court of first instance had wrongly refused to ascertain through the Phillour Bareau whether the thumb impression on the mutation entry relied upon by the defendants was that of the plaintiff. The objections raised were overralled by the lower Appellate Court and after overruling the objections the lower Appellate Court made the following remarks in the judgment:—

"Arguments were addressed to me by parties' Counsel regarding the question of abaudonment by plaintiff and his age. The points

that arise in this appeal are :-"

"(1) Whether the plaintiff abandoned his right in the land at the time the mutation was entered in respondent's favour, and

"(2) Whether he was a minor."

The decision of these questions was given against the plaintiff with the result that the appeal was dismissed and the decree of the Court of first instance was upheld. The plaintiff then came up in second appeal to this Court. On the appeal coming up for hearing before the late learned Chief Justice, he directed an enquiry by the Police Bureau at Phillour as to the genuineness of the alleged thumb impression of the plaintiff. The result of the exquiry being unfavourable to the plaintiff, the finding on the question of minority recorded by the lower Appellate Court stands unreversed and is final.

dressed to me by Mr. M. S. Bhagat on behalf of the appellant. He has tried to re argue all the questions of fast and law which have been discussed and decided by both the Courts below. He has tried to re-open the questions.

tion of the minority of the plaintiff and has criticised the evidence on the record. He has further made an attempt to show with reference to the evidence on the record that the findings of the two Courts as to the astual relinquishment by the plaintiff of his rights in the land were not established. In my opinion these are questions of fact which the appellant is not entitled to arge in second appeal. Mr. Bhagat strongly urged that his elient had not been fairly treated by the lower Appellate Court inasmuch as all the pleas raised in the memorandum of appeal had not been considered and decided seriatim by that A reference to the judgment of the lower Appellate Court clearly shows that only two points were orged before it on receipt from the lower Court of the finding on the question of minority. An Appellate Court is not bound to record a finding upon every plea entered in the memorandum of appeal unless it is urged before it. At appellant mey take as many pleas as he likes, but a Court is bound to give a decision on those pleas only which are urged and argued before it. Bhagat was, however, entitled to question the effectiveness of the abandonment in law on the fasts found, and although this was objected to by Dr. Iqbal on the ground that the plea had not been raised in the memorandum of appeal to this Court, I allowed Bhagat to raise it before me as it involved a pure question of law. It was contended by Mr. Bhagat that the mutation entry could not have the effect of extinguishing the proprietary rights of the plaint. iff as it was agreed to merely on the ground of Dalla's possession, In support of this argument he relied upon Chokhey Singh v. Jote Singh (1). This raling was also relied apon before the lower Appellate Court, and was distinguished by that Court on facts from the present case. In my opinion the lower Appellate Court took the right view. It was, however, contended that the final entry to which the thumb impression of the plaintiff was affixed did not contain any words which would amount to a relinquish. ment of the plaintiff's rights, but the muta. tion proceedings commenced from the date

^{(1) 1} Ind. Cas. 166; 31 A. 78 (P. C.); 11 Bom. L. R. 69; 18 C. W. N. 274; 6 A. L. J. 100; 9 C. L. J. 151; 5 F. L. T. 167; 19 M. L. J. 128; 12 O. C. 288; 86 I. A. 58.

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That report contains the statement of the plaintiff, which unmistakably amounts to a relinquishment of his rights. The different stages of the mutation proseedings must be looked at as a whole, and final entry must be construed to have been made with reference to all the proceedings taken in connection therewith. It is impossible to hold that the statement contained in the report of the patwari, on the basis of which subsequent orders were passed, was not present before the plaintiff when he gave his consent to the mutation of the name of Dalla.

The present case, therefore, is clearly distinguishable from the ruling above referred to. In my opinion the Courts below have arrived at a right conclusion and this appeal must be dismissed with costs. I order accordingly.

W. C. A. & N. H.

Apreal dismissed.

OUDH JUDIOIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 26 of 1921, July 18, 1921.

Present: -Mr. Dalal, A. J. C., and Syed Wazir Hasan, A. J. C.

RANODIP SINGH AND OTHERS-PRAINTIFFS
-APPELLANTS

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RAMESHAR PRASAD AND OTHERS
- DEFENDANTS-RESPONDENTS.

Hindu Law-Joint family-Alienation-Right to suc, when accrues-After-born son, position of-Limitation, fresh start of-Sons, elder, position of-Limitation Act (IX of 1908), ss. 6, 7, application of.

Under Hindu Law the cause of action in respect of an alienation accrues when the purchaser takes possession and a new cause of action does not accrue upon the subsequent birth of a son in the family, and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer, and as he was not born on that date and was thus under no disability on that date, he could not obtain the benefits of section 6 of the Limitation Act. And, when

he could not obtain such benefit himself, he could give no benefit under section 7 to his elder brothers. [p. 940, col. !.]

Chokhey Singh v. Hardeo Singh, 61 Ind. Cas. 757; 24 O. C 330; 8 O. L. J. 667; 4 U. P. L. R. (J. C.) 10,

followed.

Ramkishore Kedarnath v. Jainarayan Ramrachpal, 20 Ind. Cas. 958; 40 C. 965; (1913; M. W. N. +61; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.), Ganga Dayal v. Mani Ram, 1 Ind. Cas. 824; 31 A. 156; 6 A. L. J. 62, Periasami v. Krishna Ayyan, 25 M. 431; 12 M. L. J. 166 (F. B.) Johnson v. Madras Railway Company, 28 M. 479; 15 M. L. J. 363 and Lachman Das v. Sundar Das, 59 Ind. Cas. 578; 1 L. 558, distinguished from.

Appeal from a decree of the Subordinate Judge, Bahraich, dated the 22nd March 1921.

Syed Zahur Ahmad, for the Appellants.

Pandit Gokaran Nath Misra, for Respondents Nos. 5 and 7.

JUDGMENT.

D.L.L, A. J. O.—The question of limitation raised in this appeal is concluded by an unreported Bench decision of this Court in First Civil Appeal No. 10 of 1920 decided on 5th of April 1921, Chokkey Singh v. Harden Singh (1) J. As, however, the correctness of that decision was questioned at the Bar and the whole point was argued on behalf of the appellante, it will be necessary for me to give reasons for my agreement with the result of that decision.

The property in suit was sold by the father of the plaintiffs who is a defendant to the suit on the 3rd of June 1893. The four plaintiffs were born on the following dates:—

Ranodip Singh on the 23rd of August

1886,

Kali Bakhsh Singh on the 4th of August

Sitla Bakhsh Singh on the 1st of Ostober 1897, and Parmeshur Bakhsh Singh on the

30th of November 1900.

The plaintiffs sued to have the sale by the manager of the joint Hindu family set aside on the ground that the alienation was without legal necessity. The learned Sabordinate Julga of Bahraish dismissed the suit on the ground that it was barred by limitation under Article 126 of the Limitation Act. From that decree the plaintiffs have appealed.

(1) 61 Ind. Cas. 757; 21 O C. 330; 8 O. L. J. 687; U. P. L. R. (J. C.) 10. RANODIP SINGH C. BAMBSHAR PRASAD.

It was argued that Ranodip Singh and Kali Bakksh Singh, who were in existence at the time of the transfer, were entitled to sue under the provisions of sections 6 and 7 of the Limitation Act up to the 4th of August 1912. Before that data however Sitla Bakbsh Singh and Parmeshur Bakhsh Singh were born, so the period of limitation will extend under section 8 of the Limitation Act up to the time when Parmeshur Bakhsh Singh attained the age of 21, that is, up to 30th of November 1921. If this reasoning be accepted, the suit of the plaintiffs would by within time.

Confining myself first to the Limitation Act it is clear that the reasoning is uncound. Section 6 enacts "Where a person entitled to institute a suit or make an application for the execution of a deeree is, at the time from which the period of limitation is to be reskoned, a minor...... he may institute the suit or make the application within the same period after the disability has ceased, as would other. wise have been allowed from the time prescribed therefor in the third column of the First Schedule." Now Sitla Bakhah Singh and Parmeshar Bakhsh Singh were not in existence at the time of the alienation, that is, at the time from which the period of limitation in this suit is to be reskoned, so the provisions of section 6 cannot apply to them. Sitla Bakhsh Singh and Parmeshur Bakhsh Singh had to sue within twelve years of the date of alienation in 1893 unless they could sue jointly with any other member of the joint family. The whole difficulty in a discussion of this matter arises because the after born sons have a vested interest coextensive with that of the previously born sons of the family. Sitla Bakbsh Singh and Parmesbur Bakbeh Singh could not only sue within twelve years of the date of alienation but they sould also take advantage of any extention of time obtained by their brothers under section 6 of the Limitation Act. In the Privy Council raling of Ramkishore Kedarnalh v. Jainarayan Ramrachpal (2) when limitation

(2) 20 Ind. Cas. 958; 40 C. 966; ('918) M. W. N. 68; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 287; 15 Bom, L. R. 867; 11 A. L. J. 865; 25 M. L. J. 812; 10 N. L. R. 1; 40 I. A. 218 (P. C.).

was found to be saved with respect to previously born sons, the advantage of such saving was given also to after-born sons. Their Lordships observed at page 980. 't was conceded before this Board, and, as their Lordships think, rightly conced. ed, that if the first plaintiff susseeds in the suit, his younger brothers born before a partition of the estate will be entitled to share in the relief." This ruling however does not decide the question in favour of an after-born son that he shall have the advantage of the provisions of section 6 from the date of his birth. The case of Ganga Dayal v. Mani Bam (3) which followed Peraisami v. Krishna Ayyar (4), and Johnson v. Madras Railway Company (5) also make no referense to the applicability of section 6 to an after-born son. In all those rulings the question for desision was whether, where all the sons were in existence at the time of the alienation, the minority of the youngest saved limitation in the ease of the eldest son or not. It was held that by the application of the provisions of section 7 of the Limitation Act in such a case the period of limitation for all the sons extended to the time up to three years after the youngest son had attained majority. To make an instance from the present case, Ranodip Singh attained majority in 1904 and could have brought a suit to set aside the alienation up to 1907 but because of the existence of Kali Bakhsh Singh at the time of the alienation and the right which Kali Bakhah Singh had to bring the suit up to the year 1912, Ranodip Singh also, under the provisions of section ? of the Limitation Act, would be entitled to bring a suit in 1912. These principles of law would not come into operation as regards Sitla Bakhsh Singh and Parmeshur Bakhsh Singh bacause they were not in existence on the date of alienation and the provisions of section 6 do not apply to them. The appellants' learned Pleader pointed out that in the case of Lachman Das v. Sundar Das (6), which was quoted with approval in the Bench ruling of

^{(3) 1} Ind, Cas. 824 31 A. 156; 6 A. L. J. 33.

^{(4) 25} M. 431; 12 M. L. J. 166 (F. B). (5) 28 M. 479; 15 M. L J. 363.

^{(6) 59} Ind. Cas. 678; 1 L 558.

[&]quot;Page of 40 C.-[Ed.]

RANCHANDRA VENKATESE SHOLAPUR U. SERINIVAS KRISHNA.

this Court, the Judges did not ecnsider the question under section 7 of the Limi tation Act. It is true that in that ease the rights of the eldest con, Lachman Das, were not considered in connection with the rights of his brothers and his suit would not be time barred if the suit of his brothers had been within time. But this point which was conceded, possibly wrongly, by the appellants' Conneel in the appeal, does not in any way affect the finding as regards the inapplicability of the provisions of section 6 of the Limitation Act to after born sons.

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sus. The eause of action accrues after an alienation when the purchaser takes posses sion and a new sauce of action does not accrue upon the subsequent birth of a son in the family. This was held as early as 1867 in Ra a Ram Tewary v. Luchmun Pershad (7). The same view was held in Sildhessur Dutt v. Sham Chand Nundun (8) and the same principle of law was laid down by the Privy Council in Ujagar Singh v. Pitam Singh (9). Under the circumstances the after born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In the case of an after born son the time from which the period of limitation is to be reckoned is the date of the transfer, and as he was not born on that date and was under no disability on that date, he cannot obtain the benefits of the provisions of section 6 of the Limitation Act. When he cannot save limitation for himself, he can give no benefit under section 7 to his elder brothers.

To sum up my view of the law on the subject is that Ranodip Singh and Kali Bakhsh Singh could have brought the present suit up to 1-12 and in that suit both Sitla Bakheb Singh and Parmeshwar Singh sould have joined effectively. After 1912 no suit by any of the brothers would lie because Sitla Bakhsh Singh and Parmeshar Bakhsh Singh were not entitled to the benefits of the provisions of section 6 of the Limitation Act and for that reason the two

(7) 8 W. R. 15.

elder brothers could not derive any benefit under section 7. I, therefore, hold that the suit in the lower Court was time barred and I would dismiss the appeal with costs.

WAZIR HASAN, A. J. C .- Personally I hold a somewhat different view on the question which my learned colleague has elaborate. ly, if I may respectfully say so, discussed in his judgment, but in this particular ease the ecuslusion to which I have arrived coincides with the final proposal of my learned colleague that the appeal should be dismissed. I, therefore, concur in the order which my learned colleague would pass in this appeal.

N. H.

Appeal dismissed.

BOMBAY HIGH COURT. CIVIL EXTREORDINARY APPLICATION No. 43 or 1921.

November 3, 1921.

Fresent :- Sir Norman Masleod, Kr., Obief Justice, and Mr. Justice Shah.

RAMCHANDRA VENKATESH SHOLA. PUR-APPLICANT

tersus

SHRINIVAS KRISHNA KULKARNI— OPPONENT.

Res judicata-Civil Procedure Code (Act V of 1908), s. 1 , Exp IV, application of -Execution application held time-barred-Subsequent application on basis of acknowledgment whether maintainable.

A decree-holder applied for execution in 1919. The application was rejected as time-barred. He applied again in 1920 relying on an acknowledgment made in his favour in '918. The Court rejected the application saying that as his previous application was held to be barred by time, the point was res judicata On appeal:—

Held, (1) that the only ground on which the application could be barred as resjudicata would be that the applicant ought to have raised the issue of acknowledgment in his previous application. This was an extent to which the doctrine of res judicata

could not be extended:

(2 that in the earlier application there was no adjudication that the execution of the decree was barred but only that the application was not shown to be within time;

(3) that, therefore, the application was main-

tainable.

Appeal against an order passed by the Subordinate Judge at Bagalkot.

Mr. H. B. Gumaste, for the Applicant.

Mr. S. D. capre, for the Opponent. JUDGMENT.

MACLEOD, C. J .- The petitioner obtained

^{(8) 23} W. R. 285.

^{(9) 4} A 120; 8 I. A. 190; 4 Ser. P. C. J. 275; 2 Ind. Dec (N. s.) 579 (P. C.).

ABDUL RASBID U. JANEI DAS.

a decree in Sait No. 91 of 1913 in the Court of the Second Class Subordinate Judge at Bagalkot against the opponent on the 2nd August 1913 and filed an application for on the 3rd July 1915. execution The application was struck off as notices were not served on the opponent. A second application for execution No. 166 of 1919 was made on 25th June 1919 but it was rejected as time barred. The decree holder again applied for execution on the 19:h June 1920 relying on an acknowledgment made on the 19th June 1917 and signed by the opponent in a compromise application in a partition suit between himself and his brother. The learned Subordinate Judge said:-"Darkhast was held to be timebarred in a previous appliestion. The priot is thus see judicata. The present application must, therefore, be rejected." He decided, therefore, that once a Darkhast had been rejected as time barred no further Darkhast That is not in agreecould be filed. ment with the desision in Mahadeo V. Trimbakbhat (1), All that was decided in the previous Darkbast of 1919 was that the Darkhast itself was not in time. That would not prevent the executing plaintiff from filing another Darkhast and seeking to bring it within limitation on grounds which were not before the Ccurt when the previous Darkhast was flad. The only ground on which this Darkhest could be rejected would be that the petitioner ought to have relied upon the acknowledgment of June 1917 when he filed the previous Darkhast, and not having done so he is for ever barred from relying upon it. It does not seem to me that the doetrine of res judicata can be extended to that length. I agree with what was said by my brother Shah in the case of Mahadeo v. Trimbokbhat (1), which was eited, that in the earlier Darkhast there was no adjudication that the execution of the decree was barred but only that the application was not shown to be in time. I think, therefore, that the Rule must be made absolute and that the Darkhast must be returned to the lower Court to be dealt with on the merits.

Costs to be costs in the Darkhast. Shan, J.-1 agree.

N. H. Rule made absolute.

(1) 50 Ind. Cas 972, 2! Bom. L. R. 841.

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OUDH JUDICIAL COMMISSIONER'S COURT.

SICOND CIVIL APPEAL No. 255 or 1920. December 13, 1920.

Present: - Mr. Lirdeny, J. C.

Maulti ABDUL RASHID and another
PLAINTIPPS - APPELLANTS

rersus

JANKI DAS IND ANOTHER - DEPINDANTS -- RE-PONDENTS.

Adverse possession—Endowed property—Managers, successive—Limitation, running of—Admission of right-ful title by wrongful possessor—No relinquishment of possession—Possession, whether ceases to be adverse.

Where endowed property belonging to an idol is taken possession of adversely, limitation to sue for possession of such property begins to run from the date of possession having been taken and each succeeding manager of the endowed property does not get a fresh start of limitation upon the ground of his not deriving title from any previous manager, as the succeeding shebaits form a continuing representation of the idol's property. [p. 942, col.:.]

Where a person wrongfully in possession admits to the rightful owner that he disclaims all interest in the property in his possession, but does not voluntarily abandon or relinquish possession, the admission does not affect the relation between them so as to convert what was previously adverse possession into possession of another character. [p. 942, col. 2.]

Appeal from a decree of the District Judge, Fyzabad, dated the 22nd Mey 1920, upholding that of the Munsif, Fyzabad, dated the 7th August 1919.

Mr. Niamat Ullah, for the Appellants. Mr. A. F. Sen, for the Respondents.

JUDGMENT.-The only question for determination in this appeal is whether or not the plaintiffs' suit was barred by limitation. Both the Courts below have held that it is.

The property in suit consists of three kothris (rooms) attached to a mosque at Ajudhia.

It has been beld in a case decided in this Court in the year 19.3 that this property is wagf property. The suit in which that decision was some to was brought by one Shaikh Abdul Ghafur against Shiam Sundar Das who is now represented by the first defendant, Janki Das.

While it was held in this Court that the property was waqf property it was also held that Shaikh Abdul Ghafur was not entitled to have possession of it inasmuch as he was not the mutwalli of the trust property. His suit for possession, therefore, failed.

ABDUL BASBID U. JANI DAS.

After the suit was dismissed the plaintiffs went to the Court of the District Judge and in the month of February 1918 they obtained an order appointing them mutwallis of the mosque and of the property in suit. The present suit was filed on the 24th of October 1918 and the defendants set up a plea of limitation.

It was admitted in the plaint, and it was found in the earlier suit, that Shiam Sundar Das had been in possession of this property since the year 1903. It also seems evident that the plaintiffs in the present suit have never been in possession of the property in dispute.

I am not disposed to agree with the view taken by the Courts below that Article 142 of the First Schedule to the Limitation Act was the proper Article to apply in this case for the purpose of determining the rule of limitation. It seems to me that the suit was really a suit on title and that it was for the defendants to prove adverse possession. However, even in this view it appears to me that the plea of adverse possession for more than 12 years must be sustained.

It is argued for the plaintiffs that the possession of these defendants did not and
could not become adverse to them until the
month of February 1918 when they (the
plaintiffs) were appointed mutualis of the
property. The argument is that it was
only from the date of their appointment as
such that the plaintiffs became entitled

to possession of this waqf property.

A similar plea was raised in the ease which is reported as Nilmony Singh v. Jagabandhu Roy (1). In that case certain debutter property had been slienated in the years 1857 and 1875 by the sebait. In the year 1888 the sebait, who had made these alienations, was removed from office and the plaintiff was appointed in her place, The plaintiff brought a suit in 18:2 for recovery of possession of the endowed properties which had been alienated in the years 1857 and 1875. When the plea of limitation was raised, the argument for the plaintiff was, as it is here, that limitation began to run against him from the year 1898, the date on which he was appointed sebait, but the High Court repelled this

contention. They held that the possession of the defendants who professed to derive title not from the idol, but ignoring its rights, must be taken to have become adverse to the idol from the dates of the two alienations which were both more than 12 years before the date of the suit. It was held that each succeeding manager of the endowed property could not get a fresh start so far as the question of limita. tion is concerned upon the ground of his deriving title from any previous manager. The opinion of the Court was that the succeeding sebasts formed a continuing representation of the idol's property. And the Court also drew attention to the anomalous results which would follow if any other view of the law were taken.

Similarly, in the case now before me, I think it is not open for the plaintiffs to argue that limitation began to run against them only from the year 1918. In my opinion it began to run in the year 1803 when the defendants' predesessors took possession of

the property.

Another argument which was put forward in the Courts below, and has also been advanced here, relates to an admission which is said to have been made in the previous litigation relating to this property. It is stated in the judgment of this Court, which was passed in the month of January 1913, that chiam Sundar Dar, who is now represented by the first defendant, disslaimed all interest in this property. The contention, therefore, is that in view of this admission the possession of Shiam Sundar Das and of the present defendant cannot be treated as adverse. Bat even if this admission was made it is apparent that the person who was wrongfully in possession did not voluntarily abandon or relinquish possession. According to the statements in the plaint the defendants are still in possession of the property and I cannot, therefore, accept the argument that any admission of the nature above described made in the earlier litigation affected the relation between the parties so as to convert what was previously adverse possession into possession of another character. I hold that the decision of the Courts below is correct. The appeal fails and is dismissed with costs.

RAJNAL BANNABAYAN U. BUDANSAHEB ADULSAHEB.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 235 OF 1920.

November 11, 1921.

Fresent:—Sir Norman Maeleod, Kt.,
Chief Justice, and Mr. Justice Shah.

RAJMAL RAMNARAYAN—

PLAINTIFF—APPELLANT

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BUDANSAHEB ADULSAHEB-DEFENDANT-BESPONDENT.

Contract, suit on-Wagering contract, plea of, in defence-Onus of proof-Witness-Abstention of party to enter witness-box-Presumption.

Where in a suit to recover damages on the basis of a contract, the defendant pleads that the contract was in the nature of a wager, the onus of proving that the contract was wagering lies upon him, his mere statement that the contract was of a wagering nature is not proof of the fact asserted.

Where a defendant abstains from going into the witness-box on his own behalf to be cross-examined by the plaintiff, the Court is entitled to infer every thing against him.

First appeal from the desision of the First Class Subordinate Judge at Sholapur, in Suit No. 175 of 1919.

Mr. Copasee (with him Mr. G. N. Thakor), for the Appellant.

Mr. Bahadurji (with him Mr. G. I. Murdeshvar), for the Respondent.

JUDGMENT .- The plaintiff sued for damages in respect of certain contracts for the purchase and sale of yarn. The contracts were admitted. The only defence that the defendant could take was that the contracts were wagering. The hearing of the case followed rather a peculiar course. On the 3rd February 1920 the suit was placed for hearing and although the parties were present, the plaintiff was not examined by his Pleader but was examined for the Court. Also the defendant was examined for the Court on the 15th. Then, although each party had issued summonses to witnesses, none of the witnesses turned up and eventually on the 1st March 1920 the defendant's Pleader put in a most remarkable purshis:

There is now no necessity for the defendant to state anything more to the Court than what he has (already) stated to this Court on solemn affirmation. The defendant is not responsible to keep himself in attendance for cross examination and the suit has not come to that stage, that is to say, that stage of procedure. No steps whatever have been

taken heretofore on behalf of the plaintiff for examination of the defendant. The defendant now objects to the grant of time to the plaintiff for that purpose. The burden of proof as regards the first issue is thrown on the defendant. No additional evidence is to be given just now on behalf of the defendant."

that the contracts were wagering lay on the defendant. All that was said in his deposition before the Court was that the contracts were of a wagering nature. That of course was not proof of the fact asserted. He would have to show that at the time the contract was entered into, the common intention was not to give and take delivery but to pay differences. The purshis continues:—

"The defendant reserves the evidence which he is entitled to give by law by way of rebuttal against the evidence that may be

given on behalf of the plaintiff."

The defendant also seems to have considered that he was not bound to go into the witners box to be cross examined by the plaintiff, but that the only way for the plaintiff to get his evidence was by issuing a summons to the defendant himself. If the defendant did not shose to go into the witnessbox on his own behalf, that was a matter for himself to deside, but in an ordinary case, the Court is entitled to consider that as a point against the defendant. Certainly if a defendant says "I am not going into the witness box unless I am summoned by the plaintiff," he puts himself in the wrong. For the plaintiff is not bound to issue a summons to the defendant, and unless the defendant gives evidence on his own behalf so as to give the plaintiff an opportunity of ercas examining him, then the Court is entitled to infer everything against the defendant. Thus the defendant has absolutely failed to prove what he was bound to prove, in order to succeed in his defence that the suit transactions were of the nature of wagering contracts. The result must be that the appeal must be allowed and the plaintiff will have a decree for Re. 18,201 4-0 and costs throughout.

W. C. A.

Appeal allowed.

BANKE BIHARI LAL D. GHARI AHMAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE AFPEALS Nos. 16

June 2, 1921.

Present: - Mr. Dalal, A. J. C.
BANKE B HARI LAL AND OTHERS
- DEFENDANTS-APPELLANTS

U-7848

GHANI AHMAD AND OTHERS-PLAINTIPPS
-RE-PONDENIS.

Civil Procedure Code (Act V of 1908), O. XXI, rr 89, 92-Decree, preliminary, in redemption suit—Deposit by mortgagor, application for-Limitation.

The right of a mortgagor to pay in the amount due under a preliminary decree is a continuing right and can be exercised at any time until an order absolute is passed. No period of limitation applies, therefore, to an application by the mortgagor to deposit money [p 941, col. 2 p. 945, col. 1.]

Gajadhar Singh v Kishen Jiwan Lal, 42 Ind. Cas. 9: 39 A 641: 15 A L. J. 7:4 and Jageshar Singh v. Bhagwan Bakhsh Singh, 9 Ind. Cas. 337; 14 O C. 10,

distinguished from.

Date Judge, Bara Banki, dated 4th April 1921, reversing that of the Munsif, Fatehpar (at Bara Banki), dated 5th February 1921.

Mesers. A. P. Sen and H. K. Ghesh, for the

Appellants.

Mesers. Niamat Ullah and Ram Chandra,

for the Respondents.

JUDGMENT .- The question raised in appeal is whether any period of time is fixed for the lodging of an application by a mortgagor for desposit of mortgage money after the passing of a decree in a redemption suit under section 92 of the Transfer of Property Act. The point is covered by authority in this Court of a decision of a single Judge in Bisheshar Singh v. Bikrama, it Singh (1). The learned Judicial Commissioner, Mr. Lindsay, held right to redeem could be that the exercised at any time before an order been passed and, absolute for sale had valid therefore, the deposit was even though made long after the expiry of three years from the date of the decree. In the present case it is admitted that the defendant mortgagee has not obtained an order absolute under section 93 debarring the mortgagor of all right to redeem the mortgaged property. The decree under section 92 was to the effect that upon the plaintiff paying to

(1) 34 Ind, Cas. 349; 19 O. C. 30; 3 O. L. J. 189.

the defendant or into Court on the aforesaid 24th February 1907 a certain sum the defendant shall deliver up to the plaintiff all documents in his possession and shall retransfer the property to the plaintiff free from the mortgage and shall put the plaintiff ipto possession of the mortgaged property; but that if such payment be not made as aforesaid on the date fixed, the plaintiff shall be debarred of all rights of redemp-There is no doubt that the plaintiff sould make a deposit subsequent to the date given in the decree but the question of diffiealty to deside is whether the limitation provided by Article 181 or 1:2 of the Limitation Ast applies to an application by the mortgagor to deposit the money. In the present case the mortgagor has applied for permission to deposit money and requested the Court to inform the mortgages to with. draw the money and put the mortgagor into possession. Under the enresponding provisions of the Civil Prosedure Code repealing sections 92 and 93 of the Transfer of Property Act, it is held by the Allahabad High Court that an application to deposit money under Order XXXIV, rule 5, is governed by the limitation prescribed by Article 181 of the Limitation Act: Gujadhar Singh v. Kishen Jiwin Lal (2). The wording of the Code of Civil Procedure, however, has been entirely changed and the proceedings between the preliminary decree and the final decree are proceedings in a suit. On deposit of mortgage-money the Court is bound to pass a decree containing certain orders. Under section 92 after a decree is passed in favour of the mortgagor, no further decree or order absolute by the Court is enjoined under section 93 of the Transfer of Property Act on deposit being made by the mortgagor. Under these circumstances the decision of a single Judge of this Court referred to above appears to me to be sound. There is another Bench ruling of this Court in Vidyasagar v. Ratipal (3), where in a decree for foreelosure obtained by a mortgages under sestion 86, Transfer of Property Act, it was held that the right of a mortgagor to pay in the amount due under a deeree niei is a continuing right and can be exercised at any time until an order absolute is passed. It

^{(2, 42} Ind Cas. 93; 39 A. 641; 15 A L. J. 784. (3) 25 Ind. Cas. 752; 17 O. C. 847; 1 O. L. J. 433.

HARI PRASAD SINGHA C. SOUBENDRA MOHAN SINHA.

was definitely held there that no period of limitation applied to an application by the mortgagor to deposit money. The appellant's learned Counsel pointed out that the deeree-holder in a decree under section 86 would be the mortgages and so the ruling in Vidyangar v. Ratipal (3), would not apply here. If, however, sections 86 and 92 are read together, it would be found that there is no distinction in the daty enjoined by the two sestions on the mortgagor, so it makes no difference whether he happened to be a plaintiff or a defendant. The learned Counsel invited the Court's attention to the judgment of the Judicial Commissioner, Mr. Chamier, in Jageshar Singh v. Bhagioin Bakhih Singh There the learned Julge entered (4). into an inquiry whether an application by the mortgagor desree holder for delivery of possession was made within three years as required by Article 182 of the Limitation Act. That application, hovever, was for delivery of possession and not for deposit of money. An application for possession may have to be made within three years of the deposit of mortgage money but that is not a question for decision here. This Court eveds beloup seers sends ad lls ni bled sed, t'a' under the Transfer of Property Act a mortgagor has a right to redeem the mortgage at any time before the passing of an order absolute either for sale or foreslosure by the mortgages. I do not .think that this question arising under the Transfer of Property Act can well be reopened in this Court.

The appeals fail and I dismiss them with

epate.

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J. P. Appeals dismissed. (4) 9 Ind. Cas. 337; 14 O. C. 10.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 191 or 1918.
April 12, 1922.

Present: —Sir Dawson Miller, Kr., Chief
Justice and Justice Sir John Bucknill, Kr.
HARI PRASAD S: NGHA and OTTERS—
DEPENDANTS—APPELLANTS

DETEUS

Babu SOURENDRA MOHAN SINHA

DWARKA PRASAD SINHA AND CTHESS

- Dependants - Respondents.

- Bonthal Parginas Settlement Rejulation (III of 1872).

Regulation (III of 19.8), amending s. 5—Amendment, effect of Sonthal Parganas—Settlement Jurisdiction—Interest—Limitation Act (IX of 908), ss. 2, 14—Defendant, meaning of—Suit against Mitakshara family—New horn son impleaded—Defendant, new, whether introduced—Hindu Law—Antecedent debt, doctrine of -Applicability as against collaterals.

The effect of the amendment of section 5 of Sonthal Parganas Settlement Regulation III of 1872 by Sonthal Parganas Settlement (Amendment) Regulation III of 1908, is to exclude the jurisdiction of the Civil Courts to try cases relating to land in the Sonthal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as being under settlement to the time when the settlement is notified as completed. [p 948, col. 1.]

The operation of section 6 of Sonthal Parganas Settlement Regulation III of 1872, unlike section 5, is not limited to the time during which a settlement is going ou, nor is the section confined to the Courts locally situated in the Sonthal Parganas All Courts wherever situated who have jurisdiction to decide cases within the Sonthal Parganas, when exercising that jurisdiction, must observe the two rules relating to usury contained in that section and refuse to decree an amount of total interest in excess of the original debt or loan, that is to say, in no case can interest be decreed in excess of the amount actually advanced, after crediting interest, if any, already paid. [p 949, col.?.]

Every person who acquires an interest by devolution or otherwise in the subject-matter of litigation previously vested in another which renders him liable to be impleaded as a defendant derives his liability to be sued from that person within the meaning of section 2 of the Limitation

Act [p 462, col. 1.]

In the case of a new born son in a Mitakshara family, the person or persons through whom, for the purposes of section 2 of the Limitation Act, he derives the liability to be impleaded as a defendant, are the members of the family in whom the property which the son acquires by birth was previously vested [p. 952, cols. 1 & 2]

A suit to enforce a mortgage against certain members of a joint Hindu family was dismissed for want of jurisdiction. The plaintiff sued again in the proper Court also joining as defendants persons who had in the meantime been born in the family and sought to exclude the period during which he had been prosecuting the previous suit from the operation of limitation under section 14 of the Limitation Act. The defendants objected that the section was not applicable as the defendants in the two suits were not the same:—

Held, that the section was applicable as under section 2 of the Limitation Act no new defend-

ant was introduced [p 952, cole, 1 & 2]

The doctrine of antecedent debt applies where the debt is one incurred in substance and in reality antecedently, whether or not the debt so incurred was secured by a charge on the family property.

[p. 4.8, col 2]

Although the doctrine of antecedent debt applies only as against the sons and grandsons of the

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debtor and does not apply so as to permit of a valid charge on the property where the interests of collaterals are involved, nevertheless where all the adult members of a family are themselves the debtors and the only other persons interested are their minor sons and grandsons, the doctrine is clearly applicable. [p. 954, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 17th June 1918.

Messrs. B. O. Manuk, K. B. Dutt, O. O. Das, S. M. Mullick, S. O. Rai and L. K. Jha, for the Appellants.

Messrs. S. H Imam, P. K. Sen, P. N. Singh, N. O. Sinha and N. C. Ghosh, for the Respondents.

JUDGMENT.

MILLER, C. J .- The suit out of which this appeal arises was instituted in the Court of the Subordinate Judge of Bhagalpur on the 5:h February 1915 by the respondents elsi ring Rs. 11,81,811, principal and interest, due under a mortgage bond, dated the 21st December 1896, executed by some of the appellants to secure a sum of Rs. 3,50,000 of which Rs. 1,36,142 were advanced in cash, the balance being the amount due under a previous band. The bond in suit provided that the principal sum was to carry 71 per eent. compound interest with yearly rests. The principal was re-payable in the month of Falgon 1310 F. The last day of Falgon 1310 F. corresponds to the 14th March 1903 A. D. The first party defendants are the surviving executants of the bond and other members of their family who form a joint Hindu family governed by the Mithila Law. The second party defendant, Dwarka Prasad Singh, is no longer a member of the family having been adopted into another family. The third party defendants are subsequent transferees of some of the mortgaged property. The remainder are those having varying interests in the property and who have been substituted for others. The plaintiffs are successors-in interest of the mortgagee, Rai Babadur Surjya Narain Singh, deseased.

Various issues were raised at the trial. The Subordinate Judge, before whon the case came, found all the issues in favour of the plaintiffs except as to certain items of the loan which he found were not justified by

legal necessity. He passed a mortgage. decree in favour of the plaintiffs for Re. 15,2:,997 including costs and interest up to the expiry of the days of grace, and as against the executants of the bond a further personal decree for the sum of Rs. 44,164, including interest and proportionate costs in respect of that part of the advance which he considered was not justified by family necessity. He further ordered that the latter sum should carry interest at 6 per cent, per annum from the date of the decree until realisation.

From that decree the defendants first party have appealed to this Court. Six points have been urged before us on behalf of the appellants:

(1) That the Bhagalpur Court had no junisdiction to try the suit.

(2) That the mortgaged property, being situated within the Sonthal Parganas, the amount of interest that can be decreed is limited by the provisions of section 6 of Regulation III of 1872 relating to the Sonthal Parganas.

(3) That the suit is barred by limita-

(4) That the claim for a personal decree is barred by the provisions of Order 11, rule 2 of the Civil Procedure Code.

(5) That there being no legal necessity or antecedent debt justifying the greater part of the loan the mortgage is, to that extent, not binding on the joint family property.

(6) That interest at 6 per cent, awarded by the decree is contrary to the provisions of

section 6 of Regulation III of 1872.

The determination of the first point deperds upon whether section 5 of the Regulation of 1872, as amended by subsequent legislation, bars the jurisdiction of the Civil Courts in the circumstances existing when the suit was instituted Section 5, as amended by Regulation III of 1908, is as follows:—

"5. (1) From the date on which under section?, the Lieutenant Governor declares, by a Notification in the Calcutta Gatetle, that a settlement shall be made of the whole or any part of the Sonthal Parganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court established under the Bangal, Agra and Assam Civil Courts Act, 1887, in regard to (a) any land or any

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interest in or arising out of land, or (b) the rent or profits of any land, or (c) any village headship or other office connected with any land, in the area covered by such first mentioned not feation nor shall any Civil Court proceed with the hearing of any such suit

which may be pending before it."

The second clause of the section states that the Courts in which the suits referred to shall be tried are those appointed by the Lieutenant-Governor under the provisions of the Sonthal Parganas Act, 1855, or under sestion 10 of this Regulation. The 9th section referred to in section 5 enables the Lieutenant Governor from time to time by Notification in the Oalcutta Gacette to declare that a settlement shall be made of the whole or any part of the Southal Parganas.

Whether at the date of this sait settlement operations in respect to the mortgaged property were still going on in the Southal Parganas, or whather the settlement operations, which began in 1873, had been sompleted and notified in the Calcutta Gazette is a

question of fact.

Oa the 20th June 1904 the same plaintiffs or their predecessors in interest instituted a suif on the same bond against the defendants' family and obtained a desree which was affirmed on appeal by the High Court of Oslantia. The defendants sarried the case on appeal to His Majesty in Council and on the 19th May 1914 that appeal was allowed and the suit was dismissed on the ground that sestion 5 of Regulation III of 1872 was a bar to the jurisdiction of the Basgalpur Court, at the date when the suit was instituted. The reason for that desision was, that the greater portion of the land included in the bond was situated within the Southal Pargauss, and although some portions of it had been settled and notification to that effect had been made as provided in the section, other portions were still under settlement, their completion not having been notified when the suit was instituted. Sae Mahi Prasid Singh v. Bamani Mohan Singh (1).

The respondents contend, however, that on the 5th February 191, when the plaint in the present suit was filed, the Settlement had been

(1) 25 Ind, Cas. 451, 42 O 116, 18 O. W. N. 991; 16 M. L. T. 105; (1914; M. W. N. 565; I L. W 619; 200. L. J 231; 27 M. L. J. 459; 16 Bom. L R. 821; 11 1, 3. 197 (P. O.).

completed and daly notified and section 5 of the Ragulation had, therefore, seased to operate. The appellants, on the other hand, say that, although the last settlement operations in the Sonthal Parganas were completed in the year 1910, there was never any Notifiestion in the Calcutta Gazette to show that all the lands mortgaged and placed under

settlement had been so settled.

There have been altogether four Settlement operations in the Southal Parganas since the Regulation of 1872 was passed. The first was that conducted by Mr. Wood which contioned from 1873 to 1879; the essand was Mr. Craven's Sattlement which began in 1839 and ended in 1894. Between 1893 and 1:05 Mc. H. McPherson continued the work of Ra-Sattlament began by Mr. Craven. Certain villages still remained unsettled when Mr. MsPherson made his final report and these were dealt with in Mr. Allauson's Sattlemant between 1903 and 1910. Since that date no further Settlement operations have taken place in the Southal Pargagas. Toe appellant's case is that the whole of the Southal Pargadas was placed under sattle. ment in 1873, Mr. Wood being deputed as Settlement Officer for the purpose, and that no notification was ever published in the Oricutta Greette relating to the completion of that settlement. For the first part of this contention they rely upon a statement in Mr. M.Paerson's Settlement Report. For the sesond part they rely upon the fact that no notification of the completion of Wood's Sattlement was prodused. Sines Mr. Wood's time, howavar, there has been a Ra-Sattlemens by other Settlement Officers and in each ease the notifications required by sestion 5 have been issued and are in evidence before us. The passage relied on in Mr. McPherson's report to the effect that the whole of the Southal Parganas was placed under Sottle. ment in 1873 is to be found at the beginning of his report and may be quoted here. It states: "The whole of the district, which has an area of 5470 equare miles, was Sateled for the first time unter the provisions of Regulation all of 1872 between the years 18/3 and 1879" Tae report, however, adds that "Dacing the years 1889 to 1894, 1579 equare miles of this area was settled for a adol and to coisivague edt aeban emit Lacees Ocaven, Dapaty Collector. In 1893 I was deputed to continue the work of Re-Settle.

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ment." The report then explains how he had practically completed the record Settlement when Mr. Allanson took over the work in 1905, The notifications relating to the completion of the Settlements by Mr. Craven, Mr. MePherson and Mr. Allancon bave all been produced and proved in evidence. relating to Mr. Wood's Settlement has not. It is important to bear in mind that section 5 of the Regulation, as it stood in 1872, provided that "till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided and the settlement shall be deelared by a Notification in the Calcutta Gazette to have been completed and concluded no snit shall lie in any (Civil) Court, etc." That section excluded the jurisdiction of the ordinary Courts from the date of the Regulation until the notification of completion, but in 1908 the section was repealed and new section in the form set out above was enacted. The effect of the amendment was to exclude for the future the jurisdiction of the Civil Courts to try cases relating to any land in the Sontbal Parganas only during such period as that land should be under Settlement, the period being reckoned from the time when the land is notified as under Settlement to the time when the Settlement is notified as completed. The appellants who rely on the absence of a notification declaring that Wood's Settlement was completed have given no evidence to show that that Settlement was made under any notification in the Calculta Gazette or to show that the notifes. tion, if any, authorising that Settlement included the lands in suit. The passage relied on in Mr. McPheson's report shows that the whole district was settled between 1873 and 1879, and, on the evidence produced, there is nothing to show that the lands in suit were the subject of a notification either at the beginning or at the end of the first Settlement. It is not disputed that Wood's Settlement came to an end more than 35 years before the suit was instituted and the appellants are raising a purely technical objection that there is no notification to that effect. I think they are met, however, upon their own ground by the reply that they have failed to show that the lands in suit were ever brought under settlement by Notification in the Calcutta Gatetle. effect, we are asked, in the first place, to

assume without evidence that there was a notification placing the lands in enit under Settlement in 1873; and, in the second place, that, although that settlement was concluded many years ago and a Re-Settlement has since taken place, there was no notification of the completion of the Settlement of these lands by Mr. Wood. It appears to me that the appellants fail at the outset to establish their plea in so far as it depends upon the first Settlement.

It is contended, however, that even under the subsequent settlements the whole of the lands in suit were never notified as out of settlement. Reliance was placed upon a passage in section 103, at page 66 of Mr. Allenson's report, to the effect that 45 villages of Taluk Barcope which had not been settled by Mr. Craven were included in Mr. McPherson's second programme, and that the notification of the completion of the settlement under Mr. MePherson's first and second programmes showed only three villages and 40 villages respectively as having been settled. Mr. Allanson adds, however, in his report: But the bulk of the estate, viz. 66.86 square miles, has been resettled in the present programme." The notification authorising Mr. Allanson's Settlement includes 201 villages in Barcope Tarzi No. 481 and the notification of completion of that settlement has been produced and proved, Assuming that a few villages in Barcope were not settled by Mr. McPherson, there is no evidence to show that these villages were not included in the Settlement made by Mr. Allanson who took over charge from Mr. M. Phereon in 1905. There is nothing to show which villages they were and there is certainly nothing to show that they were comprised in Tauzi No. 481 of Barcope within which Tarzi alone the mortgaged property in Barcope is situated. This Tauzi number comprises only a portion of what is known as Taluk Barcope or Tappa Barcope. The appellants have, therefore, failed to show that any of the mortgaged property was notified for Settlement and not notified as settled. The plea as to jurisdiction accord. ingly fails.

The second point raised is, whether the restrictions as to interest contained in scotion 6 of the Regulation of 1872 are binding upon the ordinary Civil Courts locally situated outside the Sonthal Parganes but

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exercising jurisdiction over property within that area and, if so, whether the sestion applies when no Sattlement operations are going on. The second branch of this question can hardly arise independently of the first as it is only during Settlement opera. tions that the jurisdiction of the ordinary Courts is barred. Section 6 is as follows: -

6. All Courts having jurisdiction in the Southal Parganas shall observe the following rules relating to usury, namely :--

(a) interest on any debt or liability for a period exceeding one year shall not be desreed at a higher rate than two per sent, per mensem notwithstanding any agreement entrary, and no compound interest arising from any intermediate adjustment of account shall be decreed,

(b) the total interest desceed on any loan or debt shall never exceed one-fourth of the prinsipal sum, if the period be not more than one year, and shall not in any other ease exceed the principal of the original debt or loan.

(Explanation, -The exprassion intermediate adjustment of assount' in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing elaim by bond, deeree or otherwise when without the passing of fresh consideration, the original claim is increased by such renewal.

Illustration-A bond is given for Ra. 75, of which Rs. 25 are interest. Unless the obligee ean prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest and the limit of the claim on the bond will be Ba. 100)."

The explanation and the illustration appended to the section were added in 1833 (V of 1893).

There appears to me to be no reason for limiting the operation of section 6 to such time as settlement operations may be in progress. Had this been the intention one would have expected that words limiting its operation to a particular period as in section 5, would have been inserted, nor san I see any reason why sestion 6, any more than section 7, should be limited in the manner augkasted. The later sestion which example estinin agreements as to rents and rights

in lind from stano daty is elearly intended to be general and permanent in its appliestion. The reason for the enastment of the section is no doubt to be found in the preamble of Ast XXXVII of 1855 which, by section 2 of the Regulation, must be read with it, and which racites that the general Regulations and Asts are not adapted to the eledanos belies eleced to seen begiliviend who inhabit the district. It would be a surious result of this legislation if the protection from their own ignorance and improvidence afforded to the Southals by the section should depend upon the fortuitous eireumstanse of a Sattlement being in opera. tion. I am unable to assept this view. The considerations just mentioned apply to some extent also in determining whether the Courts mentioned in the section are only Courts locally situated in the Southal Parganas or all Courts having jurisdiction within, even when situated ontside, that area. I think the plain meaning of the section is that all Courts wherever they may be locally leddac Seda ait a sed in sed in the Southel Parganas must, when expreising jurisdiction arising within 10 68820 the Parganas, follow the rules relating usury set out in the section. This was the view expressed by Lord Moulton in delivering the judgment of the Judicial Committee in Maha Prasad Singh v. Ramani Mohan Singh (1). It is contended that the view there expressed was obiter as the case was desided upon the interpretation of clause 5 of the Regulation. The case, however, went before their Lordships on appeal upon this very question, and although their decision was ultimately based upon the question of juris. diction, they thought fit to express an opinion upon the interpretation of clause 6. The whole of the Acts and Regulations relating to by the Sonthal Parganas Justice Regulation the Sonthal Parganas were there considered and it was found that the ordinary Courte had no jurisdiction to try suits relating to land in the Sonthal Parganas so long as the land was under settlement "and further that whatever be the Court that has jurisdiction to deside eases within the Sonthal Parganas and is exercising that jurisdiction it must observe the two rules relating to usury above referred to" and in a later passage in the judgment their Lordships are also of opinion that apart from the question of jurisdiction, any Court dealing with the subject-matter

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of the suit would be bound to give full force and effect to the provisions of section 6 of the Sonthal Parganas Settlement Regulations, 1872, relating to neary, and, therefore, to have refused to decree any compound interest arising from any intermediate adjustment of interest or an amount of total interest exercing the principal of the original debt or loan." This can only mean as I interpret it that even if the Bhagalpur Court which had tried the suit then under appeal had had jurisdiction it would have been bound by the provisions of section 6. Whether this part of the decision of their Lordships is binding upon this Court or whether it is to be 'rea'ed

merely as obiter dictum need not be determined as I should have taken the same view even without the assistance of that decision.

It remains to consider the interpretation of the rules contained in section 6 and how they affect the facts of the present case. The bond in suit was the fifth of a series, the last three of which were ranewals of the previous bonds and interest then in arrears and the last two of which included additional cash loans. The following table shows some particulars of the different bonds which may conveniently be stated here:

	Date of bond.		Principal and rate of interest.	Cash consideration.			Payments admitted.			
(1)	3rd October 1893		Rs. 73,001 12 per cent.	Rs. 73,000	a. 0		Rs. 12,0:0 33,917	8. 0 8	P 0 0	principal. interest.
(2)	20th September 1888		12,000 11 per cent.	12,000	0	0	443	10	71	interest.
(8)	10th May 1890		95,500 10 per cent.	Nil			7,037	8	71	interest.
(4)	29th September 1891		1,67,000 9 per cent.	64,761	1	9	39,705	13	8	interest.
(5)	2!st December 1896		2,50,000 7½ per cent.	1,36,142	0	0	55,248	3	71	interest.
				2,85,903	ι	9	1,49,85	2 7	, 1	}

Some argument was addressed to us as to the meaning of compound interest arising from any intermediate adjustment of assount, and the explanation added to the section. It is admitted, however, by the appellants that simple interest calculated on the actual eash advanced beginning with the first bond amounts to more than the total sums advance ed which it is contended form the principal of the original debt or loan. The actual sums advanced amount to Rs. 2,85,903 1.9 of which Rs. 12,000 were re-paid on the 13th January 1884 leaving a balance of Rs. 2,73,903 1.9 which, according to the appellante, is the limit of the total amount of interest payable. The total amount of interest admittedly paid was Rs. 1,36,357.7-12 leaving a balance of Re. 1,37,951.10 72 as interest payable in ad ition to the principal. If the appellants should fail to establish their other sontentions, they admit this basis of calculation as establishing their liability. The respondents, on the other hand, say that the principal of the original debt or loan is Rs. 3,50,0.0, the amount of the last bond, as this was a new settlement for which consideration was given by a reduction of interest. Clause (b), however, of the section provides in terms that the total interest decreed shall not exceed the principal of the original debt or loan and makes no exception in cases of renewal or intermediate adjust. ment and the illustration seems to make it elear that in no case can more than the total HARI PRASAD SINGHA D. SOURENDRA MOHAN SINHA.

sum advanced be decreed as interest. I think the intention of the section is that the liability for interest can in no case he decreed in excess of the amount actually advanced.

The respondents further contend that the interest already pa d should not be eredited in arriving at the amount which may be deereed. The wording of clause (b) of the section, if taken in its literal sense would appear to support this view. This interpre ation is, I think, contrary to the apparent purpose of the enastment as pointed out by Sir Francis Maclean, O. J., and Pargiter, J. in Rom Ohandra Marwari v. Roni Keshobati Rumari (2), where the question was fully considered and I see no reason to differ from the view expressed by the majority of the Court in that ease. I think the intention of the Legislature was that the amount decreed should not be such as to increase the total liability for interest on the bond beyond the amount of the prinsipal debt and this intention is to some extent borne out by reference to clause (a) which restricts the rate of interest. I hold, therefore, that the interest recoverable should be limited to the amount of the principal of the original debt or loan after erediting the interest already paid.

The third question relates to limitation and arises under the following sirenmstavess. The due date of the fifth and last bond was the 14th March 1903 and interest has been paid since then or any asknowledgment made which would postpone the commencement of the limitation period which in the present ease is 12 years. The present suit was instituted on the 5th February 1915 after an unsuccessful attempt to sue in the Bhagalpur Court which was dismissed by the Privy Council as already stated for want of jurisdiction. The previous suit from the time of its institution to the date when it was finally disposed of by the Judicial Committee occupied a period of about 10 years vis., from the 20th June 1904 to the 19th May 1914 and even without deducting this period the suit was instituted within the limitation period. But the defendant No. 16 (a) Sripati 6. . . .

Singh was not originally a party to the sait. He was added as a defendant on the 30th May 1916, that is, more than 12 years after the sames of action arose. By section 22 of the Limitation Act the suit must be deemed to have been instituted against him on that date. Sripati is the minor son of Sasi Bhusan Singb, defendant No. 5, and grandson of Maha Prasad Singb, deceased, both of whom were executants of the bond, He was born in 1910 after the bond was executed and whilst the previous suit was pending. He, therefore, as a member of the family acquired an interest by birth in the equity of redemption in the mortgaged property. It is contended by the appellarts that under Order XXXIV, rule 1 of the Civil Procedure Code he was a necessary party to the suit and as he was not joined as a party until after the limitation period had expired the suit cannot now to entertained and should be dismissed. To this contention the respordents reply. first, that by section 14 of the Limitation Act the 10 years during which they were prosecuting the previous suit should be excluded in computing the period of limitation; secondly, that Sripati was not a necessary party as his interest was sufficiently represented by his father or by one or other of the members of his family who were originally joined, some of whom at least were not executants of the bond and have raised all the pleas that are open to Sripati, thirdly, that the respondents had no notice of Sripati's existence and could not reasonably be expected to have such notice until the 25th April 1916 when it was first disclosed in the written statement of the appellant, Lakhi Prasad, and that immediately afterwards they made enquiries which disclosed that Sripati had not been living with his father's family but with his maternal grandfather at Mahagaon sines his birth, and that he was thereupon added as a party on the 30.h May, and that Order XXXIV, rule 1 only applies provided the plaintiff had notice of the interest there referred to as under the law previously in force under section 85 of the Transfer of Property Act, fourthly, that the defendant Sripati, not having been born at the date of the morrgage, at most only acquired a right in the equity of redemption remaining in his father's family, ap

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the effect of his non-joinder would merely to to keep his right of redemption alive.

In my opinion the first point raised by the respondents viz., sestion 14 of the Limitation Act is a complete answer to the plea of limitation. When the previous suit was instituted, Sripati was not born and could not then be made a party. He was added about a year and two months after the limitation period expired, and even if the period between the institution of the first suit in 1904 and Sripati's birth in 19:0 be alone excluded, the limitation period as against him had not expired. It is argued, bowever, that he was not a defendant in the first suit and that section 14 of the Act only applies to cases where the defendants are the same. By section 2 (4) of the Act "defendant" includes any person from or through whom a defendant derives his liability to be sued. It is in my opinion through his father and the other members of his family that Sripati derives his liability to be sued. It is by reason of the charge created on the family property by them that Sripati, as a member of the family with an interest in that properly acquired at his birth, derives his liability to be impleaded as a defendant in a suit against the family property. We have been referred to certain decisions of which Sundar Lal v. Ohhitar Mal (3) may be sited as typical to show that a son in a Mitakshara family does not elaim under his father within the meaning of section 13 (now section 11) of the Civil Procedure Code. Whatever may be the weight of those authorities, and I express no opinion about them they are not anthorities as to the interpretation of section 2 of the Limita. tion Act. That section seems to assume that every person who acquires an interest by devolution or otherwise in the subject-matter of litigation previously vested in others, which renders him liable to be impleaded as a defendant derives his liabi lity to be sued from or through some body. In the case of a new born son in a Mitakshara family the person or persons through whom he derives this liability must be the other nembers of the family in whom the property which the son acquires by birth was previously vested. If the appellants' contention be accepted, it would in many cases work a manifest injustice. They contend that each member of the joint family alive at the date of the suit is a necessary party in whose absence the suit is not maintainable and further that the time compied in the previous fruitless litigation cannot be deducted in estimating the limition period as against him even if he was born the day before the second suit was instituted.

In such a case if the second suit was instituted after 12 years from the date when the
cause of action arose, the non-joinder of the
newly born son of whose existence the plaintiffs had no knowledge would render the
whole suit liable to dismissal unless it can
be said that the new member of the
family derives his liability to be sued from
or through his father or those who before
his birth represented the property. In my
opinion section 14 of the Limitation Act
applies and the suit is not barred. It is not
necessary, therefore, to consider the other
points taken by the respondents on this part
of the case.

The fourth point taken by the appellants relates only to the respondents, right to a personal decree against the executants of the bond. It is contended by the appellants that in the previous suit no claim was made for a personal deeree and, therefore, the respondents are presluded by Order II, rule 2 from suing for the relief which they cmitted from the previous suit. As en alternative argument they contend that if a elaim for a personal deeree must be taken to have been included in the previous suit then it must be regarded as having been dismissed, not for want of jurisdiction, but on some other ground and the matter is resjudicata and eannot be re-opened. F. r. this part of the argument they rely upon section 11 of the Civil Procedure Code read in the light of the 4th and 5th Explanations appended to the section.

The relief asked for in the previous suit was in the form usually employed in such sace. It seked for (1) an account of the amount due under the bond with directions to the defendants to pay the amount found due within six months and in default a sale of the mortgaged property and extinguishment of the right of redemption, (2) in the

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event of the mortgaged property proving insufficient to cover the decretal amount and costs, a decree against the persons of the defendants Nos. 1 to 7 (the surviving excentants of the bond) and the properties of the first party defendants (all the members of the family), and (3) such other relief as may be deemed proper. The second prayer is, not doubt, inserted in pursuance of Order XXXIV, rule 6 of the Civil Procedure Code. The cause of action in the present case was the failure to rc-pay the principal and interest due under the bond and the relief claimable was both against the property hypothesat ed and against the executants of the bond on their covenant to rc-pay. It would follow, therefore, that if the respondents omitted to sue for a personal deares against the mortgagors on the sevenant they could not afterwards sue for that which was omitted. It is not usual or necessary to ask for a personal decree where the property is held liable for the whole of the prineipal debt and interest except in so far as the proceeds may be insufficient but it is quite open to the Court in a suit framed as this was to pass a decree against the mortgagors on their coverant to re-pay if the whole or a part of the elaim should be held not to be chargeable on the property, I think it must be held, therefore, that the respondents did not omit to sue for a personal deeree which might be granted under the third prayer sat out in the plaint. It is argued, however, that, even so, no effort was made in the previous sait to obtain a personal decree when the deeree for sale of the property failed, and if such a claim was involved it must be taken to have been dismissed by their Lordships when the matter came before the Judicial Committee. It must be conceded that the relief if elaimed must be deemed to have been dismissed and the appellants contend that it could not have been dismissed for want of jurisdiction. I think it would be fruitless to speculate as to the reasons why the relief was refused. It was merely aneillary to a claim in regard to land over which the Bhagalpur Court had no jurisdiction and the whole suit was dismissed upon that ground and no other. I do not think it is open to us to assume that their Lordskips had any other reason for refusing this relef and I would hold that it is still open to the respondents to slaim may fail against the mortgaged property. I may mention that the point does not appear to have been urged before the Subordinate Judge and we have not the advantage of having his opinion before us.

The fifth point rasises two questions, (1) whether there was an antecedent debt which would justify the alienation of the family property, and (2) whether, failing such justifiestion, the loan was for the benefit of the family or warranted by family necessities. In the former case the charge would be valid. In the latter case the consent of the minor members of the family to the transaction would be implied although not expressly

given. As to Rs. 2,13,858 advanced under the bond, this sum was the balance due under the previous bond for which the fathers of all the minor defendants were liable. To this extent, therefore, there was presumably an antesedent debt for which the debtors could validly charge the family property without the express consent, of their Two points, howsoos or grandsons. ever, were raised by the appellants which require consideration. In the first place, it was argued that the principle laid down in Sahu Ram Chandra v. Biup Singh (4) had effect of limiting the dostrine of antesedency to such debts only as are not themselves secured by a charge on the immoveable property of the family. So far as this Court is concerned, we are bound by the decision of the majority of the Fall Bench in the recent case of Mathura Misra v. Rajkumar Misra (5) which decided. following the decision of the High Court at Madras in Arumugham Ohstiy v. Muthu Koundan (6), that the dostrine of antesedency applies where the debt is one insurred in. substance and reality antecedently to the mortgage, whether or not the debt so insurred was seeured by a charge on the family

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(5) 62 Ind Cas 182; 6 P. L. J. 528, 2 P. L. T. 407;

(1921) Pat. 245 (F. B. '.

^{(4) 89} Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 493; 26 C. L. J. 1; 38 M. L. J. 14 (19:7; M. W. N. 433; 23 M. L. T. 22; 6 L. W. 218; 44 I. A. 126 (P. C.).

^{(6) 52} Ind. Cas. 525; 42 M. 71'; 9 L. W. 56; (1919) M. W. N. 409; 87 M. L. J. 166; 26 N. L. T. 96 (F.B.)

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property. This point must, therefore, be decided against the appellants.

In the second place the appellants contend that the role as to antesedent deht cannot apply where it is the joint debt of the heads of the different branches of the joint family. They rely for this proposition upon certain passages in the Vivada Chintamani, an authority binding upon those governed by the Mithila School of Mitakehara Law, to the effect that the sons are only responsible for the share of their father when the debts are the joint debts of their father and others, and if two brothers have a joint debt, the son of the sarvivor is not bound for more than the father's share (Vivada Chintamani, Tagore's Translation, pages 34-35). It is argued from this that the liability of the different branches of the family is a several liability which cannot support a charge upon the joint family property of the members as a whole. In the present ease, bowever, the debt was incurred by each of the beads of the four different branches of the joint family and all the other defendants are their sons or grandsons so that all the interests were involved. There seems to me, therefore, to be no reason why the charge should not be binding upon the property in the hands of all the defendants. Mcreover, the dostrine of antecedent debt in so far as it enables the debtor to sharge the family property during his life-time so as to bind his sons' interest is not just fied by the actual text of the Mitakshara. It is a modern development of the pious obligation of the sons to pay their father's debte, an obligation which according to the text of the commentators only arises after the father's death but which comparatively recent times formed the basis of an exception to the general rule that the manager of a Mitakehara family cannot validly alienate the family property purposes unconnected with the needs of the family or the benefit of the estate. The dostrine is too well-established at the present day to admit of its being questioned by a reference to the texts of the commentators. Admitting that it applies only as against the sons and grandsons of the debtor and could not apply so as to permit of a valid charge on the family property where the interests of colleterals are involved, never-

theless, where all the adult members of the family are themselves the debtors and the only other persons interested are their minor sons or grandsons. I can see no reason why the dostrine should not be applied. Although, so far as I am aware, the objection now raised has not hitherto been the subject of express decision there are many instances in reported eases where the dostrine of antecedent debt has been applied in eireum. staness similar to the present. [see Bhagbut Pershad Singh v. Giria Koer (7), Khalilul Rahman v. Gobini Pershad (c)]. In my opinion the app-llants' contention on this part of the case fails. It follows, therefore, subject to the question of interest that in 30 far as the claim for Rs. 2,13,8,8 retained in disabarge of the previous bond is soncerned, the mortgage creates a valid charge upon the estate, and it is namessarary to consider how far this sum can be justified by family necessity.

With regard to the balance of Rs. 1,36,142 representing the each enaideration for the bond in suit the learned Sabordinate Judge considered that the bulk of this amounting to Rs. 1,23,178-4-0 was justified by legal necessity or anteredent debt and included it together with the amount due under the previous bond in the mortgage deares, giving personal deeree for the balance of Rs. 12,963-11 3 with interest, considering that the plaintiffs had failed to establish legal necessity for the latter sum which had been taken for the personal purposes of the borrowers. The deduction of this sum from the mortgage decree was not challenged by the respondents and there is no sross. appeal. The appellants, however, contend that the greater part of the cash consideration included in the mortgage decree cannot be justified either on the ground of family necessity or antecedent debt.

Evidence has been given in great detail relating to a large number of items of debt which were discharged out of the each advance. Seventeen items including the principal and interest due on the previous band are set out in Schedale No. 1 of the bond in suit and amount together

^{(7) 15} C. 717: 15 I. A. 99; 5 Sar. P O. J. 186; 12 Ind Jur 28; 7 Ind Dec. (N. s.) 1.62 P. O.). (3) 20 C. 328; 10 Ind. Dec. (N. s.) 228.

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to Rs. 3,10,763 9.5. To most of these items, however, must be added interest up to the date when they were paid off out of the consideration money obtained for that purpose. Other debts not shown in the schedale were proved amounting to Re 10,573 which were paid off out of the amount advanced. In addition the cost of the stamp for the bond, the writer's remuneration and the registration fee were paid and proved. The total sum thus accounted for inelading the sum due under the previous bond and after adding interest on the sebedoled debts amounted to Rs. 3,37,036 4 9 for which the Subordinate Judge gave a mortgage-decree with interest at the bond rate leaving a balance of Ba. 12,953-11 3 taken for personal purposes of the borrowers and not assounted for. The various items shewing the payments of the debts out of the consideration money for the bond have been set out in tabular form and printed by the respondents in the schedules marked Gand H which have proved very useful for purposes of reference during the hearing of the appeal. It will be useful here to set ont an analysis of the different items shew. ing how the total is arrived at :-Ra

		res.
	e pre-	2,13,858
ntesedent debts ins	arrad	
branshes of the far	nily	56,573
ntecedent debts inc	arred	
by one or more of	f the	
different branches	of the	
		62,736
		1,750
	n	1,750
		370
aken for parsonal	pur-	
poses and not acco	unted	
for		12,963
Total		3,50,000
	vious bond ntesedent debts inc by the heads of branches of the fac ntesedent debts inc by one or more be by all the heads of different branches family tamp fee on bond riter's remuneration egistration fee aken for parsonal poses and not asso	by the heads of the 4 branshes of the family nteredent debts incurred by one or more but not by all the heads of the different branches of the family tamp fee on bond riter's remuneration egistration fee aken for parsonal pur- poses and not accounted for

With regard to the second item representing the antecedent debts incurred by the four branches of the family, I have already held that the dostrine of antesedency applies. This sum includes the items numbered 2, 9,10, 11, 13, 14 and 17 set out in the Sebedule No. 1 of the bond which when the interest at the date of the bond is added amount to Rt. 15,573 and a further debt of Rs. 1,000 under a rolar (Exhibit 4 K) which was proved but not included in that schedule. With regard to the 17th item in the schedule amounting with interest to Rs. 21,570 8.0 the appellants took a This sum was due to farther point. Marwari under a roker Ram Anand (Ethihit 4 J) dated the 2 th Aughan 1304F. (10ch Dase nhar 18 6 A. D). It was a coneelidation of 14 earlier rokars of various deb's between September 1833 and September 1896 some of which were stated in the roker to be for each for meeting necessary expenses, others for the pries of sloth and one small sum of Rs. 265.90 for the price of gold apparently for ornaments. The original rotars were for sums borrowed by one or other of the heads of the family but never by all four and it was only on the 10:h December 1:96 that they all acknow. leged their joint liability for these sams. There ean be no doubt that at that time the negotiations for the loan from the respondents were going on, if not actually empleted and the stamp for the bond had in fact been purchased. It would be difficult in my opinion to find that the transaction of the 10th December was dissociated in fast from the mortgage trans-These debte were sonsolidated astion. under the general transaction creating a joint liability so near the date of the mortgage that it can bardly be said to be dissociated in point of time. I think that the only reliable inference to draw is that the respondents when they undertook a joint liability had in mind the necessity of ereating such a liability in order to obviate any question in future as to their right to charge the family estate with It was Surjya Narain the mortgagee himself who discharged this debt and he must have been aware of the circumstances under which the rokar of the 10th December came into existence or at least had sufficient information to put him upon enquiry as it refers to the previous rotars. I am of opinion that the transaction of the 10th December in itself affords no justification for a sharge upon the family property on the ground of antecedent deb). Thie, however, does not conclude the case. It is necessary to HARI PRASAD SINGHA C. SOURBEDRA MOHAN SINHA.

consider how far the original loans consolidated in the rokar of the 10th Dacember can be justified on the ground of legal recessity. There is evidence to shew that the mortgagee made exhaustive enquiries upon the evidence supplied him by the mortgagors as to the existence of this and other debts stated to be due, and on referring to the different rokars conthe transaction of the solidated under 10th December it appears that the sums borrowed are in almost every ease stated to be for meeting necessary expenses or for urgent necessity. In one case the sum of Rs. 500 was advanged to Gajadher Singh, the defendant No. 3, without any statement as to the purpose for which it was borrowed (Exhibit 4 B. B.) In another case Rs. 15 was borrowed by Maba Prasad without stating the reason (Exhibit 4 M. M.) and in a third case Re. 200 was taken in eash by Maha Prasad without stating the reason (Exhibit 4 O. O.). The bond in suit recites that the advance was required to enable the mortgagors to repay the dues of ereditors and to meet the necessary expenses of the family and no evidence has been called on tehalf of the appellants to prove that the debts were not insurred to meet the family recessities, Whilst it is true that the onus of proving such necessity lay upon the respondents, one must not lose sight of the fast that they had the assurance of the borrowers that the debts incurred were for family necessity and they made exhaustive erquiries as to the existence of these debts which undoubtedly amounted to a very large sum, and even if a few small items cut of the total might appear to be doubtful, I do not think we should scrutinise with meticulous care after a lapse of twenty years each small item about which the existence of family necessity is doubtful so as to give to the appellants the benefit of the doubt when the enquiries made by the respondents must have shewn that the vast bolk of this particular debt appeared to have been insurred for family necessity and was subsequently acknowledg. ed as a joint debt by the four respensible heads of the different branches of the family. I shall refer to this question further when considering the next item.

As to the sum of Rs. 62,733 the antecedent debts insurred by one or other of the different members of the family. this is comprised of over 20 different items including nine of the items set out in the sebedule to the bond, namely, those numbered 3 to 8, 12, 15, and 16. The scheduled items together with interest up to the date of payment account for over Rs. 52,100. There can be no doubt that these debts, as well as the balance making up the sum of Rs. 62,736 existed and were earrying interest at a much larger rate than that stipulated in the bond. were incurred sometime in the name of one of the adult members of the family, frequently in the name of three but never apparently of all four. The rokars in each ease have been produced and they refer to transactions between the years 1894 and 1896. From these and from the evidence given on behalf of the respondents it appears that far the greater portion of the debts were incurred in connection with the marriage eeremonies of different members of the family and for Dwiragaman and Upanyan esremonies. In other eases they were for household expanses and for purposes of sultivation. The household expenses were the ordinary tradesman's bills for sugar, spices and similar articles ineluding a few household utensils and some eloth. The marriage and other eeremonies account for roughly Rs. 40,000, the household expenses amount to between thirteen and fourteen thousand rupees. There are also certain items for each borrowed for purposes which are not clearly explained, The latter in particular have been challenged as not being justified by legal necessity. They come to Rs. 9,335. In so far as the debts incurred for the marriage and other ceremonies and the house. hold expenses are conserned, I think those may fairly be taken to some under the heading of necessary expenses of the family. It may be asked why in the space of two years it was necessary to incur debts for such purposes amounting to rather more than a year's income, but it must be remembered that since 1883 when the first mortgage-bond was executed in order to raise money for litigation in connection with the original asquisition of the estate, this family had always been in debt and

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was paying large sums periodically for interest on the loans. Between 1894 and 1895 about Rs. 35,000 were paid as interest on the previous bond and the re sources of this large family were consequently restricted. The marriage of the younger members had to be provided for and the sustom of conducting such seremonies with come estentation is a well recognised feature of the social conditions existing in this country. According to western ideas it may seem improvident but western standards of economy afford no eriterion for determining the necessary requirements of an Indian family in the position of the appellants. Their prestige as Zemindars of some position demands, and their friends expect, an amount of display in such seremonies which might appear lavish and unnecessary for people of similar means in western countries. I do not think that having regard to the drain then existing upon the income of the family which was according to the evidence in round figures about Rs. 40,000 a year, it can be said that these expenses ought to have been met out of the income or that they were in themselves excessive and they are expenses which do not srice every year but only upon occasions when the younger members of the family are of marriageable age.

With regard to the items for which each was borrowed for purposes not elearly shown by the evidence, these appear from sertain rokars which have been produced and marked as exhibits in the essa.. The exhibits in question are those marked 40, 40, 41, 4r, and 4xx. They were paid off in December 1896 at the time when the bond was executed and the money advanced, and the amount is stated to be Rs. 9,335. It appears from the rokars that there were sums borrowed in two cases by Ram Charan Singh and others in two cases by Hari Prasad Singh and in one case by Rim Charan Singh alone. The lenders are in some cases dead and the only evidence we have about them is that the some were borrowed by the members of the family whose names appear on the rokars and who had been in the habit of effecting such loans for family purposes,

Had the mortgage been granted for an advance to pay off these debts alone, it might

have been difficult upon this evidence to find that they were in fast justified by family necessity, but it must be remembered that these sums were borrowed about twenty years before the suit was instituted. The original mortgagee is dead as well as others who might have been able to throw some light upon the exact purpose for which the loans were taken. Moreover, the defendants themselves who admit that they have accounts which might throw some light upon the transactions have not produced these accounts and have given no evidence in support of the contention that there was no legal necessity for the loans. This was a matter within their own special knowledge and the representation made at the time of the loan the debts were insurred for necessities of the family and the evidence shows that bona fide enquiries were made at the time by the lender as to the nature and existence of these debts. But the eirenmstances under which the family found itself at that time must also not be lost sight of. Its history has been dealt with by the learned Subordinate Judge and need not be repeated here. It is the story of a collateral branch of a family living in comparative obscurity and poverty suddenly finding themselves within measurable dist. ance of comparative wealth through the death of the maternal great-grand-father without male issue. Opposition to their elaim is made by the alleged adopted son of the maternal ancestor's second wife resulting in litigation and an eventual compromise by which the family secured a substantial share of the estate. This is followed by further litigation to defend the property so acquired against the claims of other relatives of the original holder and still further litigation to get rid of ensumbraneers. To find money for the purposes of litigation in the first instance borrowing is resorted to and the family income is largely diverted towards paying interest on the loans which are renewed from time to time and further sums are borrowed for the purposes of maintaining the family. The loans began in 1883 and ended in 1896 when the bond now in suit was executed. At that time in addition to the indebtedness under the previous bonds amounting to over two lakes of

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rupees debts had been incurred the nature of which I have already referred to of well over a lakh. The great majority of these were debts manifestly falling either within the category of antecedent debts or debts incurred for family necessities and recourse is again had to the money-lender, who, the evidence shows, satisfied himself as to the existence of the debts and their nature after an exhaustive enquiry. He was also assured that the creditors were pressing for payment and that the debts were those of the family and for legal necessities. I am satisfied that bona file enquiries were made by the lender and that the enq iries show that in the vast majority of cases the debis were such as to lay the foundation for a valid sharge upon the family property. If twenty years later it should appear that in a few instances there is no conclusive proof that the debts were actually incurred for family neceseity or with the active participation of all the adult members of the family, still if the circumstances show that the needs of the family were such that it is probable that the money even in these cases was required for family necessities, I do not think we should require absolute proof in every case but may presume that the lender satisfied himself at the time that the debts were of such a nature as been represented to him and as appears from the recitals in the bond. In these eirenmstances I think the silence of the defendants as to the nature of these deb:s is not without significance, and may be taken into account as affording some presumption in favour of the plaintiffs, In the eireumstances I am not prepared to differ from the Subordinate Judge upon this part of the case. I may add that in the previous suit which proved infrustuous no such defence was set up although it would have been easier at that date to have determined by evidence the exact purpose for which these doubtful sums were borrowed.

With regard to the stamp-fee on the bond and the registration fee, these items are not challenged. The writer's remuneration amounting to Rs. 1,750 which was the same as the stamp duty has been challenged as exorbitant and unnecessary. At first eight this would certainly appear

shows that it is customary in such cases to pay the writer a fee of not less than the stamp duty on the bond, and I see no reason for differing from the decision arrived at by the learned Subordinate Judge upon this question.

The sixth and last point raised by the appellants relates to that part of the decree whereby the learned Judge allowed interest on the amount of the personal decree and costs in respect thereof at the rate of 6 per cent, per annum until real zation.

It is not very clear why the learned Judge awarded interest only upon the amount of the personal deeree and not on the amount of the mortgage-decree but there is no cross-appeal on this question. I think there is much to be said for the argument that the Southal Parganas Regulation applies only to the interest to be decreed under the bond and does not limit the powers of a Court under section 34 of the Civil Procedure Code to award interest on the deeretal amount notil real zation. But it has been held in this Keshobati Kumari v. otya Court in Niran an Chakraberty (9), that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan bat only upon the amount of the principal debt itself as to do so would contravene the provisions of the Regulation relating to compound interest The principle underlying this desision applies equally where the amount decreed as interest already equals the sum advanced. Although I have some doubt as to the propriety of the decision mentioned, I am not prepared to differ from the conclusion there arrived at and I think we should follow that decision,

The result of my judgment is that the appeal is allowed in part and that the decree of the lower Court must be modified in accordance with the above findings.

There will be the usual mortgage decrea for the amount of the principal sum advanced as shewn below together with a like amount as interest thereon after giving eredit for the sums already paid in respect

^{(9) 47} Ind, Cas. 179; (1918) Pat. 305.

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of principal and interest. The total sums advances were Rs. 2,85,903.1.9 of which Bs. 12,000 were re paid on the 13th January 18 4, leaving a balance of Rs. 2,73, 03-1.9. From this must be deducted the sum of Rs. 12,963 disallowed by the Sub ordinate Judge as not justified by legal necessity for which there will be a personal decree with interest to a like amount after deducting the proportion of interest already paid as shewn below. The total paid was Rs. 1, 16,352-7-1 but Rs. 400 of this must be allocated to the R. 12,000 on the 13th January 1884 paid off leaving a balance of Re. 1,35,952 7.1 difficulty arises as- to how much of this should be deducted from the interest payable under the mortgage-deeree and the interest payable under the personal decree As the amount of the personal decree deducted from the cash advance made at the date of the last bond on the 21st Desember 1886 it would appear that the interest paid before that date under previous bones should be allocated to t e previous advances which are included in the mortgage-feeres. After deducting the Rs. 40) already mentioned this amounts to Rs. 83,704 3 6 the balance paid since that date amounting to Re. 55,248-3.7 should be deducted rateably from the amount of interest payable under the mort. gage decree and the personal decree, that in the proportion 18 to 887, which Rs 2,60,940 bears to Rs. 12,96 t.

I see no reason for departing from the ordinary rule as to costs. I think the appellants who have reduced the amount awarded against them from something like 15 lakes to something like 5 lakes are entitled to their proportionate costs of this appeal.

Buckettl, J.—This was an appeal from a decision of the Subordinate Judge of the First Court of Bhagalour given on the 17th June 1918. The general circumstances which gave rice to the present litigation are of a very simple kind. They present many features which are familiar in the Courts of this and other Provinces and they raise questions which perhaps unfortunately, in the present which perhaps unfortunately, in the present of the law relating to the position of the joint Hadu family, occupy and must continue to occupy, unless and until this branch of Hindu Law is further

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explained by judicial decisions or clarified by litigation, much of the time of the judiciary.

In this ease are to be found factors of very usual type, an action brought by the plaintiffs on a mortgage-bond purporting to be executed in the plaintiffs' favour by some members of a joint family of Hindus subject to the Mitakshara Law on their own behalf and as guardians of minors and entered into for the purpose of giving to the plaintiffs seenrity for large sums of money lent by the plaintiffs to some of the defendants. Again also is to be found the usual defence (which always demands, as the law is at present constituted laborious investigation) of the enggestion by sertain members of the joint defendant family that the debts contracted were not debts of necessity or for the family benefit and cannot be supported by any adaptation of the modern dostrine of antecedent debt. In this particular ease there are, however, other special and somewhat peculiar features which raise points of considerable difficulty and interest. It is desirable, therefore, at this stage to give in some slight detail a short summary of the events which gave rise to the present suit.

There are three plaintiffs in this action, the first is the son of one Rai Surya Narayan Sioha Bahadur whilst the second and third are the grandsons of the same gentleman, There are a large number of defendants but so far as is material here, they may be grouped as being the descendants of, or deriving their title by purchase from, the descendants of one Balbbadra Singh. The second defendant died shortly before this appeal came on for hearing. Tois ancestor Balbhadra Singh left tores sons Ram Charan Singh, Gara Charan Singh, and Maha Prasad Singh, all of whom are now deat, the defendants are substantively their descend. ants or purchasers therefrom. It is at the moment unnecessary to refer closely to the way in which the defendants acquired the property which they owned, it is sufficient merely to mention that it has been referred to in these proceedings under the name of "The Bereope Estate." It was a valuable property and is said to have brought in a enasiderable insome of batween possibly Rs. 40,000 and Rs. 50,000 per annum. defendant family, however, never, although

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no precise allegations of extravagance are now persisted in against any of its members, seems to have been able to live without insurring debt, and for many years, extending back as far as 1:83, there was a long course of dealing between the plaintiffs' predecessor, Rai Surya Narain Sinha Bahadur, and the defendant family. These transactions consisted substantially of a sequence of loans to the defendant family by the plaintiff's predecessor and their nature is conewbat unusally fully recorded in a series of mort. gage bonds, most of which show the common place features of the adding of accrued interest to the amount secured by the previous bonds coupled with the addition of a further sum of money advanced to the The bond which is now being sued family. upon is dated the 21st December 1896 and was in favour of Rai Surya Narain Sinha Babadur for the sum of Rs. 3,50,000 at $7\frac{1}{2}$ per cent, compound interest with yearly rests. It was entered into by Ram Charan Singh and Maha Pracad Singh, two sons of the common accestor Balbhadra Singh, by Hari Prasad Singh and Biswa Nath Singh two sons of the remaining, and at that time, deseased son of Balbhadra Singh, whose name as mentioned above, was Gurn Charan Singh, by Gajadhar Singh and Rup Narain Singh, sons of Ram Charan Singh by Sasi Bhusan Singb, son of Maha Prasad . Singl; by three minors through their father Hari Prasad Singh and by one ninor through his father, Biswa Nath Singh. It may perhaps be hardly necessary to point out that since the date of this bond numerous other births bave taken place in the family which feature accounts partially for the increased number of defendants of whom however Nos. 19 to 42 are purchasers or transferees. Defendant No. 18 was once a member of the joint family but was adopted out of it. It may perhaps be convenient here, in view of the fast that they will have to be referred to at a later stage, to give a list of the bonds representing the which constituted the transactions between the parties. The first bond (Erhibit 3c) was dated the 3rd Ostober 1883 the amount advanced was Rs. 73,000 and the rate of interest was 12 per cent, compound with yearly rests. The second bond (Exhibit 3b) was dated the 20th Septem. ber 1888, and was an entirely disconnected

transaction, the money was borrowed to meet Government and settlement expenses and the validity of this transaction is not challenged. It was for Rs. 12,000, at 11 per sent. compound interest with yearly rests. The third bond (Exhibit 3F) consolidated these two previous leans together with a seriain amount of accrued interest. It was dated the 12th May 1890, and was for Rs. 95,600 at 10 per cent. compound interest with yearly rests. The 4th bond (Exhibit 3E) was dated the 29th September 1891, and was for Rs. 1,67,000, of which Rs. 64,761:1.9 constituted a fresh advance, the remainder representing a renewal of the old loan with such interest as had accrued. It bore compound interest at 9 per cent. with yearly rests. The 5th bond (Exhibit I) which is the one upon which action was brought in this case, war, as already mentioned, dated the 21st December 1896 for a sum of Rs. 3,50,000 of which Rs. 1,36,142 represents a fresh loan, the remainder being, as in the previous case, a renewal of the previous bond. By it the mortgagees bypothecated a large quantity of property in the Sonthal Parganas and a small quantity in the District of Bhagalpur, it bore compound interest at 71 per cent. It may be mentioned that quite considerable suras were at different periods paid off by the defendant family by way of interest.

It will be at once observed that it cannot be contended that the rates of interest charged were in any way of an extravagant description; but it must be mentioned that at the date of the suit, the claim had reached the large figure of Rs. 11,81,811 and the amount had swollen considerably by the date the suit was heard. Indeed it may also be noted here that the Subordinate Judge decided substantially entirely in favour of the plaintiffs awarding them a sum of some Re. 15,27,997 as against the family defendants together with a personal desree of some Rs. 44,134-7-5 together with costs. It is from this deeree that this appeal The records has now been prosecuted. printed for the purpose of this appeal are so massive that it will probably be advantageous at once to endeavour to set out with precision the points which have been very ably argued on the part of HARI PRISAD SINGAL U. SOUBBNDRA MOHAN SINHA.

the appellants, i.e., the defendants. They

may be summarised thus:-

(1) Aggestion relating to jurisdiction. This arises in the following way. The Baraope estate is situated in the locality known as the Sonthal Parganas, an area ramovad, broadly speaking, from the operation of ordinary law in many respects and governed largely by special Regulations (which have been varied from time to time) known as "the Regulations for the Pease and good Government of the Territory known as the Sonthal Pargans." So far as this question of jurisdiction is material here Regula. lation No. V contemplated that no suit connected with land should be heard in any Civil Court other than the special Courts provided under the Regulation so long as the place had not emerged from what is here known as the process of "Settlement", that is to say, until the completion of the territorial and revenual survey. It is argued here that it is not certain that the area within which the Barespe estate was situated was actually clear from this embargo, and it may conveniently be pointed out here also that in an earlier action brought by the plaintiffs in 1904 upon the same bond as that now sued upon, the defendant was successful on this self same ground.

(4). A question arising as to the amount of interest which can be elaimed by the plaintiffs. Here again this point arises out of the special arrangements made applieable to the Sonthal Parganas under the Regulations mentioned above. By Regulation VI, which purports to be directed against usury, there are certain very important limitations laid down prohibiting invarious ways the amount of interest which ean be elaimed within the area in question. It is argued here that these Regulations are applicable in this case, and indeed, this pointwas, together with the question of jurisdiction, a subject of considerable discussion in the previous astion to which reference already been made when it oams before the Judicial Committee of the Privy Council,

. (3) A question arising as to whether this suit is not, under certain peculiar eireumstances, barred by the operation of the provisions of the Limitation Ast. The point arises in this way. The present suit was sommensed on the 5th; February: 1915, at

shild in existence, who is said to have been born in about 1910, whose name was Sripati Singh. He was the son of Sasi Bhuean Singh and a grandson of Maha Prasad Singb, he was not joined as a party in the proceeding until the 30th May 1916. The plaintiffs etate that as soon as they discovered the existence of this child, they took the step of having him joined in proper manner, and in fact he was, at the date given above, put on the record under the order of the Court as defendant No. 16 (a). The date upon which payment of the bond was strictly due was the 14th March 1903 and it is argued that as more than 12 years had elapsed from that date before the child was joined, the suit would be barred by the provisions of the Limitation Act on the ground that it was obligatory that he, having an interest in the right of redemption of the mortgage, was a necessary party to the suit.

(4) A question as to the non existence of legal nesessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very oareful consideration of the elements of which the loan was in fact composed, and it has also been the subject of labourious enquiry and research before this Court. In cases. such as these, where, in order to find the actual origin of portions, very often emall and very often numerous of what is a large aggregate sum of money, one has to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in any very satisfactory manner, and indeed, it is probably doubtful if it is right or necessary so to do. The Sabordinate Judge took the broad view that in the main old loans contrasted for the purpose of paying off earlier debts of a composite character should be regarded earrying their own barden of proof that they fell, roughly speaking, within the sonfines of what may properly be regarded as legal necessity or family benefit.

(5). A question arising as to how far the provisions of this bond are eapable of being enforced against the defendant family under the dostrine of antesedent debt. It is argued here that the dostrine of antecedent debt only applies when the exact relation. ship of father and son is present. It is suggested that a man who is a member of a that time it is admitted that there was a joint Hindu family subject to the Mitakehara. HARI PRASAD SINGHA U. SOURBNDRA MOHAN SINHA.

Law, cannot in any way bind his nephew. It is freely admitted that some of the debts which were originally contracted and which purported to be met by their entry into the bond sued on or in connection with the previous bonds, were contracted nominally, sometimes by one, sometimes by another and sometimes by a combination of the heads of the family; and the contention here put forward is that in cases where any particular original debt purported to be contracted by, for example, one member of the family, such a transaction cannot, on the doctrine of antecedent debt, be held to bind the nephews of the person who contracted such a debt but only to bind his sons.

(6). A question as to the barring of the claim for a personal decree by the provisions of Order II, rule 2 of our Civil Procedure

Code.

Before dealing with these points in detail, it is necessary to ascertain what was really the position of the defendant family with regard to their possession of the property in question, for it has been seriously suggested that they were not a joint family at all so far as this property is concerned. The facts, however, with regard to this matter

are not complicated.

A certain Raja Ajit Barham was the proprietor of the Barcope property, and at his death left two widows, the Rances Dilabati, and Bhulanbati, who succeeded to the estate. Upon the decease of the Rani Dilabati, Rani Bhulanbati came into possession of the whole property and on her death the Court of Wards took possession of it on behalf of one Babu Chander Deyal Barham, a son of Mongal Barham, on the ground that it was alleged that he had been adopted by the Rani Bhulanbati as son to her deceased husband. Now, Ram Charan Singh, Guru Charan Singh and Maha Prasad Singh, the three sons of Balbhadra Singh had as their mother one Musammat Parbati who was a daughter of Raja Ajit Barham, and they brought a suit for recovery of the estate from the Court of Wards, joining in their action the sons of another daughter of Raja Ajit Barham. The suit was compromised, Guru Charan, Ram Charan and Maha Prasad Singh obtaining 7 annas 171 gundas share of the Barcope Raj whilst Chandra Dayal Barbam obtained a 4-annas share. It would appear that in this litigation these

three men incurred legal expenses in order to pay which they had to borrow. [See Appovier v. Rama Subba Aiyan (10), Mohaber Roser v. Joobha Singh (11)].

Subsequent to this compromise, these three men became involved in another piece of litigation, one Batan Barham and other relatives of the deceased Raja Ajit Barbam having unsuccessfully brought a suit against them and others for the passession of the Raj and here again further legal expenses were necessarily incurred. I think that there can be no doubt that the property having been thus asquired through their mother it sould not be regarded, when it reached the hands of Balbhadra Singh's three sons, as their joint aneestral family property; [Venkayyamma Giru v. Venkata. ramanayyamma Bahadur Garu (12), Atar Singh v. Thakar Singh (13), Bishwanath Prasad Sahu v. Gojadhar Prasad Sahu (14)], butl think that from an examination of what these men themselves stated in various bonds into which they entered that, as the Subordinate Judge has found, they undoubtedly elested to treat the estate, which they had thus acquired, as joint family property. In the first bond of 1883 which was entered into with the plaintiffs' predecessor by Ram Charan Singh for himself and as karta of the joint family for his minor sons Gajadhar Singh and Rup Narain Singh and for his nephew, the son of Guru Charan Singh, and by Hari Prasad Singh for himself and as guardian of his brother, Biswanath Singh and on behalf of his own minor son Lakhi Prasad Singh, and by Maba Prasad Singh for himself and as guardian of his son, Sasi Bhusan Singh, the facts as to the way in which they had acquired the property are very fully set out, and it is there stated that the properties and family of the deceased lady Musammat Parbati are joint, In clause 3 of

(12) 25 M. 678; 4 Bom. L. R. 657; 7 C. W. N. 1; 12

M. L. J. 299; 29 I. A. 156 (P. C.).

(14) 43 Ind Cas. 370; 3 P. L. J. 169; 3 P. L. W.

286; (1917) Pat, 350.

^{(10) 11} M. I. A. 75; 2 Sar. P. C. J. 218; 8 W. R. P. C. 1; 1 Suth. P. C. J. 657; 20 E. R. 20.

^{(11) 16} W. R. 221; 8 B. L. R. 38.

^{(13) 6} Ind, Cas. 721; 35 C, 1035; 10 Bom L. R. 790; 128 P. W. R. 190; 35 I. A. 236; 8 C. L. J. 359; 12 C. W. N. 1049; 18 M. L. J. 379; 4 M. L. T. 207; 42 P. R. 1910 (P. C.).

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that bond it is etated that although the properties they asquired were not the properties of their father and that although in consequence the sons during the lifetime of Ram Charan Singh and Maha Prasad Singh had no interest thereir, yet all the debts were in fact contracted for val d and legal necessities. In the second bond, entered into in 1:88 we find it is executed by Ram Charan Singh in his own right and as karta of the joint family on behalf of his minor son and on behalf of his naphew Biewanath Singh, by Hari Peasad Singh for himself and as guardian of his brother, Biswa Nath Singh and also on behalf of his own son and by Maha Prasal Singh both for himself and as guardian of his minor son, and they mortgaged their whole share in their estate declaring thomselves to be jointly and severally liable for the entire debt. In the third bond of 1890 executed by Ram Charan Singh for himself and his son Rup Narayan, by Hari Prasad Singh for himself and his son, by Biswa Nath Singh, by Maha Prasad Singh for himself and his own son, and by Gajadhar Singh son of Ram Charan Singh they again deslared themselves to be jointly and severally liable in mort. gaging their Zamindari property. In the 4th bond of 1831 executed again by Ram Oharan Singh for himself and his minor son Rup Narayan Singh, by Hari Singh for himself and his two minor sons, by Biswa Nath Singh, by Maha Prasad Singh for himself and his minor son and by Gajadhar Prasad Singh, they again mortgaged their Zimindari property and for the debt they declared themselves to be jointly and severally liable; whilst in the bond now sued upon entered into by Ram Charan Singh, by Maba Prasad Singh, by Hari Prasad Singh, by Biswa Nath Singh, by Gajadbar Prasad Singb, by Rup Narayan Singh, by Sasi Bhusan Singh, Likhi Prasad Singh, Bishen Prasad Singh and Dwarks Prasad Singh, under the guardianship of their father Hari Prasad Singh and by Tilokenath Singh under the guardianship of his father Biswa Nath Singh, there is an express deslaration that all the executants members of a joint Hindu family, here they again mortgaged their properties deslared themselves to be jointly and severally liable for the debt, and in clause 9 add "we have not transferred the same in any way before this and that we have absclate right thereto". I think that it must be taken that for the purpose of this suit it is quite clear that the property in question must be regarded as joint family property and subject to the appropriate incidents of Hindu Law attaching thereto

I now propose to endeavour to deal with the question of jurisdiction. This suit was instituted in the Court at Bhagalpur, which is in this province. The properties which were mortgaged by the plaintiffs' predecessor to the defendants were very largely situated in the Southal Parganas District and only a small portion lay within the district of Bhagalpur, Under section 5, sub-section (1) of the Southal Perganas Regulation, it is laid down that "from the date on which under section '9' (to which reference will be made presently) of the Regulation, the Lieutenant-Governor declares by a Notifica. tion in the Calcutta Gasetts, that a settlement shall be made of the whole or any part of the Southal Parganas until the date on which such Settlement is declared, by a like Notification, to have been empleted, no suit shall lie in any Civil Court established under the Bangal, Agra and Assam Civil Courts Act of 1887, in regard to

"(a) any land or any interest in, or arising out of land, or

" (b) the rent or profits of any land, or

"(c) any village headship or other office connected with any land,

"in the area sovered by such first mentioned notification nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it."

Whilst by sub sestion (2) it is enacted that between the dates referred to in subsection (1) all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under section 2 of the Southal Parganas Act, 1855, or section 10 of this Regulation ascording as the Lieutenant-Governor may from time to time direct and such officer shall hear and, even though during the hearing the settlement may be deleared to have been completed, determine them,"

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Section 9 lays down "the Lieutenant-Governor may from time to time, by notification in the Calcutta Gazette, declare that a settlement shall be made of the whole or any part of the conthal Parganas for the purpose of ascertaining and recording the various interests and rights in the lands."

It is unnecessary to consider here what is the precise meaning of this section, for the matter has already been dealt with by the Judicial Committee of the Privy Council, as I have already had ossasion to mention in a case brought in connection with this bond now suad by and against upon substantially the same parties in the year 1904, being decided, however, in the Privy Council in 1914 Maha Prasid Singh v. Ramani Mohan Singh (1)]. It is saffisient to say here that it was held in that case that although it appeared that there had been a notification declaring that a settlement of the Sonthal Perganas was to take place, yet as no notification had issued that the settlement had been completed, the Court at Bhagalpur had no jurisdiction to entertain the suit. It is, therefore, unnecessary for me to enter upon any close examination as to how it comes about that the Sontbal Parganas now falling within the Province of Bihar and Orissa, are amenable to the special Regulatione, which were in existence prior to the separation of this province from that of Bengal, or as to why suits, even of such large amount as the one in question, were under the eireumstances which existed when the case dealt with by the Privy Council was instituted, still incapable of being tried other than by the Special Tribunals instituted under the Regulations, and it is common ground that it is sufficient here merely to ascertain whether any thing has happened since the date of the institution of the prior suit which indicates that settlethe Sonthal ment of such part of Parganas as include Barcope has since been completed. If that settlement has not been completed, it is obvious that the Court at Bhagalpur could not have entertained this suit; if, however, it has been satisfactorily shown or a suitable inference can be drawn that such settlement is now over, the question of jurisdiction must obviously be decided in favour of the plaintiffe. The Subordinate Judge has found against the defendants on this point. What really happened appears to have been that the Government many years ag declared a settlement of apparently the whole of the Sonthal Parganas which was commenced and carried on by a Mr. Wood from 1873 to 1879, there is no definite evidence to indicate that this Settlement was ever finally completed and no notification of completion has been discovered. It may have been that it was too great a task at that time and that it was in fact never completed or it have been that a notification of may completion or of a whole partial completion may have been in existence but has not been discovered, at any rate, what is certain is that, at later dates, the Government began to deal piece-meal with comparatively small areas of these Perganas notifying for settlement various places from time to time, the work was earried out by different persons at different periods, notably by Mr. Craven in 1892, Mr. H. McPherson between 1903 and 1.0 and Mr. Allanson between 1905 and 1903. It will be found that the Barcope estate was dealt with in there settlements to which I have referred. Subordinate Judge in dealing with this question says: "The plaintiffs have shown that though the settlement made by Mr. Wood, was completed, but not published, the Local Government brought the portion of Barcope, under settlement from time to time (vide the copies of the Calcutta Gazette filed in this respect on behalf of the plaintiffs) and finally published it after its completion. It is, therefore, clear that the Local Government has superseded the settlement completed by Mr. Wood and has not allowed it to exist in the eyes of law. I, therefore, reject the defendants' contention as frivolous."

I think that this is by no means an improper expression of what the real situation is. In 18:9 a Notification dated the 29th January of that year was issued by the Government of Bengal declaring that a settlement should be made of the villages comprised in certain scheduled estates amongst which was Tuppa Barcope (Exhibit 28). On the 10th September of the same year, however, this Notifisa. tion was amended and a corrected list of This included Taluk areas substituted. Barcope, or Tappa Barcope. Oa the let July 1892 (Exhibit 27) we find that Mr. Craven, the Settlement Officer, submits his final report upon this Settlement of the Taluke, HARI PRASAD SINGHA U. SOURENDRA MOHAN SINHA.

which included the Taluk Barcope (Exhibit 27) and on the 13th March 1893 (Exhibit 28b) appears a notification by the Government of Bengal declaring that Mr. Oraven's Settlement had been concluded and completed and in the list given is to be found the Barcope Tuppa. It will, however, be seen from Mr. Craven's report that the settlement proceedings were not of a precisely exhaustive character, and they were in part apparently completed later. On the 14th October 1903 there is a Notification (Exhibit 28 C) of the list of areas in which settlement has been completed which includes three villages in Tuppa Barsope, Again on the 25th October 1905 there is another Notification (Exhibit 29.D) declaring that there should be a revision of the settlement made in the ease of certain areas which included the Zamindari of Barsope, Touzi No. 481. On the loth September 1907 there is a further Notification (Exhibit 28-E) that a settlement thereof has now been completed and concluded. The list of places where settlement has been so effected includes a large number of places in Barcope, whilst on the 12th February 1910 a further Notification (Exhibit 28 F) of conelusion of settlement includes the estate of Barcope, Tonzi No. 481. 1

Now some endayour has been made by Counsel for the appellants to show that if one examines the reports of Mr. McPherson and Mr. Allanson and the number of villages which are there mentioned, one may find certain discrepancies in the number, and that it is, therefore, not clear that all the property duly and completely settled. has been I myself, however, think that this bas been a failure. endeavour eider that there was on the face of the doeumente, to which I have referred, a very elear indication that the settlement of the whole of the Barcope estate was in fact completed and although it may be that there is some little difficulty in following through and identifying each village (the names of which may be differently spelled at different times) and although there may be come further difficulty in reconciling exactly the numbers of villages which are sometimes referred to as having lain within the confines of the estate, I do not think that there is any satisfactory evidence to show that anything was left out of the settlement. Under these eirenmetaness it would appear that since the institution of the last suit the settlement has been concluded, and that consequently the difficulty which stood in the plaintiffs' way in the previous case as to the Court at Bhagalpur not having jurisdiction to deal with the matter, no longer, now applies. The following cases are of interest in connection with this point:

Dungaram Marwiry v. Rojkishore Deo (15), Sahdeo Narain Deo v. Kusum Kumari

(16).

I now pass to the second and important question of interest.

Section 6 of Regulation III of 1872 of the Southal Perganas lays down the following order:—

"All Courts having jurisdiction in the Southal Perganas shall observe the following

rules relating to usuary, namely :-

- (a). Interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than two per cent, per mensem notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed;
- (b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal cum if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

We get an explanation and illustration which are both such salient features of Indian additional legislation and which, as is sometimes the case, although intended to be of an explanatory character are so worded as to give rise to no little confusion. The Explanation and Illustration which were added in 1893 read thus:

"Explanation.—The expression intermediate adjustment of account in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when without the passing of fresh consideration, the original claim is increased by such renewal."

"Illustration.—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the

^{(15) 18} C. 188; 9 Ind. Dec. (N. s.) 89,

^{(16) 46} Ind, Cas. 929; 5 P. L. J. 164.

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Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the

bond will be Rs. 100." The section is directed, according also to the side note, against usurious practices, and of course, the object of all this peculiar legislation of very paternal character which is operative in the District of the Sonthal Perganas was and is to protect the inhabit. ants there, who were of a simple type and backward culture, against what might appear to be the imposition of unsarapulous and adroit persons who might take advantage of processes available to them under the ordinary law. In Act No. XXXVII of 1855 we see in the greamble that it is stated that the ordinary law in force in the Presidency of Bengal is not regarded as being adaptable to the unsivilised race of people called Sonthals and in the Regulation, to which reference has already been made, one finds numerous instances in which it is endeavoured to safeguard the interests of these people of early culture. It is no doubt rather hard to reconcile the undertaking of great transactions in connection with these ideas of the protection of a primitive race but whilst, in the ordinary way one would have contemplated, as no doubt was the case, effairs only of small degree, the fact remains that as the settlement of the district proceeded, it was discovered that there existed persons possessed of large and valuable territorial rights. In the case now before us we have exhibited individuals, blessed with a large income and borrowing great sums of money, but there is nothing to indicate that the Regulation is other than of general application to all affairs of whatever magnitude conducted in the District. The broad contention which is put forward here on behalf of the appellants is that the Regulation which has been quoted above must here apply. The Subordinate Judge, however, did not think that the appellants could in any way take advantage of the provisions of this section VI of the Regulation. In the issues which were raised for his consideration, issue No. 11 was "are the plaintiffs entitled to compound interest, or interest exceeding the amount of the principal, keeping in view the section 6 of Regulation III of 1872 ?" In dealing with this issue, the Sabordinate

Judge writes in his decision, "the plaintiffs have successfully shown that the father of the plaintiff No. 1 lent the executants of the bond in suit Rs. 3,50,000, out of which Rs. 1,3,142 were paid to them in cash, the rest having been applied to the payment of their previous debts due to him and that when he did so, the terms of the 3rd and 4th bonds which were executed in his favour did not expire, and that he not only allowed the bonds to be renewed but also reduced the rate of interest thereof, the result of which has been that there has been a gain of over Rs. 12,000 to the executants of the bond in suit. It is, therefore, clear that the transaction under the bond has been fair and equitable within the meaning of the illustration attached to section 6 Regulation III of 1272. It appears that this question was not under controversy in the sait before the Judicial Committee and has not been judicially ensidered. This being so, I find that the plaintiffs are also entitled to the interest claimed within the meaning of the Illustration."

The Subordinate Judge did not think that there were any intermediate adjustments of account within the meaning of the Explanation attached to the section and considered that the plaintiffs had a right to recover the interest as claimed and he, therefore, found this issue against the defendants.

I greatly doubt whether the Subordinate

Judge is here correct.

The exast proposition which has been put forward by Counsel on behalf of the appellants is divisible into three definite suggestions, firstly, that the amount of interest which can be obtained by the plaintiffs cannot exceed the actual principal sums advanced, secondly, that the amount of interest which has been in fact paid must be deducted from that amount of money which, payable as interest, equals the amount of the principal loan, and thirdly, that interest cannot be granted on the decretal sum for any period after the date of the judgment if it would result in the amount thereby recoverable exceeding the total of the principal actually advanced. We are fortunately, I think, not altogether without authority on part of these questions. In the case to which reference has been made above in connection with the consideration of the questions of jarisdiction [Maha Praea! Singh v. Ramani Mohan Singh (1)], the

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general point has, to my mind, been the subject of what amounts to a judicial decieion. In the judgment of their Lordships delivered by Lord Moulton, it is stated that "Their Lordships are also of opinion that, apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of section of the Sonthal Perganas Settlement Regulation, 1872, relating to usury and, therefore, to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loap."

Their Lordships also, in my view, disposed of the question (advanced here but not very strongly orged) as to how far section of the Regulation was observeable by Courts other than those which were physically situated in the District. Moulton states after quoting in extenso sestion 6 of the Regulation: "The respondents sought to establish that the phrase, 'all Courts having jurisdiction in the Southal Parganas' meant-Courts situated in the Sonthal Parganas and dealing with matters purely local." Their Lordships eannot accept this interpretation. The words are definite and presise, and must be applied in their na'ural signification. It was urged that taken literally they would apply to everything done by a Court having jurisdiction in the Southal Parganas whether the matter related to those districts or not, insamuch as the language used makes the application of the enactment depend on the Court and not on the matter in dispute. But this is to ignore the fact that the Regulation is only applicable to the Sonthal Parganas and that, therefore, it would not apply to Courts having jurisdiction wider than these local limits when such Courts were dealing with matters relating solely to other parts of India. The enactment, therefore applies to Courts baving jarisdistion in the Sonthal Parganas and acting under and by virtue of such jurisdiction."

I am bound to say that I think that Lord Moulton's dista in the earlier case relieve this Court from considering a question which, I em'ess, presents to me very considerable difficulty. Here there lie a series of bonds, the amount of what one may perhaps term the

original debt, (that is to say, the actual fresh eash advanced) is not in dispute but with the exception of the second bond of 1886, which was, as I have mentioned before, an independent transaction, each of the five bonds which were consolidated eventually in the mortgage-bond which is now the subject of this suit, brought to itself an assumulation of interest coupled with au addition of a new advance and the accumulated interest was added to the old capital and with the fresh advance forms the aggregate sum for which the new bond is executed. I cannot but imagine that there proseed. ings constitute what I may term in the pharassology of the Regulation "intermediate adjustments", indeed I am not at all sure that each pause in compound interest, represanted by what is known as the "yearly rest," is not also an intermediate adjustment, and I am quite prepared to regard them as sush. For these reasons, I am afraid, I must hold that the plaintiffs cannot resover on their deerse a sum in excess of that which was astually advanced to them in oush which, I understand, amounts in all to the ennsiderable sum of about Rs. 2,85,000.

The second suggestion which is put forward on behalf of the appellants is that what has been in fast paid by way of interest must be deducted from the amount of interest to which the plantiffs are restrictto acitees edt to enoisiverq edt reban be the Regulation to which reference has been made. I cannot but think that this contention is sound, for if any really effective meaning is to be given to the restrictive character of the section of the Regulation under consideration, any other decision might result in absurdity, for example in the supposititious event of a borrower having paid to his lender a very large quantity of interest, he might yet be liable under any construction of the Regulation other than that which I think should be given to it, to pay further assumulated interest which might amount, together with what he had already paid, to far more than the aggregate of the original sum lent and this would be a result which would, in my opinion, be wholly inimical to the purview of this section 6 of the Regulation, I, therefore, have some to the conclusion that the amount of interest already paid must be deducted from the total sum claimed by the plaintiff HARI PRASAD SINGHA U. SODBENDRA MOHAN SINHA.

by way of interest. In this particular case the accumulations of interest are so great that they far exceed the original amounts from time to time lent and so the figure

due is a matter of simple calculation.

The third suggestion made by the appellant is that no interest can be granted on the sum setually decreed after the date of judgment if, at any rate, that would result in the smount so recoverable exceeding the total of the principal actually advanced. Now in this Court in the ease of Keshoboti Kumari V. Sotya Niranjan Ohnkraberty (9) it has been in effect held that the incidents of ecction the Regulation pursue the deeretal sum; in this decision by Rce and Coutts, JJ., it was laid down that interest subsequent to the decree must be limited to interest on the principal advanced and the costs of the suit. If the operation of section 6 of the Regulation is thus after the decree applicable to the amount decreed, it must logically follow, if that view is correct, that when the interest accruing after the decree amounts, together with the interest already paid before or awarded by the deeree, to more than the principal, it must stop or if. as in this ease, the amount of interest already paid prior to and awarded bу the equals the principal, no more can corne the deeree. Had it not been for after this decision with this proposition I am not sure that I should have been content to agree. I should have felt inclined to think that when judgment has been given for a specific amount and for the right amount, interest at the usual judicial rate follows as a matter of coure, that the matter no longer lies within the embargo of the Sonthal Perganas Regulation but follows the normal course, and that even though by accumulation of interest after judgment the amount ultimately recoverable by way of interest may in fact exceed the total amount of the principal actually advarced, the position thus achieved is a regular one. In sonnestion with this question of interest one may refer to the following BABES: Shama Charon Misser V. Chuni Lal (17), Ram Chandra Markari v. Rani Keshobati Kumari (2) and on appeal Ram Chandra

Marwari v. Rani Keshobati Kumari (18). Ramiban Shaha v. Dhiku ringh (19), Maha Prasad Singh v. Rumani Mohan Singh (1). Atikulla Munshi v. Azimuddin Haji (26). Chiran:ib Lal Choubey v. Musammat Doultea (21), Keshobati kumari v. Satya Niranjan Chakraberty (9). Having now dealt with the question of interest I pass to the third point, namely, as to whether the suit is affected by the Limitation Act.

The argument which is put forward on behalf of the appellants in connection with this point may be explained in the follow. ing manner. The bond upon which this action is now brought, was dated the 21st December 1896, and it is common ground that the right of action accrued on the 14th March 1:03. The last payment of interest was in fast made on 16th March 1902. The first suit was commenced on the 20th June 1904, it was dealt with in the Court of first instance on 12th February 1906 and was finally decided by the Judicial Committee of the Privy Council on the . 9 May 1914. The present action was started on the 5th February 1915. It is admitted that about 1910 there was born to Sasi Bhusan Singh a son, whose name is Sripati Singh, and that this shild was not joined as a party to these proceedings until the 30th May 1916, when he was added as defendant No. 16 (a) by the Court's order. It is contended by the appellants that under the provisions of Order XXXIV, rule 1, O vil Procedure Code, which reads: "Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage," this Sripati Singh was a necessary party in the suit, and that as he was not joined until after the expiration of 12 years from the date when the right of action accrued, the suit must See Nanomi Babuasin V. Modhun fail Mohun (22), Bholanath Khettry v. Kartick

Kissen Das Khettry (23), A,odiya Roy v.

^{(18) 2} Ind. Cas. 935; 10 C. L. J. 1; 36 C. 840; 6 A. L. J. 617; h M. L. T. 1; 11 Bom. L. R, 765; 13 C. W. N. 1102; 19 M. L. J. 419; 36 I. A. 85 (P. C.).

^{(19) 16} Ind Cas. 246 16 C. L. J. 264.

^{(20) 40} Ind Cas. 415.

^{(21) 41} Ind. Cas. 677; 2 P. L. W. 20. 22) 13 C. 21; 13 I. A. 1; 10 Ind Jur. 151; 4 Sar. P.

C. J. 682; 6 Ind. Dec. (N. s.) 510 (P. C.). (23) 84 C. 872; 11 C. W. N. 462.

^{(17) 26} C. 238; 13 Ind. Dec. (N. s.) 757.

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Hardwar Roy (24), Chouttan Lal v. Kallu (25), Tulshi Ram v. Babu Lal (26), Gendan Lal v. Babu Ram (27), Shiam Sundar Lal v. Buddhu Lal (28), Sidheshuri Pershad Naroin Singh (Debi Prasad Sahi) v. Dharam. jit Narain Singh (29), Girwar Narain Mahton v. Makbulunnissa (30), Jowala Prasad v. Protap Ulai Nath Sahi Deo (31), Ranjit Prasad Tewari v. Ramjatan Pandey (32), Lachhman Prasad v. Sarnam Singh (33), Bishwanath Prasad Sahu v. Gajadhar Prasad Sahu (14), Budhmal Keralchand v. Rama (34) !.

It is agreed that the period of limitation applicable in this case is that of 12 years and it is also common ground that the child Sripati Singh is one of that class of persons contemplated by the provisions of Order XXXIV, rule 1. To the argument addused by the appellants, the respondents put forward several suggested answers. In the first place, they say that the provisions of Order XXXIV, rule I are not such as necessarily entail the failure of a suit if a person who ought to be a party is not in fact joined but that the only result should be that as against such individual the deeree in the suit would not be binding. This point raises a question which is by no means free from difficulty; and with it too is involv. ed the point as to whether the omission to join Sripati Singh in this case was an act of negligence or not. It is noticeable that the provisions of Order XXXIV, rule 1 reproduced with sertain alterations those of section to of the Transfer of Property Ast, IV of 18:2. This ran as follows:- "Subject to the provisions of the Oode of Civil Procedure, section 437 (now Order XXXI, rule 1), all persons having an interest in the property comprised in a mortgage must be joined as

(24) 1 Ind. Cas. 213; 9 C. L. J. 485.

66,

parties to any suit under this Chapter relating to such mortgage, provided that the plaintiff has notice of such interest." It will be observed at once that this provise, as to the plaintiff having some notice of the interest of the individual who is not joined as a party to the suit, does not find place in the phraseology of Order XXXI, rule 4. In this particular sase the respondents alleged that, owing to the fast that this Scipati Singh did not reside with his parents, they were not aware of his existence until shortly before they actually caused him to be added as a party, and the Subordinate Judge has accept. ed this evidence, a conclusion with which I see no ground for disagreeing. He thinks that although the provise as to notice which existed in section 85 of the Transfer of Property Act, 1882, is omitted from the provisions of Order XXXIV, rule 1, it would be altogether unreasonable to suggest that where a necessary party has been, not through negligence but under circumstances which are properly explicable, omitted from being made a party to a suit, such non joinder would necessarily be a fatal bar to the progress of the action There ie, I must confess, much to be said in favour of this view. I take it that the principle which must underlie the idea that where there is a non-joinder of necessary parties the suit must fail must be that it is undesirable and contrary to public policy that the Courts should expend their time and energies in dealing with matters the jadgments upon which might, because they would not be binding upon necessary parties not joined, be infruetuous materially ineapable of effective enforcement. There are obviously in the class of cases to which this suit belongs, very considerable difficulties in the way of a p'aintiff, who really desires to know who are, and to join those who are necessary parties to his suit, for in a joint Hindu family, often composed of many adult members, there are and, during lengthy periods over which litigation of the sharaster is drawn out, must naturally be persons who from time to time have shildren. all of whom, presumably, on their birth acquire at once some kind of interest in the joint family property. It seems to me to be expecting almost too much to suggest that it is always possible for a plaintiff become arquainted immediately with the osenrrenes of such births; and the facts

^{(25) 8} Ind Cas 719; 33 A. 283; 8 A. L. J. 15.

^{(28) 10} Ind Cas. 90%; 83 A. 654; 8 A. L. J. 783.

^{(27. 1} Ind. Cas. 97, 9 A L. J. 86. (28) 24 Ind. Cas. 252; 12 A L. J. 794.

^{(39) 22} Ind Cas. 570; 41 C. 727; 19 C. L. J. 437.

^{(=0) 36} Ind. Cas. 542; 1 P. L. J. 468.

^{(31) 87} Ind. Cas. 184; (1917) Pat. 27, 1 P. L. J. 497, 2 P. L. W. 406.

^{(32) 37} Ind. Cas. 883; (1917) Pat. 118; 1 P. L. W.

^{197.} (83) 40 Ind. Cas. 281; 89 A. 503; 15 A. L. J. 584; 2 P. L. W. 29; 21 O. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R 646: 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 844; 44 I A. 163 (P. C.).

^{134: 55} Ind, Cas. 827; 44 B. 223; 22 Bom, L. R.

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that they may not be so acquainted and that the defendants do not intimate the birth of another individual, who has an interest in the subject-matter of the action, should not. I think, be capable of being seized upon as an opportunity to the defendants for perchance availing themselves, owing to the non-joinder of such a child, of the highly technolal provisions of the Limitation Act. [See Kundan Lal v. Faqir Chand (35), Raghoram Singh v. Ra ani Kanta Banerjee (36), Raghunandan Singh v. Parmeshwar Dayal Singh (37)].

However, in this case, there are other contentions on behalf of the respondents. which are, perhaps of more general value to In the first place, they call into aid provisions the of section 14 of Limitation Act, IX of 1903. Sub-section (1) of sestion 14 reads thus: -"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Jourt of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like cature is unable to entertain it."

There was placed before us a good deal of technical argument as to the precise construction of this section. See Ali Saheb v. Reji Ahmed (3:), Bhoyelal v. Amritlal (39), Sundar Lal v. Chhitar Mal (1), Chuntlal Harilal v. Bai Mani (40)]. It must be remembered that the first suit was commenced on the 20th June 1904. It appears to me that it was clearly based upon the same cause of action and was certainly between substantially the same parties, allowance being made for devolution or transmissions of interest; there is also no doubt that it was on a question of jurisdiction that the suit could not be entertained, nor is there any contro. versy that the plaintiff's predecessor was prosecuting that suit bona fide and with diligence. Under these circumstances, there

(35) 27 A. 75; 1 A. L. J. 476.

(36) 29 Ind, Cas 752; 21 C. L. J. 452.

(37) 39 Ind Cas. 779; 2 P. L. J. 806; 1 P. L. W. 6-6; (1917) Pat. 137.

(38) 16 B. 197; 8 Ind. Dec. (N. s.) 609.

(39) 17 B. 173; 9 Ind. Dec. (N. s.) 113.

(40) 46 Ind, Cas. 745; 42 B. 504; 20 Bom, L. R. 660,

fore, I am of the opinion that the time under the Limitation Act did not begin to run against the respondents until after the decision in 1914 by the Judicial Committee of

the Privy Conneil. There is a farther point which is raised by the respondents, which is of some importance and upon which I think it is desirable that I should express my view. It is that even though the name of Sripati Singh was placed upon the record after the expiration of the period prescribed by the Limitation Ast it was not in fast necessary that he should be joined at all, he being sufficiently represented by the many adult members of the joint family, who were already joined as parties to the suit. The Sabordinate Judge eonsiders that Sripati Singh was amply represented in the suit by his father until the date when he was joined. I am not prepared to subscribe exactly to the conslusion which the Sabordinate Judge has come, for it must be borne in mind that the interest of Sripati Singh was not the same as that of his father. but on the contrary opposed to that of his parent. [See Ajothya Roy v. Hirdwar Roy (24), Bal Kishan Lal v. Tapeswar Singh (41). Hori Lal v. Nimman Kunwar (42), Ram iban Shah v. Dhiku Singh (19)]. Outheother hand, there were persons on the record with whose interests those of Sripati were identical and these persons may, I think, well be regarded as forming a class of which Sripati Singh was one and as for all practical purposes representing him adequately Vide Sheo Shankar Ran v. Jaddo Kunwar (43)]. For the above reasons, therefore, I have some to the conclusion that the arguments adduced in connection with limitation by the appellants must fail. I now pass to the fourth point which has engaged our attention for a very lengthy period. [See Huncomangersaud Panday v. Musammat Babioes Munrai Koonweree (44), Sinnachani v. Ramasamy Ohettiar (45), Dhanwanta v. Banarsi Lal (46), Ravaneshwar I rasad (41) 14 Ind. Cas. 845; 15 C. L J. 446; 17 C.W.N. 219.

(42) 15 Ind. Cas. 126, 34 A. 549; 9 A. L. J. 819.
(41) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968;
16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20
C. L. J. 242; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41
I. A. 216 (P. C.).

(44) 6 M. I. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth P. C. J. 29; 1 Sar. P. C. J. 5, 2; 19 E. R. 147 (P. C.).

(15) 13 Ind Cas. 7; 10 M. L. T. 463; (1911) 2 M.W. N 5 9 22 M. L J. 85.

(16) 6 Ind. Cas. 191,

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Singh v. Chandi Prasad Singh (47) and on appeal Ravaneshwar Prasad Singh v. Chandi Frasal Singh (48), Nanda Lal Dhur Bisnos [Bangachandra Dhur Biswas] v. J.g.t Kishore Acharyya (49), Mandel Das v. Megh Narain Duber (59), Murugesam Pillai v. Manicka. vasaka Desika Gnana Sambanda Pandara Bannadhi (51), Ram Bahadur v. Jagernath Prasad (52), Kalika Nant Singh v. Shiva

Nandan Singh (53).

This question is as to the non-existence of any legal necessity for a portion of the loan in question. Very laborious efforts have been made to trace back to their origin the different sums of money of which it is alleged that this loan Rs. 3,50,000 was composed. The Subordinate Judge has gone into this question in great detail. He has arrived at the conclusion after a careful examination, that, whilst in certain instances too great a period of time has elapsed for the plaintiffs indubitably to show that the debts incurred were for family reseasity, yet in the main the material evidence adduced shows that the bulk of the purpesss for which money was borrowed from the plaintiffs was undoubtedly such as would be regarded as being for legal necessity or family benefit and that proper enquiry was made there anent, and on this basis he decides substantially in favour of the plaintiffs with the exception of excluding a small sum of about Rs. 12,000 for which he only gives a personal decree. I think that the Subordinate Judge has taken, on the whole, a very proper view of the position. The loan contracted under the fifth bond was, as I have said, for Rs. 3,10,000. The way in which this

(47) 12 Ind. Cas 931, 38 O. 721.

(48) 89 Ind. Cas 499; 43 C. 417 (P. C.). (49) 26 Ind Cas. 420; 41 C. 188; 20 M. L. T. 335; 81 M, L, J. 563; (1916) 2 M. W. N. 886; 4 L. W. 458; 16 Bom. L. R. 8dE; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43

I. A. 249 (P. C). (50 84 Ind. Oas, 742; I P. L. J. 39; 3 P. L. W. 45, (51) 39 Ind. Cas. 659; 25 C. L. J. 589; 21 M. L. T. 289; 82 M. L. J. >6 ; 15 A. L. J. 291; 1 P. L. W. 457; 5 1, W. 753; '1 C. W. N. 761; 40 M. 402; 19 Bom. L. R. 456; (1917) M. W. N. 487; 44 I. A. 98 (P. O.).

(5) 45 Ind. Cas 749, 8 P. L. J. 199; (1918) Pat. 18 ; 4 P. L. W. 377 (F. B.).

(53) 63 Ind. Cas. 625; 8 P. L. T. 149,

cum is made up is detailed in the first schedule of the bond and it will be seen from that that Rs. 2,13,858 were appropriated towarde, what is in substance, a renewal of the 4th bond, both in respect of the capital and the interest which had assrued thereon, whilst with regard to the remaining sum of Rs. 1,36,142 that represented a variety of debts which purported to have been incurred by the adult members or some of them of the appellants' family for various purposes. It is a carious fact which has markedly engaged my attention to observe the method, in which throughout the whole course of this long stretching series of borrowings, sometimes all, sometimes some and sometimes one only of the adult members of the family insurred debts, (that is to say, signed dosuments of indebtedness for many kinds of different purposes); how these dabts are apparently always regarded by the other adult members of the family as having been insurred on behalf of the family and how those adult members of the joint family who had not participated in the actual execution of individual documents of indebtedness have been invariably preparad to shoulder the burden as a common one, as is seen by the inclusion of all such in the series of bonds of which mention has already been made, and in particular, in the list of debts annexed to the bond now sued upon included in the sum of Rs. 1,36,142 (which is the fresh money advanced by the plaintiffs to the defendants under the 5th bond, that is to say, the bond in suit); we find, in exemplification of what I have just stated, that some of the debts to which this new money is appropriated are evidenced by documents of indebtedness signed in some eases by four, in some cases by three, and in some eases by one of the adult members of the defendant family. Similarly, too, it will be observed that the purposes for which these debts (embracing the new loan in the 5th bond) purported to have been contracted, cover a wide range. I do not propose to deal wih all these debts in any great detail, but I think that it is necessary that I should refer to them shortly. The first is a debt of Rs. 7,000. t was exp ented by Ram Charan Singh, Maha Prasad Singh, Hari Prasad Singh and Biswanath

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Singh in favour of one Sheo Shanker Sabay and under it Rs. 7,000 are borrowed for the purpose of performing the marriage ceremonies of the borrowers' sons. There ean be no question but that this is one οf the elasses of which fall debts within the definition of such as are capable of being regarded as binding upon the joint family property under the dostrine of legal necessity and of family benefit, and indeed, this item is conceded by the appellants as being admissible and ineapable of being seriously disputed.

The second item in the schedule is for a debt of Rs. 2. 00 borrowed from one Shanker Sahay under a document signed by Hari Prased Singh alone. It is stated in this document that the debt is incurred "to meet my necessary expenses" and in the evidence of one Jagat L. Misser, who was in the service of the lender we are told that the debt was incurred to pay the cost of presents on the occasion of the marriages of certain named members of the defendant family. Here again it would seem that, if this story is true, and there seems no reason for doubting it, this was a debt—which cannot well be challenged.

The third item in the schedule is a debt of Rs. 2,0.0. It is swideneed by an asknow. ledgment of indebtedness signed Ramebaran Singb, Maha Prasad Singh and Hari Prasad Singh in favour of one Hima: Ram Marwari. It does not, on its face, state for what purpose the money was borrowed, but in the evidence of one Jagroop Rai who was a Muhurrir in the service of Hari Prasad Singh, it is sworn that the sum was borrowed in order to pay certain expenses which the three signatories incurred on the occasions of certain marriages of their children whose names are given. Here, again, if this is true, and there seems no reasons to doubt the story, this is another of legal necessity and of family benefit.

The fourth debt in the schedule is one for Rs. 0,000. It is evidenced by a rota executed by Ram Charan Singh, Maha Prasad Singh and Hari Prasad Singh in favour of Himat Ram Marwari. The document itself does not say for what purpose the debt was contracted but in the evidence of Jagroop Rai again, we find it stated that the money was borrowed in order to meet the cost of

the esremony known as Duiragaman of the wives of the young men and of the young women members of the defendant family who had recently teen married. It has been held in Churaman Sahu v. Gopi Sahu (54) that the cost of the performance of this ceremony is an expense legitimately falling within the estegory of those debts which may be classed as of legal necessity or family benefit and again it is difficult to see how this claim can be successfully opposed.

The fifth item represents Rs. 5,000 borrowed from two persons, named Sri Durga Bhagat and Sri Ram Khelawan Bhagat, and is evidenced by a roka executed by Ram Charan Singh, Maha Prasad Singh and Hari Prasad Singh. It does not state, on the face of the document, for what purpose the money was taken and both of the lenders are dead, nor is there any direct evidence apparently that this cash was taken for purposes of legal necessity or family benefit.

The same may be said with regard to the sixth item in the schedule which represents a sum of Rs. 1,000 borrowed from the same people on the same day by a document signed by Hari Prasad Singh alone.

The seventh item shows a sum of Rr. 2,400 borrowed from two persons, named Sri Ram Lakhan Bhagat and Sri Jiwan Bhagat, the roka is signed by Ram Charan Singh, Maha Prasad Singh and Hari Prasad Singh. Nothing is said again as to the purpose for which this amount was obtained, and so far as the oral evidence goes we only get the facts of the transaction and of its subsequent satisfaction.

The eighth item is again for the sum of Rs. 5,000. This seems to have been a loan by one Debi Prashad Jha and to have been evidenced by a roka signed by Ram Charan Singh, Maha Prasad Singh, Hari Prasad Singh and Biswanath. On the document it is merely stated that Rs. 1,500 were due in connection with a former roka hundi to the lender whilst a further sam of Rs. 3,500 was being borrowed by the borrowers for meeting necessary expenses. There is, however, a certain amount of oral evidence which indicates the purposes for which this money was actually

(54) 1 Ind. Cas. 945; 10 C. L. J. 545; 13 C. W. N. 994; 37 C. 1.

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borrewed. In the first place, one witness called Gajadhar Jha who was a rephew of the lender who is now dead and who bad two other uncles named Hira Jha and Santuki Jha who are also both dead and with whom he lived joint in mess and property stated that he used to work as a clerk in his uncle's service, that he was acquainted with the executants of the roku in question, that he recollected this roka for Rs. 5,000 and that his uncle Santuki informed him that of this Rs. 5,000, Rs. 1,500 had been borrowed to pay a previous debt incurred in connection with the marriages of certain named members of the defendant family and that the remaining Rs. 3,500 were borrowed for expensee in connection with the Settlement Survey of the Barcope property. He also gives evidence that these debts were duly re-paid. Another witness named Manna Lal Misser actually wrote out the bond which was signed by the executants in his presence and he definitely states that Rs. 1,500 of the amount were set off against a previous debt incurred under a roka in connection with marriages of certain named members of the defendant family and that Re. 3,500 were taken in order to meet the cost of settlement operations. He was a relative of Santuki Jha. Another deponent Koski Nath Ohow. dbury, who was acquainted with all the parties and who was also an attesting witness to the roka, gives evidence to the same effect. It would, therefore, seem fairly evident that this debt is not one which can be successfully challenged.

The next item in the schedule represente a sum of Re. 7,500. The amount is borrowed from the person Santuki Jba mentioned in connection with the previous transaction and is evidenced by a bond executed by Ram Charan Singh, Maha Prasad Singh, Hari Prasad Singh and Biswanath Singh. The doument itself merely states that the money is borrowed "for meeting our necessities," but the oral evidence seems to show for what purpose the money was obtained. The witness Gajadhar Jha states that he was present when the bond was executed in order to expenses insurred in connection with marriages of certain named members of the defendant family and of their Dwlraga.

therewith. The same statement is also made by the other witness already mentioned named Korki rath Chowdhury. Once more it is difficult to see how, if this story is correct, these transactions can

be successfully objected to. The tenth item on the list relates to a sum of Rs. 5,000 borrowed from one Sagar Mull Marwari and evidenced by a roka signed by four defendants, Ram Charan Singh, Maba Prasad Singh, Hari Prasad Singh and Biswanath Singh, document itself merely states that the money is borrowed for meeting our necessities. The oral evidence, which is perhaps of a slender character, as to the reason for which this money was taken, is that of Ballabh Ram who was the Gomastha of the lender's firm and who was present when one, at any rate, of the executants signed the roka. He says that the money was borrowed in order to meet the cost of coltivation to buy bullocks and for the maintenance of the family house. Once more, if this story is sorrect, it would be difficult to maintain successfully that such purposes may not have been either for legal necessity or on assount of family

benefit. The 11th item in the eshedule refers to a further debt of Rs. 5,000 evidenced by a roka in favour of one Sri Handi Ram Manda and executed in his favour by Ram Charan Singh, Hari Prasad Singh and Maha Prasad Singh. The document merely states that "the loan is effected in order to meet necessary expenses." In the oral evidence of one Koolida Pershad Manda who was the son of the lender, who at the date of the deposition was an invalid, it is stated that this amount was borrowed from his father for the performance of the Upanayan ceremony of a member of the defendant family and for some other purposes which the witness cannot recollect. At any rate so far as this goes (and the amount of the money, which would naturally be required for the purpose of the investiture of the sacred thread seremony, would depend upon the importance of the family in which the ceremony was taking place) there is no doubt that this transaction cannot be objected to, and it must be resollested that one is here dealing with a family whose income was a sub. PARI PRASAD SINGHA U. SOUBENDRA MOHAN SINHA.

stantial one and which in its own way was of very considerable importance.

The 12th item represents a sum of Rs. 5,000 borrowed from two persons named Ram Charan Sahu and Gunu Sahu and is evidenced by a roka signed by Ram Charan Singh, Hari Prasad Singh, Maha Prasad Singh and Biswanath Singh. The document merely states that the sum is borrowed to meet necessary expenses. The only evidence which we appear to have with regard to this loan is not very explicit as both the lenders are dead and the son of Ram Charan Sahu merely states the fact of the loan having taken place and as to its re-payment.

The 13th item relates to a debt of Rs. 1,400 borrowed from two persons named Sri Moti Lal Sahu and Sri Sakhi Lal Sahu and evidenced by a roka signed by Ram Charan Singh, Maha Prasad Singh, Hari Prasad Singh and Biswanath Singh. The document itself merely states that the sum is taken for the purpose of meeting necessary expenses, and there seems to be no evidence relating to the exact purpose for which this sum was borrowed.

The 14th item is for a large amount of Rs. 18,145 11-3 borrowed from one Sakha Ram Marwari and evidenced by a roka signed by Ram Charan Singh, Maha Praead Singh and Hari Praead Singh. document states that the money was borrowed in respect of sum due on account of the price of eilver and gold elath and an amount taken in eash. The son of the lender is a witness in the case. name is Nope Chand Ram Marwari, he is a Barker and dealer in cloth and he states in his evidence that the defendant family used to transact considerable business with him, buying sloth and silver (presumably for ornaments) from his establishment and also borrowing money. His father is now produced most of his books dead. He and papers showing the accounts which he had had with the defendants. The roka in question represents a balance of account as dne between the parties at the date upon which it was entered into. It would seem that some Bs. 11,000 represent the cost of purchases of garments and fabrics supplied in connection with the marriages of certain members of the defendant family, impossible to enter into the individual

items of this vary lengthy assount which extended over a considerable period, but I do not see anything in the evidence which would justify one in coming to the conclusion that the purchases made from this gentleman were other than of a character which might be described as properly being either for legal necessity or for family benefit.

The 15th item relates to a sum of Rs. 3,000 borrowad from two persons named Giridhari Lal Marwari and Lakehmi Ram Marwari and is evidenced by a ro'ra signed by Ram Charan Singh, Hari Prased Singh and Maha Frasad Singh. The does. ment merely states that the loan is to meet necessary expenses but the evidence of a witness named Luchi Ram, who is the son of the lender, seems to give some fairly definite information as to the reason why this money was borrowed; the lender himself has been dead for many years but the bond was executed in the deponent's He states that Hari Prasad presense. Singh told him that the money was regaired for purposes of cultivation and for their household. It is difficult to say, without evidence to the contrary, that this debt was not contrasted for either family benefit or even legal necessity.

The last item in the schedule indicates a sum of Rs. 21,469 14 0 and with regard to this, the position is perhaps, somewhat slightly different to that which may obtain in the other items to which I have already referred. It is a loan purporting to be made on the 16th December 1896 in favour of one Babu Anand Ram Marwari and is evidenced by roka signed by Ram Oharan Singh, Maha Prasad Singh and Hari Prasad Singh. It resites that the Rs. 21,469 14 0 is due by the executants on account of principal and interest on that day in respect of a considerable number of previously contracted debts evidenced by rokas of certain dates which are given on the face of the document. It will be observed that the date of this document heing the 16th December 1896 it is only a few days prior in date to the bond upon which action has here been brought and it may be thought that in considering the next point in this care relative to antecedent debt this elese juxtaposition of dates may be of some importance. I am not sure that

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essentially that is the case. I proceed at once to enquire into some of the component portions of this roka and shall at the moment content myself with saying that it would appear at first sight to be a bond of consolidating character bringing together merely for the cake of convenience into one a number of small debts contracted at prior dates. I do not propose to enter in any great detail upon all the items out of which this sum of Rs. 21,469.140 is made up and will content myself by referring to two:

(1) An account rendered for Rs. 2,623 by one Sukh Ram Marwari for debts on account of cloth, etc., and cash dated the 30th Sawan 1304 which includes certain

interest and-

(2) An account rendered due to Surju Ram dated the 30th Assin 1304 for Rs. 5,516 on surrent account for grocer's stores, sloth and sash which includes interest on the running ascount. I see no reason to attempt, even if one had the material, to delve deeply into each petty item of old accounts or rokars such as these. There is ample general evidence to show that the lender did not lend haphezard but with prudent and reasonable enquiry and I see no reason why this i'em should be disallowed. Now, the total of the amounts which I have already dealt with in detail and which were the sebeduled amounts mentioned in the bond itself, aggregate only about the sum of Rs. 1,10,000 and as has been stated before, the amount of fresh money advanced was considerably greater than that, namely Rs. 1,36,000 odd. This surplus is represented, except for a small amount by a variety of small loans incurred, as was the case with those to which I have already referred in detail, for various purposes and contracted by one or sometimes more of the principal members of the controlling adults of the family in question, in addition to this there were also certain legal expenses spanested with the bond, such as for example Rs. 1,750 for the stamp, Re, 370 for registration and Rs. 1,750 for what is called the writing fee, that is to say, for the drawing up of the bond (a sum which to my mind appears to be semswhat excessive but which is, I understand conventionally correct), Speaking very generally with regard to this

surplue, although there are a certain number of loans, amounting in the aggregate to a small sum as to the reason for which there is no evidence as to why they were made, it may be said that it purports to be composed of petty borrowing made, as in the case with which I have dealt in detail, to meet household purposes, such as the purchase of eloth for the family, for comestibles and similar commodities; for a certain portion of this borrowing the Subordinate Judge has thought fi', after seeing the witnesses and hearing the evidence, to consider that there should be no decree against the family as such and so far as I am concerned, I am not ready to disagree with the conclusions to which he has come. It will have been observed that, hitherto, I have only dealt in detail with the actual items of debt which are referred to as appertaining to the new advance of capital on the loan arranged by the bond now sued upon and have in no way considered that part of the Rs. 3,50,000 which constituted in effect a renewal of the older (the 4th) bond aggragating in itself the capital and interest then due thereon, and here, before dealing with the other side of this transaction, that is to say, with that part of it which constituted the renewal of the fourth bond of 1801, I should like to venture a few general remarks.

This case is one which exemplifies very fally the difficulties which occur in this country in endeavouring to apply principles of British Jurisprudence to the incidences of the law relating to the Hindu joint family. In my short experience here I have already expressed my view in the case of Mathura Misra v. Raikumar Misra (5) that it is hard to apply to its consideration the exact logical processes of mind upon which the British Jurisprudence is founded and I have already there stated that I have been told that one must not attempt to do so but one cannot help feeling that the position, which partially obtains here in litigious proesedings in connection with the status of the joint Hindu family, is the cesasion for giving rise to much expensive and socially unnequaeary litigation. More than that, it saema to me that, as at present yiewed, the communal aspect of the Hinda joint family is in some respects a serious bar to real progress in the satisfactory Administration of Law HART PRASAD SINGHA U. SOURENDRA MOHAN SINHA.

and Justice-quite apart from the revenual impasse which it seems to produce. In this Court much energy and labour is devoted towards the enquiry, which is very often more or less uncertain or fruitless, as to whether in fast, debts incurred by adult members of a joint Hindu family affecting the joint family property can be later on repudiated by persons such as either minors or children not even born when the debts were contrasted on the ground that they were not binding upon the challengers on account of the fast that they were contrasted for immoral purposes or for reasons disconnected with what is known as legal necessity or family benefit. I omit altogether, for the moment, the conditions in which it is proved that such debts were incurred for improper purposes, as so far as this case is concerned, there is no real suggestion now that the polition possupied was ever of that charas. ter. On the other hand it has been pointed out by the Judicial Committee of the Privy Conneil that when in cases of this character, one finds debts contracted long ago by the heads of the family, it may be difficult and often impossible for the successors of the lender to prove within the close four corners of the doctrines of legal necessity or family benefit the cause why such money was advanced. It is interesting to observe in this connection in this case that the bond now sued upon was dated so long ago as the 21st December 1896. I cannot help thinking that where one finds the principal adult members of a joint family horrowing money without any evidence being shown against such transactions as being of an improper character, it is very difficult for minors at a far later date to dispute them or to allege easually, without positive evidence that those transactions were not designed for the benefit of the family or for some legal necessity. I cannot also belp thinking that to embark upon any very serious enquiry into such circumstances would almost render the task of the Judiciary here practically impossible. It is true that in this Province we have very frequently before us the spectacle of the historical position, which one has observed similarly in other countries many years ago. We see well-to-do gentlemen with what the ordinary person would regard as quite adequate incomes belonging to the Zemindari slass apparently unable to and sometimes care-

less of whether they can meet their expenses out of their revenues; these gentle nen are sometimes really extravagant and on the other hand sometimes unwilling on assount of the position which they hold to lower their standard of expense of living for fear of not retaining themselves in the high estimation in which they have hitherto been held. The consequence of either of these two conditions is often disastrons as they often resort to borrowing. In this ease now before us there is now no sugges. tion of anything other than that the revenue derived from the defendant's estates did not altogether suffine to support the altique of the dignity of the position which they thought it fit and incumbent on themselves to maintain. For persons situated such as these are and surrounded, no doubt, by considerable difficulties, it seems to me that one must make considerable allowances. and although they may be regarded perhaps improvident, I am not at all prepared to say that under the views which I have indicated, the debts which they entrasted can be regarded under normal eireumstances in law as insapable of recovery by the lender.

The difficulty of understanding the position of the Hindu joint family as it is to be regarded by modern conceptions of ease. law, seems in my respectful opinion to be due to the fact that the trend of resent decisions appears to have been, and perhaps rightly, directed towards the clarifying of the curious legal results due to the somewhat anomalous and archaic conditions created by the legal incidents attached under Hindu Law to the joint family; this attitude appears to be comparatively of recent date and seems to me to be founded largely on legal fictions, which do not, so far as I can see, emanate directly from the Hindu Law but on the other hand it seems probably useful and salutary and I should imagine is still in a very transitional stage. So far as one can judge from the constant questions on the matter which are brought before this Court, there must arise out of, for example the dostrine of antecedent debt, numerous important enquiries which have not as yet been decided, and yet one sannot help thinking that that doctrine is an artificial one and that legislation is the HABI PRASAD SINGUA U. SOURENDRA MOHAN SINGA.

real remedy to place the present unsatisfactory state of affairs upon an intelligible footing. It is practically impossible for the Courts here successfully to grope back into years long past in order to ascertain with regard to debts contracted long before the date of the suit, whether they were for improper purposes or for legal necessity or family benefit. If where the onus is on the plaintiff who lent the money, he or his successor can substantially prove that (the lender) made at the time some sort of reasonable enquiry, that is the utmost in my humble opinion which he or they should be required to prove, indeed as to what this enquiry should be I have no doubt, for if it was necessary for a person approached by another person, a member of a joint Hindu family, for a loan to investigate completely and exhaustively the reason why a loan should be required and whether it could properly be given, all lending transactions of that sategory between the public in this country would almost be for practical purposes at a standstill. When a lender contemplates lending money to a Karta of a joint family, it is probable that according to the present law, he should make some elear enquiry as to the reason for which the loan is being arranged but provided that he is told that reason and that reason seems to him a propor one, it does not appear to me that it is necessary for him to make any further enquiry. It ossurs to me to be indeed absord that it should be entemplated that a lender should examine entirely the circumstances of the borrower or to do more than be assured by him that the money is required for the legal nesessity or the family benefit of the family which the borrower represents. For these reasons, therefore, I consider that the . view which the Subordinate Judge expressed with regard to the new money advanced in connection with the bond sued upon is substantially correct, apart always from the question of the amount of interest which ean be elaimed under the limitations imposed by the Sonthal Parganas Regulation, I have dealt so far with the question of, what I call, the fresh capital which was advanced under the bond sued upon but, I have still now to deal with that portion which constituted the basis of the renewal of the old bond of the 29th September 1891. Now, with

regard to this, of sourse, we have the application of the dostrine of antecedent debt, and it is necessary, therefore, that one must question from that regard the point. [See Bhagbut Pershad Singh v. Girja Korr (7), Khalilul Rahman v. Gobind Pershad (8), Sahu Ram Chandra v. Bhup Singh (4), Mathura Misra v. Rajkumar Misra (5)]. concerned, as the principle is High Court in the Patna Misra v. Rajkumar Misra (5) has desided that where the Karta of a family has, hypothecating the family property, entered into an obligation which was based upon a previous similar obligation dissonnected with it in fact and in time, the dostrine of antecedent debt applies, and, of course, I do not recede from that judgment to which I was a party. This may be right or wrong, but I believe it is in consonance with the present ides of the development of the antecedent debt theory, and, incidentally, is an instance of encroachment on the ancient legal incidence attaching themselves to the joint Hindu family some of which are so opposed to modern thought. It will be observed here that in the case of this fifth bond the fresh eapital borrowed amounted to Bs. 1,36,142 the balance, which consisting both of capital and asserted interest constituted a renewal of the fourth bond dated the 29th September 18 11 being Rs. 2,13,858. This fourth bond was entered into by Ram Charan Singh for himself and for Rup Narayan Singh his minor son by Hari Prasad Singh for himself and for Lakhi Prasad Singh and Bishun Prasad Singh, his minor sons, by Biswanath Singh, by Maha Prasad Singh for himself and for Sashi Bhusan Singh his minor son and by Gajadhar Singh. So far, therefore, as can be seen it would appear to be binding in every manner possible, and if this Court by its Eull Bensh decision Mathura Misra v. Bankumar Misra (5) is correct the obligation incurred in the fourth bond is binding.

A carious question has been raised in connection with the position which, it is suggested, might obtain in certain circumstances
which might be applicable both in connection
with some of the debts which were paid off
by the fresh capital which was borrowed
under the fifth bond in connection with some
of the debts which similarly were paid off
under the fourth bond, the question relates to
how far the doctrine of antecedent debt may

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properly be extended and it arises in this way. The doctrine of antecedent debt is supposed to be founded upon Hindu Law [see Mayre's Hindu Law and Usage, 8th Edition, page 395, Gharpure's Mitakabars, page 86 (Yajnavalkys, verse 55) Tagore's Dayabbaga and \ivada Chintamani, pages 34 and 35. Colebrook's Mitakabars, page 221].

On the other hand it has been equally strenuously contended before us that the development of this dostrine has now gone past the mere application of the ancient texts and is tased at present upon much case law decision. It is common ground, however, that where a mertgage of family property is executed by a father to pay off a proper price debt it is birding upon his ecn. But what is the position in the event of all the adult members of a joint family joining in entering into a mertgage for a like purpose? Are all the sons of all the adults liable and is the whole of the family property mortgaged by all those adult members of the family liable in the same way as the sons of a father would be liable in respect of a family properly for such a debt so incurred by their father. I cannot see that any other answer can be given save in the affirmative. But the matter does not rest there. It has already been observed that there were at least four adult members of this joint family and that the fresh eapital was borrowed by them under the fifth bord for the purpose of paying off previously incurred debts, which had been incurred in some cases, under documents excented by all four adults, in other cases only by three of them and in other instances by only one. The question arises as to what is the position with regard to the application of the doetrine of antecedent debt to the family property with respect to, let us 185, for example, a debt previously incorred by a single one of these four adult members. It is true that it may perhaps be taken that although the document, which constitutes the evidence of such debt, is only executed by one of the four adults, no doubt the transaction was at the time impliedly acquiesced in by the other three adult members of the family and expressly ratified by the fact that it is aggregated into the lump sum, which finally forms the principal part of the freeh capital borrowed under the fifth bond for the purpose of paying off all these antecedent dobts however

ocrtracied, and in that way it might perhaps be argued that, provided it is clear that at least implied or expressed acquiescence was really present, it would not matter in law that the debt purported to bave been incurred by one or for that matter by three of the four adult members of the family. I think this raises a question of no little difficulty and to some extent it is difficult to avoid being led into a confusion of mind between the incidences of the doctrine of antecedent debt and the incidences which are capable of applica. tion in the same where debts incurred by representative members of a joint family are for the purpose of legal necessity or family benefit. If the dostrine of antecedent debt, as it now stands, has to be based upon the Hindu Law alone, I doubt if in cases such as those which I have quoted above, it would be possible to apply it. But if, on the other hand the dostrine may be regarded as in course of development under the moulding of judicial decisions, I am inclined to think that the dcetrice is capable of extension to cover instances of the character which I have indicated. The sixth point is as to whether the personal decree should not be regarded as barred by Order IJ, rule 2 of the Civil Procedure Code in view of the previous suit. On this question I have had the advantage of seeing my Lord the Chief Justice's judgment and with his conclusions I entirely agree. It may be now advantageous here to summarise the conclusions to which I have come. They are as follows :-

(1). I think that the Court had jurisdis.

tion to try the case.

(2). I do not consider that the plaintiffs can recover more interest than the amount equivalent to the total fresh capital actually advanced by the plaintiffs, and that from this cum must be deducted that interest which has already been paid. It is fortunate that here it is common ground that on the calculation of interest on this basis, the amount due is not less than the amount which would thus be awarded and the calculation of this sum is merely a matter of simple arithmetic.

(3) I bow to the opinion held by this Court that the ordinary legal interest cannot run on the decretal amount if such accruer increases the amount of interest to a sum greater than the principal ad-

vanced.

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(4) I am not prepared to disigree with the views expressed by the Subordinate Judge as to the amounts of the debt which he considers to have been incurred on account of legal necessity or family benefit or with regard to that amount for which he has given a personal decree.

(5) I do not consider that the personal desree is in any way barred by the previous

proceeding.

(6) I do not think that the suit is barred

in any way by limitation.

(7) I think that the fourth bond is an antecedent debt upon which that part of the fifth bond which relates to it can be entirely supported subject to the question of interest.

(8) In all other respects I agree with the judgment of my Lord the Chief Justice.

M. B.

Api e.l allowed in part.

Decree modified.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 12 of 1921.

October 10, 1921.

Fresent:—Sir Norman Macleod, Kr.,

Chief Justice, and Mr., Justice Shab.

In 76 THE TATA INDUSTRIAL

BANK, Ltd.

Income Tax Act (VII of 1918), s. 9-"Profits," meaning of Assessing officer, power of Bank-Gross earnings—Securities—Depreciation in value—Deduction, whether permissible.

The term "profits" in section 9 of the Income Tax Act means chargeable income, and must be computed from the gross income after allowing for the sums paid and debited as detailed in sub-section (2) of that section. [p 981, col. 2.]

The assessing officer is not entitled to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in subsection 2) of section 9 of the Income Tax Act. [p,

981, col. 2]

A deduction on account of depreciation on war bonds and securities held by a Bank, out of its gross earnings, is not a deduction proper and necessary to be made in order to ascertain the real assessable profits under the Income Tax Act. [p. 981, col. 2.]

Oivil reference made by the Chief Revenue Authority, under section 51 of the Indian Losome Tax Act, 1918.

Mr. B. J. Desai, instructed by Messre, Wadia, Gandhy & Co, for the Tata Industrial Back.

Mr. Bahadurji, Asting Advocate General (with him Mr. J. O. Bowen, Government Eolisitor), for the Crown.

JUDGMENT.

M.C.ROO, C. J.—This is a reference by the Chief Revenue Authority, Bombay, under section 51 of the Indian Income Tax Act, with regard to the interpretation of section 9 of the Act.

The Tata Industrial Bank was assessed by the Collector of Income Tax for the year 1920-21 on profits amounting to nearly thir. teen lace. I omit all mention of super tax as unnecessary. On appeal to the Commissioner a slight reduction was made, but before both authorities an important question was raised by the Bank since they elaimed to deduct from the taxable profits a sum of Rs. 2,98,000 said to be the amount of depresiation on war bonds and securities belonging to the Bank, arrived at by comparing the market rates with the valuations in the Bocks of the Bank. This deduction was not allowed on the ground that the only allowances and deductions to be made from the gross income in order to arrive at real assessable profits were those mentioned in sub section 2 of section 9.

The following questions were referred to

the High Court for decision :-

(1) Whether on a true construction of the Indian Income Tax Act of 1918 and in particular section 9, the only allowances and deductions to be made from the gross income in order to arrive at real assessable profits are those mentioned in sub-section 2 of section 9 and whether the said section 9 prohibits any allowances or deductions other than those specifically mentioned therein.

(2) Whether on a true construction of the said Act and in particular section 9, the assessing officer is not entitled in his disertion to allow a deduction which is proper and necessary to be made in addition to those specifically enumerated in sub section 2 in order to assertain the real assessable profits.

(4) Whether the deduction of Rs. 2,98,00 (being the amount of depreciation on war bonds and securities) cut of the great earnings of the assesses is a deduction proper and necessary to be made in order to

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ascertain the real assessable profits under the said Act, and,

(4) Whether the Act attaches to the expression 'profits' a meaning different from what is known as commercial profits.

Section 5 of the Act includes among the classes of income which shall be chargeable to Income Tax income derived from business."

Under section 9 (1) the tax shall be payable by an assessee under the head 'Income derived from business' in respect of the profits of any business carried on by him.

Under section 9 (2) such profits shall be computed after making the following allowacces in respect of sums paid or in the case

of depresiation debited.

Items I to V, VIII and IX are items of actual expenditure, Item VII deals with the case of machinery sold at a less price than the cost less depreciation, Item VI deals with the depreciation of machinery, plant and buildings,

It would appear, therefore, that with regard to assets owned by the assesses other than machinery, plant and buildings, a debit for depreciation is not allowed.

The difficulty in the case arises from the fact that various meanings can be ascribed to

the word 'profits'.

The petitioners have relied on the definition of 'profits' as laid down in Spanish Prospecting Company Limited, In re (1). The elaimants agreed to serve the Company at a fixed salary which they were not to be entitled to draw except cut of profits (if any) arising from the business of the Company. The Company went into voluntary liquida. tion. After all the creditors except the elaimants were paid and all the capital subseribed was paid to the share holders, there remained a surplus in the hands of the liquidators which the elaimants contended should be treated as profits within the terms of their agreement. Two ecntributories took out a summens asking for a declaration that the claimants were not entitled to prove in respect of the surplus on the ground that profits should be restricted to profits realized by the Company on a going scneern.

Fletcher Moulton, L. J., said (page 98):-

(1) (1911) 1 Ch. 92; £0 L. J. Ch. 210; 103 L. T. 609; 18 Manson 191; 55 S. J. 63; 27 T. L. R. 76.

"The word 'profits' bar, in my opinion, a well defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets in calculating profits must be valued and not merely enumerated ... A depreciation in value, whether from physical or commercial causes, which affects their realizable value is in truth a business lose ... But though there is a wide field for variation of practice in these estimations of profits in the domestic documents cf a firm or a company, this liberty ceases at ones when the rights of third persons intervene. For instance, the revenue has a right to a certain percentage of the profits of a company by way of income tax. The setual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid."

No doubt in the balance sheet of a business the excess of assets over liabilities or vice versa is represented by a credit or debit to the profit and loss account, so as to make the totals even. There is not much difficulty in calculating the liabilities, the value of the balance sheet depends on the correct valuation of the assets. It is the reekless or oversanguine valuation of assets which is the presureor of rain. Now if it had been intended by the Act that the profits for any particular year should be calculated by the gain in the excess of assets over liabilities during that period nothing would have been easier than to give expression to that intention. But, on the one hand, difficulties would arise in the case of every assessment in assertaining that the assessee had made a fair valuation of his assets, while, on the other, the assesses would be taxed on every appreciation in the market value of his assets, and that is certainly not the object of an Income Tax Act. It must be remembered that the word 'profit' is only used THE TATA INDUSTRIAL BANK, LTD., In re.

for explaining the method by which taxable income is to be computed. I am, therefore clearly of opinion that we are not concerned with the legal definition of profits as laid down by Fletcher Moulton, L. J. in the case above cited.

As the learned Lord Justice points out, a firm or a company has a wide field for variation in practice in its estimation of its profits but that liberty ceases when the rights of a third party intervene. And in the case of income tax the Legislature prescribes the manner in which the taxable amount is to be saleulated. The income of a business may be defined as the gross sarnings either actually received or properly considered as if they had been received, after deducting all ordinary expenses incurred in the earning. These expenses must come under one of the Items I to V, VIII and IX of section 9 (2). When the questions arise how the income is to be disposed of, the distinetion between income and profits as legally defined above will be clearly seen, and profits may be fairly accurately described as that amount which can be taken out of the business for dividends or private expenses without impairing its efficiency. Of course out of that amount something may still be left in the business by way of reserve but it is not disputed that any sum eredited to reserve is liable to be taxed. It may also be as well to note that we are not concerned with the case of a business which deals in stocks and chares, looking solely for its income to the gains made by buying and selling, for it seems to be admitted that then an. ticipated losses may be deducted. We have been referred to the corresponding provisions of the English Income Tax Act but it would appear that the Indian Legislature has deliberately refrained from adopting those provisions, and instead of detailing allowances which cannot be deducted mentions specifically those which can. At the same time no English case has been eited to us in which a deduction for depreciation such as is now claimed has been allowed. In the rules applicable to eases I and II of Sebedule D of the Income Tax Act, 8 & 9 Geo. V, e. 5, the only rule which deals with depreciation is rule 6 in which a deduction for depreciation of mashinery and plant can be allowed from the profite or gain of a trade.

Apart from that, the only deductions which would be allowed if not prohibited would be expenses incurred solely for the purpose of earning the profits, and any other debits for depreciation would not come within this estegory. It seems to me, therefore, that in construing sections 5 and 9 of the Act, chargeable income is synonymous with profits and section 9 (2) prescribes how those profits are to be ascertained. From the gross income only certain debits for depreciation are to be allowed and this debit asked for by the Bank not being mentioned therein cannot be allowed.

I think this was the obvious intention of the Legislature, since, while depreciation of machinery, plant and buildings can easily be calculated as provided in the Act, it would be a very different matter to have to enter into such calculations with regard to assets other than these. But this much is clear that if the profits of a business are to be calculated ascording to the legal definition of profits, that method of calculation must be continued from year to year, and an assessee would not be allowed to write down his assets in a year when market values had declined without writing them up when values had increased.

I would answer the questions propounded in the reference as follows:—

- 1. Profits in section 9 of the Act means chargeable income and must be computed from the gross income after allowing for the sums paid and debited as detailed in subsection (2).
- 2. The assessing officer is not entitled to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub-section (2).
 - 3. No.
- 4. 'Profits' in the Act means chargeable income.

The Bank will have to pay the costs of the reference.

SHAH, J.—On this reference the position appears to me to be simple and clear, though on account of the way in which the questions have been formulated it has become nonecessarily difficult. On the interpretation of section 9 it seems to me to be clear that the tax under the head "Income derived from business" is payable in respect of the profits of the business carried on by the assesses. The meaning of the word

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profits' is not defined: but I agree with the learned Chief Justice on this point in holding that it is the gross income of the business. Even then it may be open to the assessing authority to take into consideration the nature of the business and the losser, if any, in determining the profits or the gross income of the business. The section does not make any provision as to how the profits are to be determined. But it seems to me that where a deduction is proper and necessary to be made in order to assertain the 'profits' or gross income of any business, the assessing authority may allow it in his discretion.

The section, however, makes prevision for making allowances in respect of certain sums paid or in the case of depreciation debited by the Company or the individual concerned. They are stated in section 9, sub-section (2) and it is clear that those are the only allowances which the party eould claim as of right. The Collector is not bound to make any other allowences in favour of the party, nor is the party entitled thereto as of right. In the present case the depreciation claimed by the Compay is not ecvered by any clause of section 9 (2) and cannot be allowed as such. This poeition is not seriously contested before us on behalf of the Company. But it is urged that as an item of loss it is open to the Collector to allow it in calculating the profits or the gross income of the business during the year in question. As stated in the letter of reference, the attitude taken up by the Company before the Revenue Authorities was to claim only depreciation as such without agreeing to take into account appreciation, if any. As regards this point, the position for the Crown has been very fairly and in my opinion scrreetly stated by the Chief Revenue Authority in paragraph 12 of the reference. This reference must, therefore, be dealt with on the footing that the deduction claimed by the Company is in respect of depreciation as such and not as an item of less or gain in the business during the year. This will prejudice neither the right of the Company to elaim, for the power of the Revenue Arthorities to make, due allowance for any loss or gain in virtue or appreciation of the of depreciation various scenrities in the course of and as part of the business in determin ng the

amount of the profits or gross income of that business, if the facts essential for making such allowance are established. It is not easy, in my opinion, to formulate categorical replies to the questions some of which are general. Treating the reference, however, as limited to the claim made before the Revenue Authorities for depreciation as such, I concur in the answers proposed by my Lord the Chief Justice to the questions raised in this reference as also in the order as to costs.

The Bank's Attorney moved the High Court on the 4th November 1921, for an order fixing up the scale of costs.

Macagon, C. J.—Following our decision in Aurangabad Mills Ltd., In re (2) the costs will be taxed as on the Original Side. But in order to avoid any question being raised in future whether the Court has jurisdiction in references of this nature to direct costs to be taxed on the Original Side scale, it will be advisable to consider whether a rule should be framed under the Bombay Pleaders Act XVIII of 1927.

Answer accordingly.

W. C. A. (2 64 Ind. Cas. 9, 23 Bem. L. R. 570, 45 B. 1286.

OUDH JUDICIAL COMMISSIONER'S COURT.

No. 32 of 1920.
August 11, 1920.

Present: -Mr. Daniels, A. J. C., and Syed Wazir Hasar, A. J. C. Rani BIJAI RAJ KOER-PLAINTIFF

-APPELLANT

Thakur JAI INDRA BAHADUR SINGH-DEFENDANT -RESPONDENT.

Decree, construction of—Court, duty of—Declaratory decree—Decree capable of execution—His Majesty in Council, order of, transmission of, for execution—High Court, power of, to give directions—Civil Procedure Code (Act V of 1904), O XLV, r. 15 - Consent order—Finality.

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It is the duty of a Court to avoid such a construction of a decree as may in future result in multiplicity of suits between the parties in respect of a matter which has been finally settled. [p. 985, col 1.]

A talugar executed a Will, under which he devised his estate to his nephew, and by the same Will he granted a maintenance allowance of Rs. 500 per mensem to his wife. By a subsequent codicil he granted another sum of Rs. 500 per mensem to his wife. The lady later on brought a suit in the Court of the Subordinate Judge to enforce her right to the annuities against the legatee. She not only claimed the arrears of maintenance but also asked for relief as to her right for the same in future and paid Courtfees both under clause (ii and clause (ii) of section 7 of the Court Fees Act. The Subordinate Judge held that she was entitled to an allowance of Rs. 500 per mensem, under the Will and that she was entitled to nothing under the codicil appeal, the Judicial Commissioner's Court decreed her claim "for a declaration that she is entitled to maintenance at the rate of Rs. 1,000 per mensem out of which half will be recoverable from the taluqdari and the other half from the non-taluqdari property, if any." On a further appeal, their Lordships of the Privy Council upheld this decree and observed as follows: - "The respondent's Counsel expressed a fear that the declaration granted was insufficient It does not so seem to their Lordships. It is a corollary of the declaration granted that any income which has since the death been received from the nontaluqdari estate will be liable as well as the future income to pay the extra 500 rupees, including arrears, from the death up to the date of the declaration : "

Held, that the decree was not merely declaratory of the lady's right to maintenance but that it empowered her to recover that maintenance from the taluqdari and non-taluqdari properties to the extent to which they were respectively liable. [p. 985, col.].]

Rashi Ram v. Chaudhrain Sahib-un-nissa, 15 Ind. Cas. 289; 15 O. C. 99, distinguished from.

In transmitting an order of His Majesty in Council to the Court below for execution under Order XLV, rule 15, Civil Procedure Code, a High Court is perfectly competent to give directions to the lower Court for the payment of the money only in the event of a sufficient security being filed by the decree-holder. [p. 986, col. 1.]

An order passed by consent is conclusive between the parties. [p. 986, col. 2]

Appeal from a decree of the Second Additional District Judge, Lucknow, dated the 12th February 1920.

Mr. John Jackson, for the Appellant.
Babus Ishwari Prasad and Mohan Lal, for
the Respondent.

JUDGMENT. -Thakur Rajindra Babadur Singh was the last holder of the Mahewa

taluga, in the District of Kheri. He died on the 18th Ostober 1912. By his Will of the 14th June 1907 he devised the estate to his nephew, Thekor Jai Indra Bahadur Singh, and by the same Will be granted a maintenance allowance of Rs. 500 per mensem to his wife, Rani Bijai Raj Kcer. By a codicil of the 4th October 1912 he granted another sum of Rs. 500 per mensem to Rani Bijai Raj Koer. Rani Bijai Raj Koer brought a sait in July 1913 in the Court of the Subordinate Judge of Rheri to enforce ber right to the annuities stated above against Thakur Jai Indra Bahadur Singh. In her plaint the lady stated that she had received a certain amount of money from Thakur Jai Indra Bahadur Singh in payment of the maintenance due to her. The relief which she asked for was that the "Court might be pleased to pass a decree for Rs. 5,479 14 0 with interest at six per cept. per annum until payment from the date of suit, and the costs of the suit and that the plaintiff might be declared entitled to an allowance at the increased rate set out in the condicil of the 4th of Ostober 1912, that is, to Rs. 500 a month more than was set out in the Will of the 4th June 1907." Soon after the institution of the suit just mentioned, Thakur Jai Indra Bahador Singh's estate was taken under the superintendence of the Court of Wards and the Deputy Commissioner of Kheri was consequently substituted as a party to the suit.

It would be seen from what has gone before that the Rani not only claimed the arrears of maintenance but also asked for relief as to her right for the same in future. She accordingly paid Court fees both under clause (i) and clause (ii) of section 7 of the Court Fass Ast (Ast VII of 1870). learned Subordinate Judge held that the Rani was entitled to an allowance of Rs. 500 per mensem under the Will and that she was entitled to nothing under the codicil. The Rani appealed to this Court. Her appeal was successful. At the end of its judg. ment this Court ordered as follows: -"The appeal is, therefore, allowed and the plaintiff's elaim decreed for a declaration that she is entitled to maintenance at the rate of Rs. 1,000 per month out of which half will be recoverable from the talqudari and the other half from the non talugiari property, if any." The defendant, that is, the Deputy BIJAI RAJ KORR C. THARUR JAI INDRA BAHADUR SINGH,

Commissioner of Kheri was dissatisfied with the decree of this Court and an appeal was preferred by him against that drecree to His Majesty in Council. That appeal was dismissed and the decree of this Court confirmed.

Rani Bijai Raj Koer, the decree holder, then applied to this Court under Order XLV. rule 15, of the Code of Civil Procedure and this Court transmitted the order of His Majesty in Council to the Subordinate Judge of Kheri for execution. In spite of her great efforts the lady succeeded in recovering only about Rs. 1,200 in execution of her decree in the Court of the Subordinate Judge of Kheri. Afterwards she applied under section 39 of the Code of Civil Procedure for the transfer of her decree to the Court of the Subordinate Judge of Lucknow. The decree holder presented a fresh application for execution on the 12th of March 1919 to the Court of the Second Additional District Judge of Lucknow, to whose file the case had been transferred for disposal. The prayer in the application was that under Order XXI, rule 52, of the Oode of Civil Procedure a prohibitory order be issued to the Registrar of the Court of the Judicial Commissioner, Oudb, and Rs. 20,994 together with future interest, whatever it might be, be made payable. It may be stated that this sum of money was held by the Registrar of this Court as belonging to the judgment debtor, being the profits of nortolugdari property of which he had become the owner by virtue of a decree of the Privy The learned Additional District Counsil. Judge issued the order prayed for on the 12th March 1919 but unfortunately this was done without notice to the judgment-debtor. On the 14th March 1:19 the decree holder moved this Ocurt by a petition of that date for an order for the payment of the money attached under the prohibitory order mentioned before. Notice of this application was issued to the judgment debtor and at the hearing of it his Counsel, Mr. St. George Jackson, appeared before the Court. This Court disposed of the application by its order dated the 25th July 1919 which we set out here in extenso.

"It is not disputed that Rajindra Bahadur Singh became entitled to a half share in the 31 villages. The profits, out of which a half share has been attached, are the profits of those 31 villages, from the 11th November 1910, when the Receiver got possession up to the 18th October 1912, the date on which Rajindra Bahadur Siugh died. There appears to be a certain amount of dispute as to the manner in which the legacies made by Rajindra Bahadur Singh should be administered. One of the legatees is Jai Indra Bahadur Singh, the judgment debtor, whose interest has been attached in this case. The money attached cannot, however, be paid to the attaching creditor because other annuitants and legatees are also concerned in the administration of the estate, left by Rajindra Bahadur Singh.

"Mr. John Jackson, who appears for the attaching creditor, states that his client will furnish security for the refund of the money, if it is paid to her, in the event of the title of the judgment debtor, whose interest has been attached, being hereafter found defective. Mr. St. George Jackson, who appears for the judgment debtor, states that he has no objection to the money attached being paid over to the attaching creditor, if sufficient security is furnished as above provided.

"Let the attaching creditor be allowed six weeks' time for filing security. In case the security is furnished, the amount attached will be sent over to the Court making the attachment. If it is not furnished, both the applications will stand dismissed. The parties will in the circumstances, bear their own some of this proceeding."

On the 5th August 1919 the judgment. debtor lodged objections to the execution of the decree in the Court of the Second Additional District Judge. The ground upon which the application for execution was eventually thrown out by the learned Judge was not taken in the petition of objection dated the 5th August 1919 but was urged at the bearing. The objection was that the decree, which Rani Bijai Raj Koer was seeking to execute, was merely declaratory and not capable of execution. The learned Judge accepted the objection and dismissed the application for execution except as regards a sum of Rs. 2,932 10 10 recoverable as arrears of maintenance under the decree in question. The decres-holder has preferred this appeal against that order.

We are of opinion that the appeal must prevail. The attitude which the judgmentBIJAI BAJ KORR U. THAKUB JAI INDRA BAHADUR SINGH.

debtor has taken in resisting the execution of the decree is manifestly unjust. It is our clear duty to avoid such a construction of the decree in question which would bereafter result in multiplicity of suits between the parties in respect of a matter which has been finally settled by His Majesty in Council. We think that the decree is not merely deslaratory of the plaintiff's right to the maintenance but that it empowers her to recover that maintenance from taluqdari and non taluqdari properties to the extent to which they are respectively liable. A copy of the printed case of the respondent in that appeal before their Lordships of the Privy Conneil has been placed before us by the learned Ocunsel for the appellant. Amongst the reasons stated therein for the dismissal of the appeal, one was as follows :- "Because the decree as drawn up in the Court of the Judicial Commissioner ought to be amended as it might raise difficulties so as to prevent the respondent from exercising her right to recover in execution of arrears of maintenance improperly withheld." This matter seems to have been considered by their Lordships of the Privy Council at the end of their judgment. They said :- "The respondent's Counsel expressed a fear that the declaration granted was insufficient. It does not so seem to their Lordebipe. It is a sorollary of the deslaration granted that any income which has since the death been received from the non-talugdari estate will be liable, as well as the future income, to pay the extra Rs. 500 including arrears, from the death up to the date of the declaration," Deputy Commissioner of Kheri v. Bijai Ras Koer (1).

The mere fact that the order passed by His Majesty in Council confirms the declaration granted by this Court does not make the order in any sense unexecutable. In the case of Barlow v. Orde (2), Lord Westbury, in addressing the Counsel for the petitioners in that case, observed as follows:—"Your elient will take care to understand, and it must be generally understood, that their Lordships do not recognise the existence of any doubt or difficulty in

Decrees relating to maintenance have frequently been subjected to an objection similar to the one urged in this case. In this connection we may refer to a decision of the High Court at Calentta in the case of Ashutosh Banner, ee v. Lukhimeni Debya (3). We may add respectfully that we entirely agree with the view taken by the Full Bench in that ease as regards the construction of such decrees. Our attention was drawn to a decision of a Bench of this Court in the sase of Kashi Bam v. Chaudhrain Sahib-unnisea (4). The ratio decidendi of that case, as wellas of many other cases considered in that judgment, was that no date had been fixed in the decree from which the maintenance would become due. In the case before us there is no such difficulty. The date is not only well-ascertained on the facts of the care but it is distinctly mentioned in the order of His Majesty in Council, as being the date of the testator's death.

But there is another ground upon which we think this appeal must succeed. We have already quoted in full the order of a Bench of this Court dated the 25th July 1919. The Counsel, who appeared for the judgment-debtor, distinctly gave his consent to the money being paid over to the decree-holder if sufficient security was furnished by her. It is admitted that the security which this Court ordered to be furnished has been filed and accepted as sufficient by the

that which has embarrassed the Court below, namely, that a declaration is not equivalent to an order. It is the duty of an Appellate Court frequently, and all that it can do, to make a declaration, and then the form in which that declaration is conceived, and the words in which the order is framed, amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed." The desree of this Court, the necessary portion of which we have quoted before, not only granted a declaration as to the right of the plaintiff but it further laid down the mandate that "balf will be recoverable from the taluquari and the other half from the non-taluedari property."

^{(1) 43} Ind. Cas. 987; 20 O. (C. 260 at p. 264; 22 C. W. N. 305; 4 O. L. J. 739; (1918) M. W. N. 824; 8 L. W. 1 (P. C.).

^{(2) 18} W. R. 175; 8 P. R. 1872 (P. C.).

^{(8) 19} C: 139, 9 Ind. Dec: (N. 8:) 538 (F. B.).

^{(4) 15} Ind, ('as, 889, 15 O. C. 99,

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We do not think that it is now Court. open to the respondent to withdraw that consent. It was asted upon by the desreeholder inasmuch as she filed the security in pursuance thereof as noted above. order of this Court, therefore, is in our opinion binding on the respondent We may refer in this connection to the following decisions of their Lordships of the Privy Council, Mungul Pershad Dichit v. Grija Kant Lahiri (5), Ram Kirpal v. Rup Kuari (6) and Beni Ram v. Nanhu Mal (7).

The learned Pleader for the respondargued that the order of the 25th July 19,9 was passed by this Court in its administrative capacity and that it had no jurisdiction to pass that order if it were held to be of a judicial character. are not prepared to accept this contention. We do not think that by transmitting the order of His Majesty in Council to the Court below for execution under Orler XLV, rule 15, of the Code of Civil Procedure this Court divested itself of the power of giving directions to the Court below in regard to the execution of the decree. Sub-rule (2) of rule 15 of that order vests such a jurisdiction in this Court and it "shall (upon the application of either party) give such directions as may be required for the execution of the came; and the Court to which the said order is so transmitted shall execute it accordingly." We may quote another remark of Lord Westbury from the ease of Barlow v. Orce (2) :- "Therefore, it was the duty of the parties to have brought the decree of Her Majesty in Council to the knowledge of that Court, and asked that Court to enforce and execute the decree, and it would be the duty of the Court to give directions for that purpose. Of course, it has no primary power of doing it; but it is to be enforced and executed under the directions of the Court by the Judge or officer by whom the suit was originally tried." This Court war, therefore, perfectly competent to give directions to the lower Court for the payment of the money only in the event of a suffisient security being filed by the decree holder. We have already pointed out that this order

was passed with the consent of the judgment. debtor. In a recent decision of the Privy Council in the ease of Ramachandra Deo Garu v. Chaitana Sahu (8) Lord Buskmaster stated the effect of an order passed by consent as being conclusive between the parties. We are confident that if the order dated the 25th July 1919 had been brought to the notice of the learned Additional District Judge he would have given the same effect to it as we have done.

We, therefore, allow the appeal, set aside the order of the learned Additional District Judge and, as the ease was disposed of on a preliminary point, we send it bask to him for disposal assording to law. The appellant will be entitled to her costs in both the Courts.

J P.

Appeal allowed.

(8) 56 Ind. Cas. 537; 18 A. L. J. 625; (1920) M. W. N. 566; 39 M. L. J. 68; 28 M. L. T. 97; 12 L. W. 260; 24 O. W. N. 1055; 2 U. P. L R. (P. C.) 122; 22 Bom. L. R. 1313; 47 I. A. 200 (P, C.).

ALLAHABAD HIGH COURT. FIRST CIV.L APPEAL No. 199 CF 1919. January 25, 1922.

Fresent : - Mr. Justice Piggott and Mr. Justice Walsh. JHABBU LAL AND OTHERE-

PLAINTIFFS-APPELLANTS

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JWALA PRASAD AND OTHERS -DEFENDANTS - RESPONDENT 1.

Hindu Law-Widow-Partition among family-Widow given full share of husband-Intention-Husband's heirs entitled to such property after widow's death-Evidence-Statement by deceased person provable against persons claiming through him.

Where after the death of a brother the remaining brothers partition the joint family property and give to the widow of the deceased brother the full share of their deceased brother in the immoveable as well as in the moveable property and in the assets of the joint family business, and the share is much more than what is needed for her maintenance, it may be assumed that the intention of the brothers was to regard the widow as the representative of the late husband and in such a case the share thus allotted to the widow descends after her death to her husband's heirs. [p 99', col. ..]

Any statement made by a person in a previous suit against his own interest is provable after his death in a subsequent suit as against a party

claiming through him [p. 931, col, 1.]

^{(5) 8} C. 5'; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J 249; 4 Ind. Dec. (N. s.) 32 (P. C.).

^{(6) 6} A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. s.) 718 (P. C.).

^{(7) 7} A. 102; 11 I. A. 181; 4 Sar. P. C. J. 564; 4 Ind, Dec. (N. s.) 138 (P. C.).

JHABBU LAL U. JWALL PRASAD.

First appeal from a decree of the Sabordinate Judge, Shabi happar, dated the 11th May 1918.

Mr. Gulzari Lal, for the Appellants.

Mr. Harnanian Frisil and N. P. Asthani, for the Respondents.

JUDGME ! I. - The plaintiffs in this suit as originally filed were Sakh Lal, son of Shib Charan Lal, together with Jhabba Lal and Daulat Ram, sons of Kalla Mal, an own brother of Sakh Lal. The fact that Sakh Lal has since died and is now represented in this appeal by his sons does not affect any of the questions before us for determination. principal defendant, Jwala Prasad, is the daughter's son of Lalji Mal, brother of Shib Charan Lal. For cortain reasons which are not material in view of the desision we have come to in the case as a whole, there were joined with him as defendants his father Janki Prasad and his wife Musamnat Dropadi. In dealing with the appeal before us we propose to treat Jwala Prasad as the principal and the only substantial defendant in the case. It is ad. mitted that Shib Charan Lal and Lalji Mal had two other brothers named Manna Lal and Bindrabao. Of these four brothers Lulji Mal died first, in or about the year 1879 A. D. Shib Oharan died in 1889, Bindraban in 1909. Musammat Genda, widow of Lalji Mal and grandmother of the principal defendant died on the 9th of May 1913. Manna Lal survived her, but had died before the institution of the present suit. The plaint as drafted ean only be described, in view of the fasts disclosed by the evidener, as a thoroughly disingenuous dosument. It alleges that Lulji Mal died at a time when he and his three brothers still formed a joint undivided family and it care. fully avoids admitting that separate possession or enjoyment in respect of any portion of the joint family estate was ever conferred upon his widow Musammat Gonda. There is an admission that this lady's name was resorded as the owner of a rateable share in some of the Z mindari property belonging to the joint family. This is said to have been done "for consolation" only, and there is an express plea that Musannat Genda never enjoyed astail possession over the landed property standing in her name. With reference to cartain other items of property, which admi tails d I not form part of the joint family estate at the time of Lalji Mal's death, there

are allegations to the effect that they had been acquired with the income from ancestral property but fistitiously in the names of certain of the defendants. The plaintiff goes on to state that after Musammas Genda's death, the defendants by setting up false and unfounded elaims have dispossessed the plaintiffs in respect of some of the items of property specified at the foot of the plaint and bave denied their title in respect of other items. The suit, therefore, is for recovery of possession in respect of shares in a number of items of property and a declaration of title in respect of the plaintiffs' shares in certain other items. The principal defence was undoubtedly that there had been a separation in the family prior to the death of Lulji Mai, that Musam. mat Ganda had succeeded to Lulji Mal's estate as a Hindu widow and that the principal defendant Jwala Prased was the heir to that estate under the Hinda Law after the death of his mother and of his grandmother. There can be no question, however, that the written statement of this defendant did also set up a certain alternative line of defence. It admitted that the death of Lalji Mal had taken place in the year 1879, whereas a formal and effective partition of the joint family property only took place five years later, that is to say, in Inasmuch, however, as Musummat Ganda was, according to the defendant, assigned a th share in all the property divided at the partition of 1884, and was assigned this share as the representative of Lalji Mal, it was contended that, if she did not in fact take this property in the ordinary way as the widow of a separated Hindu, then she must be taken to have received it at the partition with full proprietary rights and it was pleaded that before ber death she had executed a Will in favour of the principal defendant. In the closing paragraph of the written etatement the plea was very distinctly taken that, in any possible event, the defend. ant Jwala Prasad, as the representative (that is to say, as the lawful heir and successor) either of Lilji Mal or of Musammit Ganda, had a better claim than any of the plaintiff; to that portion of the property in sait which had formed part of the original joint property of the family and had been assigned to Musammat Ganda at the partition of 1884. With regard to other items of property the defendants contended that they JEABBU LAL U. JWALA PRASAD.

represented acquisitions made by Musammat Genda out of the surplus profits of the property in her hands, that they had never accredited to the estate of Lalji Mal in the hands of his widow, that she had retained full disposing power in respect of the same and that she had disposed of them in favour of the defendante. There were also certain pleas challenging the right of the plaintiffs to sue for a mere declaration in respect of some items of property. The suit was tried out in the Court below upon issues very carefully framed which seem fairly to cover the whole ground of the controversy between the parties. The second issue was in the following terms :-

Which of the disputed properties existed in Lalji Mal's time and what interest did Musammot Genda acquire in it?

We have laid some stress upon the pleadings and the frame of the issues, because it has been suggested to us that the argument principally relied upon before us on behalf of the defendante-respondents sets up on their behalf a case not taken in the Court below, or raises some issue, not tried by that Court. We think it will be sufficiently clear when we come to deal with the point that this is not the case, in view of what has been stated above, regarding the pleadings and the second issue in the case. The learned Subordinate Judge found that Lalji Mal died whilst still in a state of jointness with his three brothers, but that there was a partition, accompanied by a complete division of the joint femily property in the year 1884, five years after the death of Lalji Mal. At this partition certain property, including some of the landed property in suit, was banded over to Musammat Genda. It remained in her possession from that date until her death in She made savings out of the income of this property and by means of these savings acquired some of the other properties in suit. She seems also to have invested money in constructing an indigo factory which was also one of the properties elaimed by the plaintiffs. In respect of those items of property set forth at the foot of the plaint which had originally belonged to Lalji Mal and his three brothers jointly, and had been dealt with at the partition of 1884, the learned Subordinate Judge found that a share in these properties was given to Musammat. Genda as a provision for maintenance and

that upon her death these properties would go, neither to her own heirs nor to the heirs of her husband, but, as he puts it, to "the estate from which" the property had been taken. Upon this finding he has decreed the plaintiff's claim for a certain rateable share in each of those items of property which he has put in this case. Their suit has been dismissed in respect of other properties acquired by Musammat Ganda out of her savings, on the ground that these acquisitions had never been amalgamated with the enrous of the property obtained by her under the partition, that they were acquisitions of her own over which she had full disposing power and that the defendants were lawfully in possession of the same. There has also been a finding adverse to the plaintiffs on the question of their right to a mere desigration in respect of one item of The suit having been partly property. desreed and partly dismissed, the plaintiffs have appealed to this Court and the defendants have filed cross-objections. The memorandum of appeal raises one or two questions of detail regarding particular items of property. It contests the finding of the Court below with regard to Musammat Genda's acquisitions out of the income of the property in her hands and it shallenges the finding of the lower Court as to the extent of the share to which the plaintiffs were entitled. The defendants have filed a petition of erossobjections raising more than one point, but principally contending that the suit ought to have been altogether dismissed. It was admitted in argument that the defendants could not seriously press the contention that Lalji Mal had separated from his brothers during his life time. We must, therefore, proceed with the case on the assumption that the Court below rightly found that Lalji Mal died in a state of jointness with his three brothers. Five years later we find these three brothers engaged in effecting a complete partition of the joint family property in their hands. There was moveable as well as immoveable property concerned. Four lists were drawn up and one of these liste, admittedly specifying property amounting to a full one-fourth share of the whole, was headed "share of Lalji Mal," and the properties therein specified were made over to Musammat Gunda. There is not the slightest doubt that tuis lady continued for her life-time in full . JHAI BJ LAL U. J. WALA PRASAD

possession and enjoyment of the properties thus assigned to her. As a matter of fact some years later there was a further division and apportionment of property, consequent upon the dissolution of a family basiness, and here again a full one-fourth share was handed over to Musammat Genda. The principal question which we have to determine is the effect of the partition proceedings of 1884. The learned Subordinate Judge has assumed, almost without discussing the point, that the properties assigned to Musammat Genda at this partition were given to her in recognition of her right of maintenance. It is not perfeetly clear from his judgment which of two proposition be intended to affirm. He may have meant that the three brothers, Shib Charan Lal, Manna Lal and Bindraban never parted with any property at all in favour of Musammat Genda and created any estate in her favour. this point of view it would have to be contended that the each and moveables assigned to Musammat Genda were treated as representing money immediately needed by her for her maintenance and that the shares in the landed property made over to her remained all the time in the ownership of the three brothers, while Musammat Genda enjoyed only a permissive possession, by license of the real owners, in lieu of each which they would otherwise have to pay her for maintenance. This position is scarcely arguable and it has not been seriously pressed upon us on behalf of the appellants. The amount of the property made over to Musammat Ganda, being far in excess of what she needed for her comfortable maintenance, and the considerable sums assigned to her at the divisions of the moveables and the joint business make it impossible to suppose that there was no transfer of ownership and no estate created in her favour. In reply to the question whether or not the three surviving brothers or the heirs of those brothers, could at any given moment have resumed possession over the whole or any part of the immoveable property assigned to Musammat Genda in 1884, the only possible answer seems to be that they could not have done so, because the proceedings at the partition had amounted at the very least to a transfer of those properties in favour of Musammet Genda for her life-time. Now, assuming that a lifeestate was created by the partition of 1884 in

favour of Musammat Genda, the real question in isone is: - who would succeed to that estate upon the death of that lady? The learned Subordinate Judge does not seem to have looked at the case from this point of view at all. He quotes decision in Debi Mangal Prosad Singh v. Mahadeo Prasad Singh (1) as authority for the proposition that property taken upon a partition by a Hindu widow reverts on her death to the lawful owners of the estate from which that property was taken. As a matter of fact the decision in this case was that such property passed on the death of the widow to the heirs of her deseased husband. If that decision can be applied literally and fully to the facts of the ease now before us, it is so far from being an authority in favour of the plaintiffs that it is decisive against them. The plaintiffs are not the heirs of Lalji Mal; on the contrary, that gentleman's heir under the Hindu Law is the principal defendant, Jwala Prasad. As a matter of fact the case in question is distinguishable from the present. The property dealt with in the reported case was the share taken on partition by a Hindu mother, that is to say, a share to which the widow concerned had a legal right which she could have enforced if necessary by suit. In the present case, assuming that Lalji Mal died in a state of jointness with his brothers, his widow had a right to nothing except maintenance. What we have to determine is whether, the surviving brothers having under the circumstances allotted to the widow a full 1th share in the joint family property, such as would be taken by her husband had he survived until the date of the partition, is it to be presumed that they created in her favour the ordinary estate of a Hindu widow, passing on her death to the heirs of her husband, or are we to take it that they intended to create in her favour a special kind of life estate, with reversion on her death to the donors or heirs of the donors? We have been referred in argument to an old ease which is the foundation of much of the subsequent case-law on the subject, that of Sceemuty Rabutty Dasses v. Sibchunder Mullick (2). In that case, there having been a dispute in a Hindu family regarding the slaims of a

(1) 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. B. 220; 15 C. L. J. 344; 23 M. L. J. 462; 80 I. A. 121 (P. C.).

(2) 6 M. I. A. 1, 1 Sar. P. O. J. 484, 19 E. R. 1,

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Hindu widow, a document was drawn up which expresily and in terms assigned certain property to that lady for her sole absolute use and benefit, in her character of heiress and legal personal representative of her deceased husband. The immediate point for datermination was whether the widow under this instrument took an absolute estate, or merely a life-estate devolving upon her death upon the heirs of her deseased husband. It was held that she took a life estate only and that the heirs of her deseased husband succeeded on her death to the corpus of the property. The fac's in that case seem to be distinguishable from those of the present case, because it was conceded that the widow was entitled as of right to some share and the only question was as to the amount of her share. Nevertheless it has to be noted in the present ease that Musammat Genda war, at any rate, entitled to something. She was entitled to maintenance and when the brothere of her deceased husband, in lieu of her right to maintenance, shose to assign certain property to her on partition, the question arises whether, in the absence of any evidence one way or other, it ought not to be assumed that they intended to give her the ordinary life-estate of a Hindu widow, with reversion after her death to the heirs of her deseased husband. We have come to the ecnelusion, however, that it is not necessary to rest the decision upon any mere presumption. There are circumstances in the case which seem to us very strongly to indicate that the intention of the brothers at the time of partition was to deal with Musammot Genda as the representative of her deceased husband and that they in fact dealt with her in this escapity. It would be very difficult to understand on any other supposition why they should bave given ber, not merely a 1th share in the immoveable property, but her full rateable share in the moveable property and in the assets of the joint family business when those same to be divided. If they looked upon themselves as dealing with a widow who only required maintenance at their hands, they would surely never have handed over to her large sums in eash, as representing ber late husbard's share in the moveable property of the family and in the joint family business. They would seareely have remained quiescent while she made consider. able sayings out of the property in her

hands and acquired property for herself, or for the benefit of her daughter's sons. They would searcely have described the paper drawn up at the partition, on which they engrossed a list of the properties assigned to Musammat Gends, as the share of Lalji Mal. Moreover, the matter can be carried even further than this. There have been at least two litigations in this family, the particulars of which have been laid before The learned Subordinate Judge alludes to them in his judgment and does so principally for the purposes of confirming his opinion that there was no partition in the family until efter the death of Lalji Mal. It seems to us, however, that there are other significant circumstances cornected with these litigations. Kallu Mal, brother of the plaintiff Sakh Lal, had another son named Paran Mal, and on the 8th of January 1911 this Paran Mal instituted a suit for posses. sion by partition in respect of properties belonging to this family, on the allegation that he was the adopted son of Lalji Mal. Amongst the defendants were Manna Lal, Musimmet Genda, the daughter of Bindra. bar, the plaintiff Sakh Lal and other members of the family. Muszmmat Genda in her written statement very clearly pleaded that her daughter's sons were the ultimate beirs and successors to Lalji Mal's share in the joint family estate. The suit was eventually decided upon a finding that Puran Mal had failed to prove his alleged adoption, but when it came to an apportionment of shares, it is obvious that Puran Mal was given the share in the joint family property which world come to him on the assumption that Lalji Mal's th share was properly in the possession of Musammat Genda and was not available for apportionment amongst the descendants of Shib Charan Lal. Even more important is the suit which was brought by Manna Lal after the death of Musammat Genda. There was a dispute between this gentleman and other members of the family, including the defendant, Jwala Pracad, and Manna Lal came into Court claiming separate possession over certain items of Zemindari property. He stated in his plaint that on the death of Mes:mmat Genda the whole of the property which had been assigned to her on partition had descended to him by right of inheritance, though he did not explain the precise nature of this right. He contented JHABBU LAL C. JWALA PRASAD.

himself with saying that he would bring a separate suit hereafter to enforce the right thus elaimed. The important part of the case, however, lies in certain statements made by Manna Lal when he was examined on the 15th of July 1914 in the Court of the Subordinate Judge of Shabjabappar. It must be remembered that any statements made by Manna Lal, who died before the institution of the present suit, favourable to the defendant's case, are provable not merely as statements made against the interest of Manna Lal himself, but also because the plaintiffs in the present suit are, as regards a substantial portion of their claim, claiming through Manna Lal. Manna Lal's account of the partition of 1834 is to some extent confused by a misapprehension which had somehow grown up in his mind, to the effect that Shib Charan Lal as well as Lalji Mal had died before the partition. We now know that Lalji Mal died in 1879, the partition was in 1884, while Shib Charan Lal diel in 1889. Allowing, however, for this apparently honest missonesption in the mind of the deponent, there are passages in Manna Lal's deposition which have an important bearing on the questi n now in issue. He seems to have been expressly asked why four lots were prepared at the partition of 1:84, if there were only himself and Bindraban alive at the time. He deposed as follows:- There were three brothers and so four lots were prepared. As regards the brothers who had died, their respective shares were given to their heirs by sommon consent," He went on to say that it was in this way that property had been allotted to Musammat Genda, but hastily added that this was only for her maintenance. When it was pressed upon him that this last assertion of his was not consistent with what he had said just before, he said that he had made a mistake in the first instance but that what he now said, namely, as to the assignment in Musam. mat Genda's favour being only for her maintenance, was correct. When further pressed in pross-examination, however, we find him recorded as making the following assertion : -"When Musammat Genda became the owner of a share, then her property will descend to her daughter's sons."

This is a literal translation of the words of the deposition as recorded in the vernaeu. lar. It is, of course, possible that the question

had been put to Manna Lal in a bypothetical form and that he only meant to may that, if Musammet Genda had received a share, then of course that share would descend to the beirs of ber late busband. Considering however the deposition as a whole, the significant admissions with which it commenced and with which it ended seem to us of greater weight and importance than the comewhat half. hearted attempt made by Manna Lal to shaftle out of them in the middle of the deposition. Looking at this statement, along with the other items of evidence which we have already considered, it seems to us beyord question that, whatever may have been the motives influencing Shib Charan Lal, Manna Lal and Bindraban in the year 1884, they did join to confer upon Muszamat Ganda in respect of the property assigned to her at the partition the ordinary estate of a Hindu widow, on the understanding that they were dealing with her as the representative of her late busband and with the deliberate intention that the share thus assigned to her should descend after her death to the heirs of Lalji Mal under the Hinda Law. The only serious argument that we can see against such a conclusion is that the conduct thus assribed to the three brothers is too improbable to be believed, or, at any rate, to be believed upon the somewhat slender materials available on this record. It is, however, impossible for any one to say now what precise motives may have influenced the conduct of these three brothers in the year 1884. Although we have ascepted the finding that Lalji Mal died in a state of jointness with his brothers, we are bound to admit the possibility (when we come to deal with an argument of this sort) that the brothers were perfectly aware that the question of a separation of the family had been discussed in the life-time of Lalji Mal and that they were only honeatly carrying out an arrangement which they knew had been virtually determined upon before, and which would have been carried out if Lalji Mal's death had not supervened. We need not do more than put this forward as a suggestion to meet an argument based upon probabilites. Our decision we base upon what seems to us a fair and reas inable consideration of the evilence as a whole. The finding which we have record. ed obviously disposes of the entire ease, Jwala Prasad, defendant, is the rightful beir

RAMJI LAL U. GIANI.

them by inheritance from Lalji Mal, or by inheritance from Musammat Genda, or under the Will of the latter; the plaintiffs' suit must fail and should have been dismissed altogether. We accordingly dismiss the plaintiffs' appeal, allow the cross-appeal of the defendants, set aside the decree and order of the Court below and dismiss the plaintiffs' suit, with costs throughout, including in this Court fees on the higher scale.

J. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2339 OF 1920.

February 24, 1921.

Fresent:—Mr. Justice Wilberforce.

RAMJI LAL AND OTHERS-DEFENDANTS-

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GIANI-PLAINTIFF AND PEARE LAL-DEFENDANT-RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 152, O. XLVII—Decree, amendment of—Amendment not merely clerical—Court expressly acting under s, 152—Order, whether appealable.

Plaintiff sued to recover a certain sum of money as his share of certain trees sold from common land. The suit was decreed, but according to the calculations of the Court the amount payable to plaintiff was found to be less than demanded by him. He objected to the calculations and stated that the distribution of the amount involved had been worked out on an incorrect area. The Court professing to act under section 152, Civil Procedure Code, allowed the objection and amended the decree:

Held, that the Court must be deemed legally to have acted under Order XLVII and not under section 152 of the Civil Procedure Code and that order amending the decree was appealable.

Second appeal from the decree of the Additional Judge, Delhi, dated the 9th June 1920, rejecting the appeal with costs by holding that the appeal to his Court does not lie against the order of the Munsif, First Class, Delhi, dated the 6th April 1920, amending the decree of the Munsif, First Class, Delhi, dated the 17th November 1919.

Dr. Nand Lal, for the Appellants. Lala Jagan Nath, for the Respondents.

JUDGMENT .- In this case the plaintiff sued to recover a sum of Rs. 69-12-0 as his share of certain trees sold from common The suit was decreed and according to the calculations of the First Court the amount payable to the plaintiff was found to be Rs. 53-10-10. The plaintiff subsequently objected to the calculations and stated that the distribution of the amount involved had been worked out on an incorrect area. The successor of the Munsif considered this application to be correct and acting under section 152, Civil Procedure Code, allowed an amendment of the deeres. Against this decision the defendants appealed and the District Judge has held that no appeal lies, as the order in question was passed under section 152.

The defendants have come up in second appeal and their Counsel urges that the Munsif's order was really under Order XLVII and not under section 152. This contention must be upheld. Section 152 refers merely to arithmetical or clerical errors which are patent on the face of the judgment or of the decree. In the present case the whole system of calculation adopted by the First Court was challenged in plaintiff's application and there was no more allegation of an arithmetical or elerical mistake. I hold, therefore, that the Munsif, although he purported to act under section 152, must be considered legally to have acted under Order XLVII, and an appeal, therefore, lay to the District Judge.

I accept the appeal and remand the ease to the lower Appellate Court for desision on the merits.

Court fee on appeal to be refunded. Costs to be costs in the case.

N. H.

Appeal accepted;

DUNI CHAND D. BMPEROR.

LAHORE HIGH COURT.

OBIMINAL REVISION No. 716 OF 1920.

September 14, 1920.

Present:—Mr. Justice Wilberforce.

DUNI OHAND—Acousel—Petitioner

DETSU8

EMPEROR-RESPONDENT.

Opium Act (I of 1878), s. 9 (c), (g)—Authorised agent of licensec, right of, to possess opium—Register of sales, mistake in—Agent, whether liable.

The authorised agent of a retail licensee of opium, is entitled to possess opium to the extent of his license. [p. 994, col 1.]

Neither the rules, nor the terms of the license in the Punjab provide for any penalty against an authorised agent in respect of any mistake in the register of accounts of sales of opium. [p. 934, col. 2.]

Case reported by the Sessions Judge, Dara Ghazi Khan, with his No. 431J, of 28th April 1920.

while investigating a case (No. 44) happened to search accused Dani Chand's house and found 2 seers of opium, and on search of his shop he found 5 tolar of opium at 5.30 P. M. On inspecting his register he found that 2 seers of opium were down as the balance, and thus 5 tolar were found in excess.

He sent a ruq 1 to his than 2 as first information report and sent a telegram to the Excise Sub Inspector.

The assumed was sent up for trial by the Police.

GROUND.—The charge against him is rather a little vague. It recites breach of sections 137-133, which appear to be paragraphs of the Excise Manual, Volume II. Again it recites rule 49 (3), which is alleged to have been violated.

The charge is mainly under sestion 9 of Act I of 1878, and though no subsection is quoted, it seems that the subsections (c) and (g) were meant, as the words contained therein are Najais taur par apres quibza men rakha hua thu aur tumhare register ka hisab bhi galat darj tha."

I think the assused has not been prejudiced by the Magistrate's omission to mention sub-sections of the section 2.

But thinking that the appellant is an authorised agent of the retail vend lisauses. Mula Ram, he is authorised to keep opium

under his license in his vend premises to the extent allowed by the license. But the license prescribes no limit and the opium found in his house (2 seers) and at his shop (5 tolas) were covered by his license and in my opinion his conviction under section 9 (c) of the Opium Act was not sustainable. Emperor v. Lalli (1) seems to apply to this case.

Under rule 49 (f) of the Opium Ast
"The licensee shall keep correct daily
accounts of sales of opium in such form as
the Financial Commissioner may from time

to time prescribe."

When his shop was searched, the register kept in the shop and written by others for the applicant showed a sale of 21 chhitaks from 1st September 1919 to 8th September 1919 and there was found to be an excess of 5 tolss over the sales : but the Hindi bahi kapt by the petitioner showed a sale of 16 chhataks of opium in those dates (cide paragraph 3 of Zimni 1, dated 9th September 1919). The bahi and the register were taken possession of by the Sab Inspector at one and the same time. Thus it appears that the entries which the accused got made were not properly made by those who made them for him. From the statement of the Sub-Inspector before the Magistrate it will appear that the opium found at his house and shop (2 seers and 5 toles) was the sorrest balance in his Hindi bahi which the accused himself wrote, and that the register showed an excess of 5 toals. The Sub-Inspector's statement is not corroborated by his Zimni entry 3 of 9th September 1919.

But as he has given his statement on solemn affirmation, it should be considered to be correct, and that the balance actually found on search tallied with the accused's private buhi in Hindi in his own handwriting. In such a case the mistake in the register would be a bona fide one and the accused is entitled to an acquittal.

of 5 chhataks as given in the Zimnis and the register was earelessly kept, a lenient punishment under section 9 (q) of the Opium Act was called for when we take into account that the accused is illiterate

^{(1) 43} Iud. Cas. 598, 41 P. R. 1917 Cr; 18 Cr. L. J. 977.

BMPEROZ U. LAXMAN MATHA.

and was then ill, and his brother in law had died. In that case the punishment at seven days' imprisonment which the arcasel has already undergone should be considered sufficient.

For these reasons I submit the records of the ease on the revision side for orders of the High Court of Judiesture at Lahore. The assumed was released on bail by order of this Court dated 1st April 1920.

Mr. Bair-ud din Kureshi, for the Petitioner,

Lala Sheo Narain, for the Pablic Prosesa.

tor, for the Respondent.

ORDER -In this case the petitioner, who is the authorised agent of a retail liseusse of opiam, has been convicted of offenses papishable under sestion 9 of the Opiam Act. The charges were vague and the judgment of the Magistrate also is vague, but apparently the Magistrate's meaning was that the petitioner had infringed the provisions of the Act by the illegal posses. sion of five tolas of opium and had also made mistakes in his ragister. On a position for ravision tha Sassions to that officer has forwarded the proseed. inge under sestion 438, Oriminal Procedure Code, pointing out that under the authority of Emperor v. Lalli (1) the petitioner being the authorized agent of the licensee is autho. rized to posses opium to the extent of his license. The learned Judge has also pointed that though there was a mistake in the regular ragister of sales, the Hindi register kept by the petitioner was correst. In the opinion of the Sessions Judge at the most the offence was a technical one and the petitioner's action was more excusable on the ground that be himself does not understand Urdu and was at the time ill and in mourning.

As for the illegal possession of 5 toals of opium I agree with the dessions Judge that the petitioner being the authorized agent of the licensee and being authorized to possess opium and the amount found not being beyond the limit of his license, the conviction cannot stand. Enperor v. Lulti (1) was a clear authority in point. The learned Counsel for the Urown urges that the 2 seers of opium were found in the patitioner's house and that under the terms of his license he was only legally entitled to keep

ment appears sound, but in the present case there was no definite charge against the petitioner for keeping opium in his house as opposed to his shop, nor is there any evidence to show that the house and the shop are in any way separate. Moreover, the charge was in respect of five tolas, which were found in the shop. The first part of the conviction, therefore, cannot stand.

As for the second part of the charge in respect of the mistake in the Urdu register, the learned Counsel for the petitioner points out that only the licensee himself sould be prosecuted. He refera to a strong authority in his favour Kalu Mal Rhetri, In the matter of (2). The rules and the forms of licenses in Bengal may be different from those prevailing in the Punjab, but I notice that in this Province neither the rules nor the terms of the license provide for any penalty against the authorised agent in such a matter. I hold, therefore, that the whole sonviction was legally unjustified and accepting the petition I acquit the petitioner.

W. C. A.

Fetition accepted.

(2) 29 C. 606; 6 C. W. N. 674 (F. B.).

BOMBAY HIGH COURT.
CHIPINAL REFERENCE No. 61 of 1921.
January 12, 1922.

Present:—Sir Norman Maeleod, Kr., Chief Justice, and Mr. Justice Coyajes. EMPEROR—PROSECUTOR.

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LAXMAN NATHA-ACOUSED.

Criminal Procedure Code (Act V of 1899), s. 344

-Prosecution on Police report-Adjournment at request of prosecution-Complainant, whether iable for costs.

where a Magistrate takes cognizance of an offence on a Police report, the complainant is merely a witness, and if an adjournment takes place because of the absence of the prosecution witnesses on the date fixed an order under section 344 of the Criminal Procedure Code directing the complainant to PIQIBIA U. EMPEROS.

pay the expenses incurred by the accused is not justified, as the adjournment was not caused through any fault of his.

Oriminal Reference by the District Magia-

trate, Sholapur.

JUDGMENT.—This is a reference by the District Magistrate of Sholapur asking the High Court to exercise the powers conferred by section 439 of the Oriminal Prosedure Code with regard to an order of costs under section 344, Oriminal Procedure Code, passed by the Second Class Magistrate of Malsiras. That order was that the expenses incurred by the 10th assused in bringing a Pleader from Pandharpur, a distance of thirty-two miles, and going back the same distance and also his Pleader's fees which had been settled by the parties should be paid by the complainant.

Now, I could understand that if an adjournment takes place for which the examplainant is solely to blame, then an order sould be made that the complainant should pay any costs which may have been incurred by the assused. But in this esse, as the District Magistrate points out, the complainant was not at fault as the Magistrate had taken cognizance of the offence upon Police report. The Police Sub-Inspector was responsible for keeping the witnesses in question present on the date fixed, and not the complainant who was only a witness. We agree with the reasons given by the District Magistrate for setting aside the order passed by the Second Class Magistrate, and accordingly the order is set aside. If the amount has been paid, it must be refunded.

W. C A.

Order set aside.

LAHORE HIGH COURT,
CAIMINAL APPEAL No. 519 of 1920,
November 1, 1920,
Present: -Mr. Justice Chevis,
FAQIRIA-CONV OF-APPELLANT

EMPEROR — REAPINGENE,
Arms Act (XI of 1973), s. 20—Chhavi, concealment
of—Sentence, suitable.

Where a person is convicted under section 20 of the Arms Act of having concealed a chhari, and nothing is known against him, and it is not shown that he has not broken the law in the past, the maximum sentence provided by the section is not called for, nor is a merely nominal sentence.

Appeal from an order of the Magistrate, First Class, exercising enhanced powers under section 30 of the Oriminal Procedure Code, Kasur, District Labore, dated the 27th July 1920.

Lila Rama Nand, for the Appellant. She'kh Niaz Ali, for the Respondent.

JUDGMENT.—The appellant, Faqiria, has been convicted of having consealed in his possession, a chavi. Under section 20 of the Arms Act he has been sentenced to undergo seven years' rigorous imprisonment.

The evidence for the prosecution shows that Bhagwan Das, head constable, was patrolling at night, accompanied by Ala Ditta, constable, and two sweepers, and at a bridge across the canal they came upon Faqiria and one Bhaga, who on enquiry said they were going to a cartain village to buy a buffalo. The nature of Faqiria's stick aroused Bhagwan Dae's suspicions, and he searched Faqiria and found a chhavi head in his waistoost pocket.

The defence is, that the Police palmed off the charm head on to Faqiria because he did not bribe the head constable. Certain defence witnesses have been called, but I agree with the learned Magistrate in holding the case fully proved.

The weapon was consealed, and I take it that though the appellant did not know that he was going to meet a Police Officer that night he knew that he might possibly do so, and so he thought it prudent to earry the weapon concealed. I consider, therefore, that he has rightly been convicted under section 20 of the Arms Act.

As to sentence the appellant is a chimba, and nothing seems to be known against, his character in the past. The habit of carrying chimis seems, unfortunately, to be on the increase, and sertainly requires, righton repression. The Magistrate remarks, such weapons are not earried for any incoment purpose, though I suppose it must be admitted that they may cometimes be carried for self defence. But I am not prepared to say that the maximum sentence must be inflicted in every case merely

LEGAL REMEMBRANCER O. ABI LAL MANDAL.

because the weapon in question is a chha:i. To pass nominal sentences in such cases would, of course, be useless, but if the habit is so engrained that substantial sentences will not check it, then I do not think it can be stamped out even by infliction of the maximum sentense. In Khem Singh v. Emperor (1) the maximum was inflieted because the offender was a man of very bad character, who had previously been convieted of offences under sections 414 and 457, and bad also been bound over to keep the peace and to be of good behaviour. Here nothing is known against the appellant in the past, and we are not justified in assuming that he has ever broken the law in the past.

I uphold the conviction but reduce the sentence to three years' rigorous imprisonment.

W. C. 4.

Sentenca reduced.

(1) 28 Ind. Cas. 796; 8 P. R. 1915 Cr.; 76 P. L. R. 1915; 16 Cr. L. J. 412.

CALCUTTA HIGH COURT.
GOVERNMENT APPEAL No. 4 of 1920.
February 9, 1921.
Present:—Mr. Justice Teunon and
Mr. Justice Ghose.
LEGAL REMEMBRANCER—

AHI LAL MANDAL-Accosed.

Penal Code (Act XLV of 1880), ss. 193, 423—Fabricating false document—Sale-deed containing false recital of marriage executed—Offence—"Fraudulently," meaning of—Deprivation of property—Deception and injury.

Accused executed a sale-deed in favour of a woman alleging that she was married to him on a particular date and transferring to her certain land in lieu of dower. In fact, no marriage took place between the accused and the woman who was the wife of another person:

Held, that the only possible inference was that he was acting in furtherance of his desire to secure the person of the woman, and his intention was to use this document and false statements therein in

judicial proceedings to mislead the Judge and that, therefore, he was guilty of an offence of fabricating false evidence under section 153, Indian Penal Code. [p 997, col. 1.]

Held, also, that the accused had a further intention to cause injury to the woman and her true husband and to support his false claim to that status and that, therefore, he was also guilty under section 423,

Indian Penal Code [p 997, col. 1]

The words "fraud," "fraudulently" and "to defraud" in section 423, Indian Penal Code, are not confined to connote deprivation of property and the deception of the person so deprived. It is not essential that the person deceived or to be deceived and the person injured or intended to be injured should be one and the same. [p. 997, col. 1.]

Government appeal from an order of acquittal passed by the Sessions Judge, Puri,

dated the 16th July 1920.

Mr. B. L. Mitter (with him Babu Santosh Kumar Bose), for the Crown.

Babu Birbhusan Dutt (with him Babu Satis Chunder Ghatak), for the Accused.

JUDGMENT.—The prosecution in this case has reference to a document registered on the 10th of July 1919 by the person Ahi Lal, against whose acquittal the present appeal has been preferred by Government. The document purports to be a conveyance transferring to one Marium Bibi four bighas of land in lieu of a sum of Rr. 49/said to be due to her on account of dower. The document describes Marium as the wife of Ahi Lal and recites that the marriage was celebrated on the date borne by the document, namely, the 12th of Baisakh.

It has been found by both the Courts below that this document was executed by the accused Ahi Lal, that no marriage between Ahi Lal and Marium ever took place, and that, in fact, Marium was and is the wife of one Moti Mandal of village

Idolpore.

We have been taken over the whole of the evidence in the case, and we are satisfied that the findings of the Courts below are correct. The question in this appeal then is whether the accused has committed the offences punishable under sections 193 and 423 of the Code.

We have found that the statements made in this document are false. There is extraneous evidence that the accused is on bad terms with the father of the woman Marium, and also that he has sought to obtain her in marriage. With what

HADRESO O. BUMOSANDRY BYLLIS DESHWARH.

intention, then, did the accused fabricate this document? It is suggested on his behalf in the course of argument that he was merely perpetrating a bad practical joke. He himself has offered no explanation. The only possible inference, therefore, is that he was acting in furtherance of his desire to seeare the person of this woman, and this, in the circumstances, he could only do by judicial proceedings. We can only conclude, therefore, that his intention was to use this document and the false statements therein in judicial proceedings and thereby mislead the Judge.

We, therefore, find him guilty of the offence of fabricating false evidence, punish able under section 193 of the Indian Penal Code.

He is also, in our opinion, guilty under section 423 of the Indian Penal Code. The statements in the document relating to the consideration for the transfer are false, and the only question then is whether the accused in making the document was acting fraudulently. Here the contention advanced on behalf of the accused is that the words "fraud," "fraudulently" and "to defraud" connote deprivation of property, and the deception of the person so deprived. We are unable to confine the words in question to this restricted meaning. We are not of opidion that deprivation of property, actual or intended, is an essential ingredient in fraud, or the intention to defraud, and we are further of opinion that it is not essential that the person deseived or to be deseived and the person injured or intended to be injured should be one and the same. In the present case we have already found an intention to deceive and mislead. The further intention to sause injury to the woman and her true bueband, and to support assused's own false claim to that status is elearly to be deduced from the facts. The language of the section (section 423) is thus satisfied, and we find the assuted guilty of the offense punishable thereunder. We, therefore, restore the order of the First Court and sentence the adensed under each section to nine months' rigorous imprisonment: the two sentences to run conenrrently. J. P.

. Order accordingly.

BOMBAY HIGH COURT. ORIMINAL REPEBUNCE No. 59 OF 1921. January 19, 1922.

Present :- Sir Norman Maeleod, Kr., Chief Justice, and Mr. Justice Coyajee. EMPEROR-PROSECUTOR

versus

RAMOHANDRA BAPUJI DESHMUKH

-Accesso

Criminal Procedure Code (Act V of 1898), 1. 545-Compensation, when awardable.

Accused dishonestly induced the complainant to part with her ornaments, and these he pledged with D. He was convicted under section 420 of the Penal Code and sentenced to imprisonment and fine, and the Magistrate directed that out of the fine, a sum should be paid to D. as compensation under section 545 of the Criminal Procedure Code:

Held, that the order under section 645 could not be sustained, as under it compensation is only awardable to a person for the injury caused by the offence committed, and that as the offence committed in this case was cheating, no injury was caused to D. thereby.

Oriminal reference made by the District

Magistrate of Abmednagar.

JUDGMENT,-The assused was convicted of an offence punishable under section 420. Indian Penal Code, and sentenced by the Magistrate to four months' rigorous imprisonment and a fine of Rs. 100. The accused had dishonestly induced the complainant to part with her ornaments, and these were pledged with a person called Dalishand. The Magietra'e directed that out of the fine, if recovered, Rs. 35 should be paid as compensation to Daliehand under sestion 545, Oriminal Procedure Code. But that section only enables the Magistrate to direct that the whole or any part of the fine, if resovered, should be applied in compensation for the injury eaused by the offence committed. The offence committed was cheating, and no injury was saused to Daliehand by the cheating. We think, therefore, that the District Magistrate was right in asking this Court to revise the order passed by the Trying Magistrate under section 545. Oriminal Procedure Code, and the order must be set asife, and if any compensation has been paid to Dalieband, it must be refanded.

Order set anile.

W. C. A.

HARI CHARAN DAS C. BMPEROR.

CALCUTTA HIGH COURT.

CLIMINAL APPEAL No. 457 of 1921.

September 28, 1921.

Present:—Mr. Justice Newbould and

Mr. Justice Ghose.

HARI CHARAN DAS AND OTHERS—

APPELLANTS

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EMPEROR-BESPONDENTS.

Trial by jury—Charge—Misdirection—Discrepancies and contradictions in evidence, how to be dealt with in charge—Duty of Judge.

In determining whether there has been misdirection to a jury, the charge must be judged as a whole, and it must be seen whether the case for both sides has been fairly put, so that the jury understood what they had to decide and come to a right decision. [p. 498. col. 2.]

In dealing with discrepancies and contradictions in the statements of prosecution witnesses in his charge, the Judge should draw attention to the more essential items, and the strongest argument advanced by the defence; merely referring the jury to the speech of the Pleader for the defence is not sufficient. [p. 992, col. 1.]

Criminal appeal against an order of the Additional Sessions Judge, Sylhet, dated the 14th July 1921.

Babus Datarathi Sanyal and Hamendra Kumar Das, for the Appellants.

Mr. Orr, for the Orown.

JUDGMENT,-The appellants have been convicted of rioting and sentenced under section 147 of the Indian Penal Code to two years' rigorous imprisonment each. There can be no doubt that on the 23rd of November last a serious fight took place between the appellants on one side and the principal prosecution witnesses in this case on the other. Men of both parties were separately sent up for trial on charges of rioting and other offerces. The trial of some men of the complainant's party resulted in their acquittal and the trial of seven men of the appellant's party resulted in the acquittal of one of the seven and the conviction of the others as stated above.

From the portions of the evidence that have been read to us there seems to be very little doubt that what really happened was a mutual fight between the two parties, very probably pre arranged. But in reporting the matter to the Police both parties tried to make out a case of pure aggression by the other side. According to the accused, the occurrence took place at or near what is

described as Atkayari plot and the actual beating is said to have taken place at a point marked 'A' in the Police map Exhibit 3. According to the prosecution, the occurrence took place at a spot marked "a" in the map about half a mile to the east of the other plot. Every thing seems to point to the real occurrence having taken place at neither of these places. The jury, however, have expressly found that the occurrence took place at the spot where the prosecution witnesses say it did. It is contended and we think fairly contended that in coming to this conclusion the jury were not properly directed by the learned Sessions Judge. Saveral points in favour of the case for the appellants have been put to us by the learned Pleader who has appeared before us for them. But we do not propose to deal with these points seriatim. In judging the charge to the jury one sannot say that there has been misdirection because every point in favour of the accused has not been put to the jury. The charge must be judged as a whole, and one must see whether judging it as a whole, the case for the two sides had been fairly put so that the jury can understand what they have to deside and some to a right conclusion. What we find in the present charge is that it was never suggested to the jury that both the case for the prosecution and the case for the defence might be false. To exemplify this we may take one of the several points urged. In his comments on the evidence of the investigating Police Offiser, the learned Judge remarks "He (the investigating Police Officer) did not see any marks of struggle etc., on any of the spots where the occurrence is located by either side and in their visinity." In the first place there is a positive misdirection in saying that the investigating Officer found no marks of struggle in the vicinity of the place of occurrence as pointed out by the appellants. Both the map and his evidence show that marks were found in plots marked 11 and III which are very near to the plot marked "A." What we think is more serious in this connection is that the evidence of the investigating Offiser that he found marks of occurrence at other places than those alleged by the two parties, plots 'A' and 'a', was not put to the jury! One cannot but think that if this view of the case had been put to the jury it was very unlikely that they

EMPEROR U. JANU PARIE.

would have some to the finding that the place of occurrence was that described by the prosecution. There are several other matters which make it extremely improbable that that part of the proceeution story is true. Some of these have been put to the jury in the charge. But they have been put more from the point of view that the jury had to consider whether the place of occurrence was at "a" or A' and not from the point of view whether the prosecution had succeeded in proving the place of occurrence at a and not anywhere else.

Also we cannot entirely approve of the manner in which the learned Sessions Judge has dealt with the discrepancies and contradictions in the statements of the procesution witnesses in his charge. He referred the jury to the speech of the learned Pleader for the defence. It is not necessary for him to repeat every thing that has been said in such a speech. But he ought to have drawn the attention of the jury to the more essential items and the strongest argument that had been advanced for the defence. A mere reference to the arguments of the Pleaders was insufficient.

Taking the sharge as a whole we are not satisfied that the issue before the jury was properly understood by them. Taking this view we cannot uphold the conviction and we do not think, having regard to all the circumstances of the case, that ary useful end would be served by ordering a re-trial. We accordingly allow this appeal and set aside the conviction of the appellants and direct that their bail-bonds be discharged.

W. C. A.

Appeal allowe i: Conviction set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 183 of 1919.

February 16, 1920.

Fresent:-Mr. Faweett, J. C., and Mr. Kemp,

A. J. O. EMPEROR-PROFICUTOR

JANU FARIR—A COUEED.

Bombay District Municipal Act (III of 1901), s 98 -

"Any building," meaning of—Criminal Procedure Code (Act V of 1898), s. 439 (5)—Acquittal - Revision at the instance of Local Government,

The words "any building" in section 96 of the Bombay District Municipal Act are wide enough to cover a building in a private Mahla and permission of the Municipality is necessary to build any building within the Mahla. [p 999, col 2.]

A High Court is prohibited by section 439 (5) of the Criminal Procedure Code from entertaining proceedings in a case of acquittal by way of revision at the instance of the Local Government as the latter can appeal from the acquittal under section 417 of the said Code. [p. 1000, col. 1.]

Report by the District Magistrate, Hyder-

Mr. C. M. Libo, First Assistant Public

Prosecutor for bind, for the Crown.

JUDGMENT.-In the ease ensideration the assused admittedly erested three walls in the Municipal limits of Tando Allabyar without the permission of the Municipality and was prosecuted by the Municipality under section 96 of the Munisipal Act III of 1901 for baying done so. His defence was that the walls had been erested not on Manieipal ground but in a private "Mable", and that the permission of the Municipality was not, therefore. required. The Bench Magistrates of Tando Allabyar have accepted this contention and acquitted the accused. The District Magistrate of Hyderabad has referred the case to us with a recommendation that the acquittal be set aside and a re trial ordered under section 439 of the Oriminal Procedure Ccde.

It is quite elear that the acquittal was erroneous, for, as held in Khushal tas Moolchand v. Emperor (1), the words "any building" in section 95 are wide enough to cover a building in a private Mahla, and the plea set up and assepted by the Magistrate affords no valid defence to the prosecution. But we do not think that we should interfere in this case. The Assistant Public Prosecutor has drawn our attention to the case of Emperor v. Tirithdas Kewalram (2), in which it was held that this Court has jurisdiction to interfere with an acquittal under section 439, Oriminal Procedure Code, but that this revisional jurisdiction should only be exercised sparingly, and generally only in cases where there is an error of law and pressdure

771.

^{(1: 44} Ind. Cas. 248; 11 S. L. R. 90; 19 Cr. L. J. 380. (2) 17 Ind. Cas. 408; 6 S. L. R. 120; 13 Cr. L. J.

AINUDDI CHOWKIDAR U. EMPEROR.

patent on the face of the judgment. This, no doubt, is a decision in his favour; but, without entering into the question whether sub-section (4) of section 439 offers a bar to our interference, we think that such interference is clearly opposed to the provisions of sub-section (5) of that section. District Magistrate moves us as an agent of Government and Government could have appealed from the accused's acquittal under section 417, Criminal Procedure Code. Thus in Emperor v. Kalekhan Sardarkhan (3) the Court imposed a fine in an appeal from an sequittal under section 96 of this same Act. As no such appeal has been brought, subsection (5) prohibits us from entertaining proceedings by way of revision at the instance of the Local Government, and we cannot in a matter of this kind differentiate the District Magistrate from the Local Government.

We, therefore, refuse to interfere, and direct the record and the proceedings to be returned.

J. P. & N. H.

Interference declined.

(3) 8 Ind. Cas. 1050; 12 Bom. L. R. 1060; 35 B.
236; 12 Cr. L. J. 1.

CALCUTTA HIGH COURT.
Chiminal Appeals Nos. 358 and 363 of 1921.
September 21, 1921.

Present: - Mr. Justice Newbould and
Mr. Justice Ghose.
AINUDDI CHOWKIDAR AND OTHERS—
ACCOSED—APPELLANTS

tersus

EMPEROR - RESPONDENT.

Trial by jury—Charges of rioting and murder— Deceased already suffering from infirmity—Charge to jury—Duty of Judge—Misdirection.

Where in a trial by jury upon charges of rioting armed with deadly weapons, and murder, it appears that the person whose death was caused was suffering from a disease which accelerated his death, and the injuries described in the medical evidence were in themselves not apparently sufficient to cause immediate death, it is the duty of the Judge in his charge to the jury, to place these

facts before them, and to ask them whether they are satisfied that the accused, when attacking the deceased, knew or had reason to believe that the injuries caused were likely to cause death and whether it could be inferred that death was intended to be caused. An omission on the part of the Judge to do this, amounts to a misdirection to the jury. [p. 1006, col. 1.]

Appeal against the orders of the Second Additional Sessions Judge, Bakarganj, dated

the 4th May 1921.

Babus Dasarathi Sanyal, Manmatha Nath Muteries and Assini Kumar Gupta, for the Appellants.

Mr. Orr, for the Crown.

JUDGMENT .- The appellants in there eases were tried before the Second Additional Sessions Judge of Buckergunge and a jury and the jury unanimously found them guilty on all the charges found against them. All the accused were charged with rioting armed with deadly weapons and also with being guilty of murder in consequence of one Nebaluddi having been murdered in prosecu. tion of the common object of the unlawful Four of the assused were also assembly. convicted of murder after into operation the provisions of section 34, Indian Penal Code. All the accused have been sentenged to transportation for life and further sentences have been passed of three years' rigorous imprisonment each under section 148, Indian Penal Code, the sentences to run concurrently. The appellant Kabiruddin has further been convicted of an individual act of causing burt with a dangerous wearon and sentenced to three years' rigorous imprisonment under section 324-this sentence also to run concurrently with the sentence of transportation for life.

An objection has been taken to the framing of the charges of murder; but we see no reason why in the present case the persons alleged to have taken a more immediate part in the causing of the death of the deceased should not be charged under section 302 read with section 34, Indian Penal Code, and also charged with others with constructive murder under the provisions of section 149, nor can we accept the contention that, on the facts alleged and found, section 34 is not applicable to the case of the appellants who have been convicted under section 302 read with that section. But we are of the opinion that there has been a serious misdirection in putting the

DOWARSINGE C. EMPEROR.

medical evidence before the jury Assord. ing to the medical evidence, Nehaladdi, the person found to have been mardered, had four injuries on his person, three wounds in his head scalp deep and a deep sat wound on his side. It was also found that the membranes of the brain were deeply enn. gested and covered with a thick layer of esagulated lymph. In the opinion of the Civil Surgeon who held the post morten examination, death was due to shock and bemorrhage resulting from the injuries just mentioned and probably asselerated by the condition noted in the membrane of the brain which appeared to be of old stand. ing. In putting the medical evidence to the jury, the learned Sessions Judge correstly put to them explanation of section 239, Indian Penal Code, which provides that a person who esuses bodily injury to another who is labouring under a disorder, disease or bodily infirmity and thereby asselerates the death of that other shall be desmed to have caused his death. But what he omitted to do was to point out that, if a person was suffering from an injury which would render injuries which would not have a fatal effect to one ordinary man, fatal to that person, it does not necessarily follow, as it would in the case of a healthy man, that the person is fluting those injuries knew it to be likely that death would be eaused thereby. The fact that the deceased was suffering from a disease which accelerated his death and also the fact that the injuries described in the medical evidence are in themselves not apparently sufficient to cause immediate should have been pointed out to the jury and they should have been asked whether they were satisfied that the assused when attacking Nebaladdi knew or had reason to believe that the injuries they eaused to him were likely to cause death and whether it sould be inferred that they intended to sause death. It may be that the view of the jury was that when a number of persons armed with spears did attack a person, they intended to esuse his death and that the fast that he died a little sooner owing to unknown infirmities did not affect the case. But it may also be that, had the bearing of the medical evidence on the intention of the accused been properly put to the jury, they would not have been able to some to the decleion they did that by causing the death

of Nehaluddi the offence of murder was committed. Taking this view, we must hold that there has been a misdirection and that that misdirection has in effect caused a misearriage of justice. But having regard to the fact that the assused have also been convicted and sentenced for the offence of rioting armed with deadly weapons which conviction is, in no way, affected by this misdirection, we do not think it nessessary to order a re-trial. We also think that, having regard to the youth of the appellant, Hayyat Ali, who is recorded to be 14 years of age, the sentence on him may be considerably reduced We accordingly allow these appeals to this extent: the convictions of the appellants under section 302 read with section 149, Indian Penal Code, are set aside and also the convictions of the four appellants, Ainuddi Chowkider, Barukhan, Shujaddi and Khadan Ali under sestion 302 read with section 34, Indian Penal Code, are set aside and also the sentence of transportation for life passed under those sections. We affirm the convictions of the appellants under sestion 148, Indian Penal Code, and also the conviction of Khabiruddin under section 324, Indian Panal Code, and uphold the sentences passed on them under these sections, except in the case of the accused Hayyat Ali. We reduce the sentence passed on this accused, Hayyat Ali, to one year's rigorone imprisonment.

W. C. A.

Sent-ness molified in some cases.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

April 1, 1922.

April 1, 1922.

Present:—Mr. Hallifax, A J. C.

DOMARS NG -Applicant

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EMPEROR -Non-APPLICINT.

Criminal Procedure Code (Act V of 1898), s. 45

-Sudden and suspicious death—Duty of Mukaddam

LOMARSING D. EMPEROR.

and Kolwar to report deaths—Failure—Offence—Death resulting not fairly soon after cause, whether reportable—False defence, whether indication of guilt—Mons rea—Ingredient of offence under s 4—Technical offence—Duty of Magistrate—Measure of punishment.

Under section 45 of the Criminal Procedure Code every Mukaddam and Kotwar is bound to communicate forthwith to the nearest Station House Officer or Magistrate the occurrence in and near the village of any sudden or unnatural death or any death under any suspicious circumstances [p. 00', col 2.]

However unnatural, in the ordinary sense of the word, the cause of a death might be, it would not come within the meaning of the word 'unnatural' as used in section 45 of the Criminal Procedure Code so as to require to be reported immediately unless it occurred fairly soon after the cause [p 1002, col. 2]

The guilt of an accused should not be inferred from the omission by the accused of an available true and complete defence and substitution for it of unsustainable falsehoods. It is the duty of a Magistrate to find out whether an accused person is guilty or innocent, not merely to decide whether the pleas he chooses to put forward are sound or not. [p 1004, col. 1.]

Intention necessarily implies a mens rea, a consciousness of doing wrong A Mukkaddam or Kotwar cannot be convicted under section 45 of the Criminal Procedure Code for an omission to make a report of a sudden accident or suspicious death if he honestly believes that there was no necessity for him to make the report and the view held by him is a reasonable view [p. 003, col. 1.]

A nominal penalty of a pie only need be imposed if the accused is guilty of nothing more than a slight error of judgment which had no harmful consequences whatsoever if in such a case the responsible authorities choose to prosecute and the Magistrate is bound to convict when the offence is proved [p. 100', col. 2.]

Revision against an order of the District Magistrate, Raipur, dated the 17th November 1921, in Oriminal Appeal No 14) of 1921.

Mr. J. O. Ghosh, for the Applicant. Mr. S. R. Pandit, for the Crown.

ORDER.-Domar Singh Kurmi, the applicant for revision, is the Mukaddam of the village of Jarur in the Raipur District. He has been convicted of an offence punish. able under section 170 of the Indian Penal Code, of intentionally omitting to give notice to the Police of a death in his village which he was legally bound to give. Jodhan Panka, Sirdar Chamar and Bahorik Panka, all Kotwars of the same village, were convicted along with him. The Mckaddam was fined Rs. 20 and cash Kotwar was fined Rs. 10. The Mukaddam chope appealed to the District Magistrate, who dismissed his appeal, and he has now applied to this Court for revision. On his

petition a Rule was issued to the District Magistrate to show earse why the convictions of all four assued should not be set saide.

The circumstances are these. 11th of April 1921 one Talaram, Brahman of Jarur, fell from a tree. He died, apparently from the effects of the fall, at 2 r. M. on the 13:h of April. The Mukaddam thought no special report of the death was necessary, as there was nothing sad len or suspicious about it, and the body was barnt in the usual source on the same day. On the 14th of April, probably in the forenoon, though this is not elear nor is it of any particular sonsequence, the Sab. Inspector in charge of the Station House visited the village in the course of one of bis usual rounds and was told all about the death. He was apparently of opinion that the death ought to have been reported before the body was burnt and that the raport made to him after that could not be said to have been made "forthwith." In this the two Courts appear to have agraed with him. With the expediency of prosecution in such a case I am, of sourse, not concerned, but a venture to say that, to my not very long and som awhat out-ofdate experience as a District Officer, such a prosecution appears likely to discourage rather than to stimulate reporting.

section 45 of the Criminal Under Procedure Code, every Makaddam Kotwar is bound to communisate forthwich to the nearest Station House Offiser Magistrate the courrence in or near the village "of any sudden or unnatural death or of any death under suspicious circum. stances." Now there was nothing suspicious about this death, nor was it sudden. In the memorandum submitted by the District Magistrate it is suggested that it was both sudden and unnatural. But I prefer the view taken by the learned District Magistrate himself in the appeal and by the Magie. trate who tried the ess, that it was unnatural but not sudden. It seems to me that, however unnatural, in the ordinary sense of the word, the cause of a death might be, it would not come within the meaning of the word 'annatural' as used in section 45 of the Oriminal Procedure Code so as to require to be reported immediately unless it ossurred fairly soon after the cause. If, for

SUPERINTENDENT & BEMEMBRANCER OF LEGAL APPAIRS U. BARODA KANTA.

instance. Tularam had lingered for several weeks after his fall and had then died. solely from the effects of the fall, that would surely not have been regarded as a death which had to be reported forthwith, though it would be just as unnatural as if Tularam had died within a few minutes of his fall, or had been killed by it icstantaneously. The length of the period between the cause and the effect which obviates the necessity for an immediate report must be largely a matter of opinion, and the opinion that a period of two days was sufficient for this purpose in this partienlar case may be wrong, but it is by no means unreasonable. Indeed, I am inslined

to hold it myself. Now, falsehoods in a defence do not in this country even tend to indicate the guilt of the accused, as the learned District Magistrate bas suggested in his memoran. dum. Even the entire omission of an available true and complete defence and the substitution for it of unsustainable falsehoods are so closely in accordance with the common, indeed almost universal, course of human sondust that we cannot infer from such a defense that the guilt of the accessed is likely. But the true de'ence has not baen entirely omitted here, though it is not pat forward very clearly. In any case, it is the duty of a Magistrate to find out whether an coused person is guilty or innocent, not merely to decide whether the pleas he shooses to put forward are sound or not. Now, it is clear from the evidence that the Mukaddam thought that there was no necessity for an immediate report of Tala. ram's death, because he lived for two days after the assident, and it was for that reason that he sent no report. The Kotware, of course, did not make a report because the Mokaddam told them it was not necessary. This cannot possibly be called an intentional failure to report. Intention neget. sarily implies a mens rez, a consciousness of doing wrong. The Mukaddam held the perfeatly reasonable view, which, as I have said before, I am even inclined to think was the right view that there was no necessity for an immediate report.

But even if it be granted that the failure to report did some within the terms of section 176 of the Indian Penal Code and was a punishable offence, hit was surely, in

these eireumstances, one in which to more than a cominal penalty should have been imposed. If the responsible arthorities shoose to prosecute, and an offeres is proved, the Magistrate is bound to convict, but be need not impose any heavier penalty than a fine of one pie. The Mukaddam was, in any care, guilty of nothing more than a very rlight error of judgment which had no harmful sonsequences whatsoever, and the Kotwars were guilty of accepting his slightly wrong interpretation of the rules on the anbject of the immediate reporting of deathe. But I have held that they are not suilty of even a technical offence. All the four convictions are, therefore, set aside and the amounts of the fines, which have presumably been paid. will to refunded.

G. P. D

Convictions set aside.

OBIMINAL GOVERNMENT APPEAL
No. 1 CF 1921.

CRIMINAL REVISION CAPES NOS. 146 AND 147 OF 1921. May 3, 1921.

Freient :- Mr. Justice Teunon and Mr. Justice Ghore.

IN APPEIL NO. 1 OF 1 2'.

THE SUPERINTENDENT AND REMEM.

BRANCER OF LEGAL AFFAIRS.

A PPELLANT

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BARODA KANTA AND OTERES-

In No. 146 or 1921

NITYANANDA DAS-ACCUIED-

IN No. 147 OF 1921
SARAT CHANDRA GHOSH-ACCUSEDPRITITIONER

te sus

MANORANJAN MAJUMDAR-

COMPLAINANT - OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 225B-Resistance
to execution of Civil Court warrant.

It is not necessary that a Bailiff executing a Civil Court warrant should in the first instance show the warrant. It is sufficient that he should apprise the person to be arrested of the contents of the warrant and show it if desired and resistance to execution is not justified merely because the Bailiff fails to show the warrant in the first instance. [p. 1004, col., 2]

SUPERINTENDENT & REMEMBRANCER OF LEGAL APEAIRS O. BARODA KANTA.

IN APPEAL No. 1 or 1921.

Mr. B. L. Mitter, Stending Counsel, and Babu Narendra Kumar Bose, for the Crown.

Babu Atulya Charan Pose, for the Respondents Nos. 1 and 2.

Babus Dosarathi Sanyal and Taraleswar Pal Chowdhury, for Respondent No. 3.

IN ORIMINAL REV. SION No. 146 OF 1921.

Babu Narendra Kumar Bose, for the Petitioner.

Babu Atulya Charan Bose, for the Opposite Party.

IN ORIMINAL REVISION No. 147 OF 1921,

Babus Manmatha Nath Mcokeree and Satindra Nath Mukhergee, for the Petitioner.

Babu Atulya Charan Bose, for the Opposite Party.

JUDGMENT.

ORIMINAL GOVERNMENT APPEAL No 1 1921 Tawnox, J.—In this case cas Baroda Kanta Majumdar was placed on his trial on a charge of offering resistance to his lawful apprehension and of essaping from lawful enstudy, offences punishable under section 225 B of the Indian Penal Code. Two so assused, his son Monoranjan and one Somiran, were sharged with resening Baroda from lawful sustody. All three were further charged with assaulting the peor, Nawab Ali, whose duty it was to arrest or assist the Bailiff in arresting Baroda Kanta. Somiran was further charged with assaulting the Bailiff and with removing the peon's badge. The precent appeal is directed against the order of acquittal made in the case of all three by the Fourth Presidency Magistrate.

The accused Baroda Kanta Majumdar owed some Rs. 700 under a Small Cause Court decree obtained against him by one tarat Chandra Ghosh. In execution of this decree a warrant for the arrest of Barada Kanta was issued. On the morning of the 13th July, the decree-holder, Bailiff Nityananda Das and peon, Nawab Ali, proceeded to house No. 14, Jagurnath Sur Lane, in which Barods with his wife and son occupied two rooms, in order to execute this warrant. That the decree holder and his party went to arrest Baroda Kanta is not disputed but while the proceedation witnesses say that Baroda came outside, was there arrested, resented and escaped, the defence says that Baroda was arrested within one of his two rooms, there struggled and made resistance, and was assisted by his son, Manoranjan, in effecting his escape. It is further said that in this room. there was a lady, presumably Baroda's wife. The Magistrate has apparently accepted the ease for the defence and, finding that the warrant was not shown to Baroda, and, that the Bailiff and decree holder were not entitled to enter the room, holds that Baroda was entitled to resist and his son entitled to assist him. On these grounds he acquite Baroda and his son. The third accused he acquits on the ground that he was not present. Now it is not necessary that a Bailiff excenting a Civil Court warrant should in the first instance show the warrant. It is sufficient that he should apprise the person to be arrested of the contents of the warrant and show it if desired. [Rajani Kanto Fal v. Empercr (1) and Abdul Rahaman Sahib, In re (2) !. But it is quite elear in this case that the Bailiff was armed with the warrant issued, and it is further clear that Baroda well knew the purpose of the decree-holder and the Bailiff's visit. There could be no reason why the Bailiff should seek to withhold or conceal his warrant, and we have no doubt on the evidence that the warrant was in fact shown.

Even if we were to believe that the Bailiff and the deeree holder followed the judgment debtor into the room there was no reason why they should not do so. This was no ease of breaking open an outer door and the room itself was the outer of the two rooms ccoppied by Barcda. The presence of a woman therein was not even suggested to any one of the prosecution witnesses.

As to the alleged assault on the deeres. bolder, the peon and the Bailiff, the evidence is conflicting but what emerges beyond all dispute is that Baroda Kanta was arrested in execution of a warrant issued by the Small Cause Court, made his escape, and was assisted in so doing by the son Manoranjan. We, therefore, find these two guilty under section 225B, Indian Penal Code, and centence them, Baroda Kanta to pay a fine of Rs. 100, in default to undergo rigorous imprisonment for six weeks, Manoranjan to pay a fire of Rs. 50, in default to undergo rigorous imprisonment for one week. The evidence leaves some doubt as to the identity of the third accused, Somiran and, in his case we, therefore, do not disturb the order of aequittal.

G.O.E, J .- I agree.

(1) 5 C W. N 843. (2) 24 Ind. Cas. 175; 15 Cr. L. J. 439; 1 L. W. 500.

C. DUNN C. EMPREOR.

CRIMINAL REVISION CASES Nos. 143 & 147

TEUNON, J.—These applications in revision arose out of one and the same crimical case. It appears that one Sarat Chandra Ghosh obtained a decree in the Presidency Small Cause Court against one Barada Kanta Majumdar and in execution for the balance due (some Rs. 700) took out a warrant for the arrest of the judgment-debtor. On the 13th of July about 7 A. M. he, accompanied by the Baitiff, one Nityananda Das entrusted with the execution of the warrant, proceeded to 14, Jugarnath Sur Lane, the house in which the judgment-debtor occupied two rooms.

It is not disputed that the Bailiff and the decree-holder did on the day in question go to 14. Jugarnath Sur Lane, in order to exacte the warrant entrusted to the Bailiff. What happened on their arrival is in dispute. The complainant who is the son of the judgment-debter alleges that the decree holder and the Bailiff caught hold of the judgment debter at the door of his room, and that when the judgment-debter tried to extricate himself, they followed him up into the room, in which was also the judgment-debter's wife; when the son assisted his father in freeing himself, the Bailiff pushed him and knocked him over.

The Trying Magistrate has found that the judgment debtor's wife was in fact with him in the room, that the Bailiff did not show his warrant, that the son did not know that Nityananda was a Bailiff, and was, therefore, justified in seeking to extricate his father and that the Bailiff was not justified in pushing him over. On these findings he has convicted the decree holder, Sarat Chandra Ghose, of the offence punishable under section 448 and the Bailiff, Nityananda, of the offence punishable under section 352 of the Indian Penal Code.

We are unable to accept the conclusions arrived at by the Trying Magistrate. It is not necessary that a Bailiff executing a Civil Court warrant should show his warrant in the first instance. It is sufficient that he should apprise the person concerned of its contents and thereafter show it, if desired. Now it is quite clear from Baroda Kanta's statement that he knew both the Bailiff and the decree-holder, and well knew why they sought to arrest him. Apart from that, there was no

reason why the Bailiff should not display his warrant and we do not believe that he failed to do so. The evidence of the son and of his father taken together next shows that this was no ease of breaking open, or even open. ing either outer or inner door. The Bailiff were justified in and the decree-holder following up the judgment-debtor into his room, the outer of the two rooms occupied by him. We are not satisfied that the lady was in fast present in that room, and no objection to their entry was taken on that The story of his assault on Manoranjan we can but regard as an embellishment or exaggeration. We, therefore, hold that it has not been shown that either deeres-holder or Bailiff did more than they were entitled to do in execution of the warrant obtained by the decree-holder and entrusted to the Bailiff.

We, therefore, set aside the conviction of and the rentence imposed on each of the petitioners and direct that the fine, if paid, be now refunded.

Gaost, J .- I agree.

B. N. & N. H.

Conviction set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REFERENCE No. 743 of 1921

TND

CRIMINAL REVISION Nos. 16 AND 17 OF 1922. February 17, 1922.

Present: -Mr. Justice Gokul Pracad and Mr. Justice Stuart. O. DUNN-APPLICANT

versus

EMPEROR - RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 423 (d)—Expunging remarks against witnesses by subordinate Courts—High Court, power of—"Amendment", meaning of.

A High Court has no authority to expunge remarks from judgments of subordinate Criminal Courts which reflect on certain witnesses in cases in which the effective orders of the lower Courts are not before the High Court in appeal or in revision.

[p. 1038, col 2]

The word "amendment" in section 423 (d) of the Criminal Procedure Code means amendment of an effective order of the Court below. [p. 1008, col. 2.] DUNN U. EMFEROR.

Oriminal reference made by the Sessions Judge, Benares.

Mr. B. E. O'Conor, for the Applicants in Revision.

Mr. Satya Chandara Mukerjee, for the Applicant in the Reference.

Mr. Lalit Mohan Banerice, (Government Advocate), for the Opposite Party.

JUDGMENT.

STUART, J .- We have before us Criminal Reference No. 743 of 1921 from Sessions Judge of Banares and Criminal Revisions Nos. 16 and 17 of 1:22. same point arises in all :- "Has the High Court authority to expunge from judgments of lower Courts remarks reflecting unfavourably upon the credibility or the character of witnesses in cases in which the effective orders of the Courts are not before the High Court either in appeal or on revision?" In the Reference the station-master of Benares Cantonment took exception to remarks reflacting upon himself made by a Magistrate at Benares in a judgment in a criminal case. that ease the accused persons Were aequitted. The station-master appeared as a witness for the defence. The Magistrate, while finding that the evidence did not justify a conviction, disbelieved the stationmaster in certain particulars. We have that the learned Sessions Judge believed the station-master to be telling the truth-a circumstance which goes far to remove the sting of the remarks made by the Magistrate.

In the two applications in revision, a business man and a Vakil gave evidence prosecution in a **6856** section 409 of the Indian Penal Code in the Gorakhpur District. The Magistrate found that no charge under section 409 could lie on the facts, and dismissed the ease acquitting the accused persons. He commented severely upon the two applicants holding that they had been disingenuous and acted with malice while giving their evidence. We are informed that District Magistrate did not agree with the Magistrate who tried the case these points and that he desired to appeal against the asquittal. The authorities. however, refused to appeal.

These applications have been made with the intention of removing the remarks from the record to which the applicants object.

We have first to consider whether we have any authority to give the applicants the relief which they desire. Our procedure in criminal cases is to be found, except in regard to cases brought before the High Court in the exercise of its ordinary origi al criminal jurisdiction, in the Code of Criminal Procedure (Act V of 1938) This is clear from section 29 of the Letters Patent of this Court. We have, therefore, to examine the Criminal Procedure Code in order to discover whether it gives any authority.

It has been brought to our notice that other High Courts and Chief Courts and Judicial Commissioners' Courts have ordered portions of a record to be expunged and it is argued that the fact that they did so affords authority for us to do so.

We are referred, first, to the the ease of Baroda Noth Bhattacharya v. Karait Sheikh (1). There the Registrar of the Court was directed to expange from a judgment of the Sessions Judge remarks which reflected on the Local Government, the District Magistrate and the Deputy Magistrate.

In 1911 Twomey, J, of the Lower Burma Chief Court in the case of Ma Kya v. Kin Lat Gyi (2) held that he had the power to order passages to be expunged from a judgment but refused to use it.

In another case of the same Chief Court, Emperor v. Thomas Pellako (3), the Presiding Judge directed passages to be expunged from a judgment.

In Lachchu v. Emperor (4) the Judicial Commissioner of Oadh directed a passage, which reflected upon the conduct of a Counsel, to be expunged from the judgment.

It will be seen that in none of these decisions did the Court direct itself to the question as to whether it had any authority to pass such an order or whence it derived that authority. The cases are,

^{(1) 2} C. W. N. CCLVI (256) (notes).

^{(2) 11} Ind. Cas. 1000; 12 Cr. L. J. 484; 4 Bur. L.T.

^{(8) 14} Ind. Cas 613; 5 Bur. L. T 20; 13 Or. L. J. '5). (4) 24 Ind. Cas. 156; 15 Cr. L. J. 420; 1 O. L. J. 141.

DONA D. EMPEROE.

however, not on all fours with the cases before us. There is no appeal before us. The eirenmetances in the eases before are different from the siroumstances in the eases to which we have referred, for, in those eases the Courts were adjudicating on final orders in appeal. We sent for the records to satisfy ourselves as to the regularity of the proceedings of the Courts in question. We may say in limine that the proseedings were perfectly regular. The matters having, however, come before us under section 435, we can exercise powers given bу section 439. Those are the powers conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428, or on a Court by section 338, subject to certain qualifications, one of which is that a finding of acquittal cannot be turned into one of conviction under section 439. None of these sections be invoked except section 423, and have to see whether saction 423 has application. Section 423 lays down in respect of appeals that, in an appeal from an order of acquittal, the Court may reverse that order. It may then take action towards further enquiry or towards a re-trial or may find the person acquitted guilty and sentence him. It lays down that in an appeal from a conviction the Court may reverse the finding. If the finding is reversed, the sentence is necessarily set aside. Then the Court may sequit or discharge the accused or direct his re-trial or commit him for trial. may uphold the finding. In the latter ease, there remains the sentence. When the finding is upheld, the sentence be altered. The finding may be altered. If that is the case, the sentence may be maintained or altered, and if the finding be upheld, the nature of the sentence may be altered but the alteration must not result in an enhancement. The section proceeds to lay down that in an appeal from any other order the Court may alter or reverse such order. This exhausts sub-sections (a), (b) and (c). They have clearly no bearing upon the present matters. Then follows the sub-section (d). "The Court may make any amendment or any consequential or incidental order that may be just or proper."

The nature of consequential or incidental orders under this sub-section was discussed

by a Fall Bench of the Calcutta High Court in Mehi Singh v. Mangal Khanda (5). That Fall Bench considered that the only sonsequential or incidental orders within the purview of the provision were orders which follow as a matter of course, being the nesessary complements to the main order passed, without which the latter would be incomplete or ineffective (such as directions as to the refund of fines realised acquitted appellants, or on reversal of acquittals as to the restoration of sompensation paid under section 250) for which no separate authority is needed, and (not?) orders which though ancillary in character require more than the support of a Criminal Court's inherent jurisdiction and could not be passed without express anthority. We agree generally with the view taken in the Calcutta decision, and, on that view, the order which we are asked to pass is not a consequential or insidental order. It sanuot be said on this interpretation that the expunging of remarks from the record which reflect on certain witnesses is a consequential or incidental order. Such expunction would, in no sense, be consequent on or incident to the effective order of the Court below, which in these eases is contained in the finding of acquittal. It remains to be considered whether, if we do what we are asked to do, we can bring our action within the scope of our authority by regarding such an alteration as an amendment which may be just or proper. It has been argued strenuously before us (we have had the advantage of hearing the arguments of two of the most experienced Counsel at the Bar) that the word amendment' as used in this sub section confers a very wide power upon the Court and that we can without scruple: consider the provision, which allows us to make any amendment, that may be just or proper authority for expunging the remarks which exception is taken. We are unable to assept that view. We can read the word 'amendment' only to mean in this ennestion ameniment of an effective order of the Court below. Here the effective order is the order of acquittal. It is impossible for us to amend that on these

^{(5) 12} Ind Cas. 237; 89 C. 157; 14 C. L. J. 437; 16 C. W. N. 10; 12 Cr. L. J. 529.

DUNK C. ESPELOR.

applications. We are debarred from interfering in any way with the effective order, for the reason that we are not asked to question the asquittals. Thus there is nothing which we can amend in the effective orders. In support of the view which we take to the effect that the word amendment' means amendment of an effective order, we refer to a decision of a Bench of this Court, Ram Piyari v. Emperor (6), where a woman was convicted under section 325 of the Indian Penal Code and sentenced to a month's imprisonment. The matter came before the Additional Sessions Judge in revision. The parties then applied to compound the case. The case could not be compounded under rection 345 (5) of the Code of Oriminal Procedure, but when the matter came up to the High Court, it was held that the High Court had authority under section 423 (d), Oriminal Procedure Code, to amend the order of conviction by substituting for it an order that the offense should be compromised. Such an order, it is to be noted, does not have the effect of an acquittal. There is no provision in sub. sections (a), (b) and (c) for converting an order of conviction into an order permitting compromise. Sub section (d) clearly covered the case and gave authority for the action taken by way of amendment. The amendment was an amendment of the effective order of the Court below. Similarly in Abadi Begam v. Ali Husen (7), a Bench of this Court altered an order of the Sessions Judge in which he had directed certain property to be handed over to the Magistrate as unclaimed property by directing that the Magistrate should dispose of the property according to law. At that time the clause in question had not some into existence, but the view taken

in that application was accepted by the Bench in Ram Piyari v. Emperor (6). There is also a decision of Stanley, C. J. in Gopi Nath v. Emperor (8), in which he upheld an order of the Sessions Judge directing a greater amount of property to be restored to the complainant than the amount restored by the Trial Court. He acted under the authority of section 423 (d). He appears to have considered that he was making a consequential or incidental order, but we should have considered that he was rather amending an effective order of the Court below.

All these decisions go to support the view, which we should have held in the absence of authority, that the word amendment' in this connection can only mean amendment of an effective order of the Court below, and that the existence of the provision sannot give us authority to amend the judgments of lower Courts by expanging passages, which do not commend themselves to us, in eases in which we have no authority to interfere with the effective orders passed by the Courts. We are unable to find that this Court has any authority in such circumstances. This view was taken by one of us in Criminal Reference Chattara v. Basdeo Sahai decided on 4th October 1920. If it be held that the grievances of persons who are unjustly criticised by Courts of law in circumstances which obviate the effective orders of the Courts coming before superior Courts in appeal or revision are so great as to require a special enactment for their protection, the matter is one for the consideration of the Legislature, but as the law stands we are satisfied that we have no We, therefore, dismiss these authority. applications.

J. P.

Applications dismissed.

(8) 3 A. L. J. R. 770; A. W. N. (1906) 256; 4 Cr. L.

J. 370.

^{(6) 5} Ind. Cas. 696; 32 A. 153; 7 A. L. J. 103; 11 Cr. L. J. 203.

⁽⁷⁾ A. W. N. (1897) 28.

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"Account, mutual, open and current," meaning of -Test of mutuality-Limitation Act (IX of 1908), Sch. I, Art. 85.

An account current is an open or running account batween two or more parties, or an account which contains items between the parties from which the balance due to one of them is or can be ascertained, from which it follows that such an account comes under the term of open account in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits.

The test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. An account which consists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account and, also, if the balance is sometimes in favour of the debtor but generally in favour of the banker the account is not a mutual one.

Where, therefore, an account does not indicate transactions creating independent obligations on both sides but there is sometimes a credit in favour of the defendant, and that only for a few days, the account is not a mutual account, and in a suit on such an account the plaintiff is not entitled to the benefit of Article 85 of Schedule I to the Limitation Act, Pat GOPAL BAI U. FIRM HABCHAND RAM ANANT RAM 30

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TION.

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of Second Appellate Court to interfere.

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Administration-sult - Property partly

outside jurisdiction-Court, jurisdiction of.

Where in an administration suit it is found that some of the properties are situated outside the jurisdiction of the Courts of British India, and are in the possession of a person claiming a share in the estate, the Court has no jurisdiction to order that person to deliver possession of the property to the administrator to enable him to sell it and realize its proper price for the benefit of the estate; but the Court can direct that person to account for the value of such property before obtaining his share of the estate in the hands of the administrator. L B AYESHA BEE v. GULAM HUSEIN SULEMAN ABOO, 11 L. B. R. 188 530 Admissibility of secondary evidence.

If a proper case has not been established for the admission of secondary evidence of the contents of a

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written document, and objection has been taken to the fact that the document has not been produced, it is not permissible to go to other evidence for the purpose of indicating what the contents of the written document may prove to be if once it were examined. PC Bonerji v. SITANATH DAS, (1922) M. W. N. 98; 26 C. W. N. 238, 30 M. L. T. 182; 20 A. L. J. 294; 15 L. W. 452; 35 C. L. J. 320; 24 Bom. L. R. 565

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proprietor adopting Adoption — Disqualified without consent of Court of Wards, validity of-

Madras Regulation (V of 1804), s. 25.

An adoption by a disqualified proprietor, whose estate is under the Court of Wards and who is above 18 years of age but under 21 years, without the consent of the Court of Wards is not invalid under section 25 of the Madras Regulation V of :804 read with section 2 (a) of the Majority Act. ARULANANDA MUTHU v. PONNUSAMI, 15 L. W. 287; 265 (1922, M. W. N. 93; 42 M. L. J. 129

Adverse possession-Criminal Procedure Code (Act V of 1898), s. 146-Attachment, effect

of-Continuance of possession of true owner.

When a property is attached under section 146 of the Criminal Procedure Code, it passes into legal custody and, during the continuance of the attachment, such custody is for the benefit of the true owner. If the true owner was in fact in. possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong-doer was in possession at the time when the attachment took place, the effect of the attachment is tointerrupt his possession, and from the moment of attachment the possession of the rightful owner revives in the eye of the law.

The intervention of the public authorities for the preservation of peace operates in the same. way as the vis major of a flood, and the constructive possession of the land is thereafter, if

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There can be no continuance of adverse posses. sion when the land is not capable of use and enjoyment by the rightful owner. CHANDRA MAITI V. BIBHABATI DEBI, 84 C. L. J. 302

- Decree for possession - Symbolical possession obtained in execution, effect of.

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- Endowed property-Managers, successive-Limitation, running of - Admission of rightful title by wrongful possessor-No relinquishment of possession - Possession, whether ceases to be adverse.

Where endowed property belonging to an idol is taken possession of adversely, limitation to sue for possession of such property begins to run from the date of possession having been taken and each succeeding manager of the endowed property does not get a fresh start of limitation upon the ground of his not deriving title from any previous manager, as the succeeding shebaits form a continuing representation of the idol's property.

Where a person wrongfully in possession admits to the rightful owner that he disclaims all interest in the property in his possession, but does not voluntarily abandon or relinquish possession, the admission does not affect the relation between them so as to convert what was previously adverse

possession into possession of another character. O 941 ABDUL RASHID v. JANKI DAS, 9 O. L. J. 2

-, nature of -Onus of proof.

In order to defeat a suit for possession of immoveable property by the plea of adverse possession, such possession must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But the onus of establishing adequacy, continuity and exclusiveness is upon the adverse possessor. When the holder of title proves that he, too, has been execcising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds. PC KUTHALI MOOTHAYAR v. PERINGATI KUNHABANKUTTY, 44 M. 883; 14 L. W. 721; (1421) M. W. N. 847; 4 M L. J. 650; 30 M. I. T 42; 48 I. A. 395; 25 C. W. N. 666; 24 Box. L. B. 669 45 I

Partition-Possession held under mistake-Permissive possession—Restoration.

Permissive possession does not rest barely on an expressed agreeement by means of which one party permits another to take possession of his property. It is a question of legal inference from the circum-

stances of a particular case.

Where on partition being effected between coparceners each by mistake gets into possession of certain plots which have been allotted to the other. and such possession continues even after the mistake is discovered, each must be deemed to hold possession of the plots with equal consciousness that he is entitled to hold possession of them so long as the other party holds possession of his plots, in other words, each holds in lieu of what the other holds, and each is liable to restore the plots which he holds as soon as the other party delivers the plots which that party holds in lieu of the former.

The possession held under such conditions is lacking in the permanent presence of the essential element animus domini in the conception of juristic possession. A person who has acquired possession

Adverse possession-concld.

precaris is not deemed to have juristic possession. He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to the other. The possessory relation in such circumstances is imperfect. It is vitiated by the duty to restore and must, therefore, be deemed as equivalent to

permissive possession.

In such a case, where the parties hold possession of the wrong plots in ignorance of the title of the other party, then both must be held to be labouring under a mistake of fact and when restoration of one party takes place to his original position he cannot recover from the other without surrendering the benefit which he derived under the mistaken act. This principle of equity is not limited only to cases of agreements, but extends even to acts committed under a common mistake of fact. O MAQBUL AHMAD v. FARHAT ALI, 8 O. L. J. 546: 4 U. P. L. B. (J. C. B

---- , requisites of-Lands submerged every sear

during rainy season-Wrong-doer.

Adverse possession must be possession adequate in continuity, in publicity and in extent of area, in order that it may be effective to destroy the title of the true owner.

Possession to be adverse must be actual, visible, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass

Where lands are submerged every year during the rainy season, acquisition of title to them by

adverse possession is impossible

Where the land is submerged, the possession of the adverse holder ceases and the possession of the true owner constructively revives, so that while the land remains submerged, whether for a year or a month, no possession can be deemed to continue in the wrong-doer so as to be available towards the ultimate acquisition of title against the true owner. C MAHARAJA OF COOCH-BEHAR U. MAHENDRA RANJAN RAI CHAUDHURI, 34 C. L. J. 465 923

Agra Tenancy Act (II of 1901), SS. 20, 79-Occupancy tenant, transferee from, position of—Possessory right—Ouster—Damages.

A transferee from an occupancy tenant, although in law a trespasser, has a possessory right good against all the world except the true owner, i e., the body of zemindars, and a person who is not a member of such body cannot forcibly oust him from possession without being liable for damages. A BANESHWAR DUDE U. SHEO HABAKH DUBE

- 83. 79, 195—Wrongful dispossession of tenant - No suit within six months, effect of.

The failure of a tenant to apply to recover possession of a holding from which he has been wrongfully ejected by the landholder within the period of six months allowed by the Tenancy Act bars not only his remedy but extinguishes his right also A BHIKHABI SINGH V JOKHAN

- SS. 199, 201-Res judicata - Proprie. tary title, question of, determination by, Revenue Court.

Ordinarily the Rent Courts in the Agra Province have no jurisdiction to determine questions of title, but, under the provisions of sections 199 and 201

Agra Tenancy Act-concld.

of the Agra Tenancy Act, special jurisdiction has been conferred upon Rent Courts by virtue of which they are empowered, in given circumstances, to

decide questions of title.

The decision of a Rent Court under section 199 as well as under section 201 of the Agra Tenancy Act in the exercise of its jurisdiction to decide a question of title is resjudicata and prevents the trial in a subsequent suit in a Civil Court of any issue relating to the same proprietary right. A JHAMOLA KUNWAR v. HANWANT SINGH, 20 A. L. J 340 915

Record-Presumption-Alteration in share, effect of.

Where in a suit for profits it appears that there has been an alteration in the Revenue Record prior to the institution of the suit, but made during the period for which profits are claimed the duty of the Court trying the suit is to consider the order by which the alteration was made and give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of a certain share in a mahal during the first year of the period in respect of which profits were claimed, and it were shown that after the close of that year he had been recorded as proprietor of a less share only upon a finding that he had transferred his interest in the remaining share after the close of the first year in suit, then the duty of the Court would be to give effect to the entries year by year, calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers.

When, however, it is clear, upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and was not passed upon any alleged transfer having occurred during the years covered by the suit, then the Revenue Court is bound to give effect to the entry as it stood on the date of the institution of the suit. A MUBARAK FATIMA V. MUHAMMAD QULI KHAN, 20 A. L. J. 243

Aggrieved litigant, remedy of.

Where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment C SARAT CHANDRA MAITI C. BIBHABATI DEBI, 34 C. L. J. 302 433

Appeal-Civil - Plea, new.

inadmissible evidence-High Court, power of.

Where a finding of the Court below is based in part upon inadmissible evidence, it is vitiated thereby, and a High Court can arrive at findings upon the other evidence on the record. A SAKTOO MAL v. GOPAL CHAND, 4 U. P. L. R. (A.) 5

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- Instalments - Discretion of Court.

Unless a very strong case is made out a High Court will not interfere, in second appeal, with the discretion exercised by the lower Court in fixing instalments, on the ground that the instalments fixed are too low, especially where a large portion of the amount decreed consists of interest. L BHUP CHAND v. UDE RAM

to be raised.

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Arbitration — Award — Legal flaw — Party procuring legal flaw cannot take advantage of it.

General principles of law must be applied to arbitration matters as to all others.

Where one of several arbitrators agrees to an award but at the instance of one of the parties wilfully refuses to sign it, though there is a legal flaw in the award, the party who procured it cannot take advantage of it. A RAM SUNDAR TEWARI V. KULWANTI KUNWAR, 20 A. L. J. 392

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Arbitrator's powers—Arbitrary interpretation—Juris.

diction of Civil Courts.

Although generally the interpretation of arbitration clauses is for the arbitrator, yet when a Court is asked to file an award, it must determine whether the document propounded as such is the production of an arbitration tribunal duly constituted under the terms of a contract or agreement binding upon both parties.

In a contract of sale there were two clauses, one providing that the parties would refer their disputes to arbitration, the other that no claim or dispute of any sort was to be recognised unless made within a certain specified period. In course of time the sellers claiming damages for breach of contract referred the matter to arbitration, but did so after the period specified had expired. The buyers raised objection but the arbitrator gave the award holding that the second clause referred to disputes raised by the buyers only and had nothing to do with any claim for damages by the sellers. On an application to file the award the buyers contended that the award was without

Arbitration-concid.

jurisdiction. The sellers replied that the Court had no jurisdiction to open the matter as the interpretation of the clause was for the arbitrator alone:

Held, that the Court had jurisdiction to go into the matter, that the clause was applicable to both parties and that, therefore, the award was invalid.

Per Walsh, J .- The interpretation of arbitration clauses is for the arbitrator but in the present case there is no question of interpretation. To hold that a plain and unambiguous clause applies against one party to the contract and not against the other is misconduct A KEDAR NATH MOTI LAL v. SUKHAMAL BANSIDHAR, 4 U. P. L. R. (A.) 64: 69 I 20 A. L. J. 385

--- Jurisdiction-Award based on grounds some

of which not justifiable, effect of.

Where the aid of arbitrators is invoked on grounds some of which do, while the others do not, justify the exercise of their jurisdiction and it cannot be held that the award proceeds solely on those grounds which entitle the arbitrators to exercise their jurisdiction, the award is null and void on the principle that if the bad is not separable from the good, the whole is bad. C HURMUKHECY RAM CHUNDER v. JAPAN COTTON TRADING Co., 1 D. 342 84 O. L. J. 253

Arbitration Act (IX of 1899), s. 13 (1), 14-Arbitration-Reception of evidence in absence of party affected thereby, propriety of-Principle of justice - Irregularity of procedure -Misconduct - Award, when should be remitted and when set aside.

Where the arbitrators in a case do not decide a substantial question arising between the parties to the arbitration in the presence of both the parties and arrive at an ex parte decision in the presence of

one party the award is invalid.

Whether an arbitration is conducted on the footing that it is a mercantile or a legal arbitration, the first principles of justice must be equally applied in every case. One of these elementary principles is that an arbitrator must not receive information from one side which is not disclosed to the other, whether the information is given orally or in the shape of documents

. In arbitration proceedings both sides must be heard, and each in the presence of the other; however immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it, except in the presence of the

opponent.

It is both an unwise and unsafe proceeding for an arbitrator to take proof in the absence of either

or both parties.

If irregularities in procedure are proved which amount to no proper hearing of the matters in dispute that would be misconduct sufficient to vitiate the award, without any imputation on the honesty or impartiality of the arbitrator.

The Court may remit an award when the arbitrator has been guilty of misconduct in a technical sense, that is, if the misconduct is of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him If the arbitrator is guilty of fraud or partiality or such like misconduct, as would justify his removal, the

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Court will not remit the award. But where the arbitrator has merely failed to exercise all his powers or has improperly exercised a discretion, such as, hearing witnesses or consulting documents in the absence of the parties, and this has happened in spite of a complete absence of dishonest motive the Court will not hesitate to remit the award to the arbitrator instead of setting it aside.

An arbitrator is the Judge chosen by the parties, he has a wide measure of discretion as to the manner in which the proceedings are to be conducted and a due knowledge of the whole case is to be brought to his mind. His award will not be set aside merely because the Court differs in opinion from him upon the merits of the dispute submitted for his decision. C HARI SINGH NEHAL CHAND v. KA' KINARAH Co., LTD., 34 C. L. J. 89

-S. 19-Stay of suit-Action not relating to matters submitted to arbitration.

Before an order can be made to stay a suit under section 19 of the Indian Arbitration Act, it must be established that the suit has been instituted in respect of a matter agreed to be referred to arbitrarion.

A Court will refuse a stay, where the action commenced relates to matters outside the submission. C JNANENDRA KRISHNA BOSE V SINCLAIR MURRAY & Co., 34 C L. J. 173

--- Sch. I, Cl. 3, meaning of-Accard made three months after notice but within three months

of entering on reference, validity of.

An award made three months after the date of a notice calling on the arbitrators to act but within three months from the day when they actually entered on the reference and heard the evidence is within the time mentioned in Schedule I, clause 3 of the Arbitration Act and is consequently valid.

The provisions "entering on the reference" and "having been called upon to act by notice in writing" in clause 8 of Schedule I to the Arbitration Act are alternative in this sense that where no reference is entered upon at all, then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even although the arbitrators may be called upon to act by notice if they enter upon the reference, they have three months from that moment for making their award and for enlarging the time for making the award if the circumstances at the reference satisfy them that they cannot complete the award within three months. A FIRM SARDAR MAL-HARDAT RAI v FIBM SHEO BAKSH RAI-SBI NABAIN, 20 A. L. J. 274 907

Arms Act (XI of 1878), s. 20-Chhavi concealment of - Sentence, suitable.

Where a person is convicted under section 20 of the Arms Act of having concealed a chhavi, and nothing is known against him, and it is not shown that he has not broken the law in the past, the maximum sentence provided by the section is ret called for, nor is a merely nominal sentence. L FAQIRIA V. EMPEROR

Attachment before judgment-Dismissal of

first execution application.

An attachment before judgment does not enure beyond the dismissal of the first application of execution made after the passing of the decree. N ANOLAKSAQ V. MAHIPATRA 850 Attorney-Bills of costs-Lien-Limitation, bar of-Set-off.

In the case of a personal action for a debt, limitation merely bars the plaintiff from having the particular remedy by way of suit and does not extinguish the debt.

Therefore, if an Attorney has any form of lien upon property in respect of his bills of costs, he can exercise that lien notwithstanding that, by the terms of the Limitation Act, he could not bring a suit.

The bar of limitation applies to a claim of setoff by a defendant as if he were bringing an
independent suit of his own but where he is defending himself by way of set-off, if his claim was
not barred at the time of the issue of the plaint, he
may prosecute a set-off even though the time may
have elapsed before his filing, say, a written statement claiming the set-off. C NARENDRA LAL v.
TARUBALA DASI, 25 C. W. N. 800; 48 C. 817 209

Auratha son, right of, to claim share on fatter's re-marriage. See BUDDHIST LAW, BURMESE —PARTITION 538

Benami purchase, constituents of.

To constitute a benami purchase, it is not necessary that there should be any thing secret about it, and, unless it is intended for a fraudulent purpose, there is no reason why the deed evidencing the transaction should not disclose the nature of the transaction. M KRISHNAN PATTER v. LARSHMI, (1922) M. W. N. 117; 42 M. L. J. 19: 30 M. L. T. 238

Bengal Land Revenue Sales Act (XI of 1859), s. 37—"Settlement," meaning of—

Bajeapti taluk, settlement of.

The expression "after the time of settlement" in section 37 of the Bengal Land Revenue Sales Act does not mean "after the time of the Fermanent Settlement of 1793." The word "settlement" as there used refers not to the Permanent Settlement but to the contract with Government under which the estate was held.

In the case of a Bajeapti taluk the contract with Government is first made when revenue is assessed thereon and it is transformed into a revenue paying estate liable to be sold for its arrears. C MOKBUL ALI SADAGAR v BASARAT ALI, 34 C. L J. 485 911 Bengal Municipal Act (III of 1884),

SS. 178, 224, 271—Notice to demolish—
Objection against notice—Objection disailowed—
Committee, duty of, to specify time for compliance—
Time not specified—Prosecution bad.

Where, under section 178 of the Bengal Municipal Act, an objection against a notice issued under section 224 directing the removal, within a specified time, of a building constructed without permission, is disallowed, the Committee is bound to specify a time within which the requisition is to be carried out, the fact that a period of time was mentioned in the original notice does not absolve the Committee, after disallowing the objection, from the obligation of again specifying the time within which the requisition should be complied with, and where a Committee omits to do this, a conviction under section 271 of the Act is bad in law. Pat RAMPARTAP LAL v BARII MUNICIPALITY, 3 P. L. T. 801; 28 Cg. L. J. 273 417

Bengal Survey Act (V of 1875),

S. 41 -Settlement Officer, status of.

A Revenue Officer appointed with the additional designation of Settlement Officer is vested with the powers of a Superintendent of Survey under the Bengal Survey Act, and has the powers of a Collector under section 41 of that Act, and also the power to delegate his functions under the section to an Assistant Settlement Officer and his order has the force of a Civil Court decree as to possession Pat Balgobian Kumar v. Rai Behari Lal Mitter, (1922) Pat 1 4

Bengal Tenancy Act (VIII of 1885), S. 52 (a) - Enhancement of rent-Excess area— Intermediate Survey Settlement of land by scientific measurement-Excess area over area found in Intermediate Settlement - Presumption - Onus-Landlord and tenant.

The area of a holding was determined by scientific measurement at the Settlement of 1898, and was accepted by the tenant who paid rent according to that area. At the subsequent Settlement the area was again measured and was found to be in excess of that found at that of 1898:

Held, that the presumption was that the area found at the previous Settlement was the accurate area for which the tenant was paying rent and that under section 52 of the Bengal Tenancy Act the landlord was entitled to the additional rent such as may be just and equitable upon the excess area. Pat BISHUN PRAGASH NARAYAN V. ACHAIB DUSADH 82

whether personally liable for rent due prior to his transfer.

A transferee of a tenure is not personally liable for rent which accrued due prior to the transfer. Pat INDER CHAND BOTHRA v. SURE VDRA NARAIN SINGH, (1922) PAT. 137; 3 P. L. T. 313 711

of order of Collector—Collector, whether competent to direct prosecution—Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1893), ss. 195, 474, order for prosecution under.

Where a Collector, acting under the provisions of section 69, sub-section (3), of the Bengal Tenancy Act, makes an order prohibiting the removal of certain crops and the order is disobeyed it is competent to him to act under the provisions of section 195 or section 476 of the Criminal Procedure Cod?, and to direct a prosecution under section 128 of the Indian Penal Code in respect of the disobedience to his order. C LAKSHAN BOR v. NARANARAIN HAZRAH, 25 C. W N. 6.7; 48 C. 1086; 28 CR. L. J. 281

----- ss. 95 (a), 97-Court of Wards' power

to sue.

Section 17 of the Bengal Tenancy Act gives the Court of Wards power to sue in the case of an estate which comes to it under the provisions of section 95 (a) of the Act.

The Court of Wards has the same power to sue when the estate comes to it indirectly, through the mechanism of the Bengal Tenancy Act as it has in a case which comes directly under the provisions of the Court of Wards Act. C SECRETARY OF STATE FOR INDIA V ANNADA MOHAN ROY, 31 O. L. 1 205

Bengal Tenancy Act-contd.

to sue - "Estate," meaning of - Accretion - Re-

The word "estate" in section 95 (a) of the Bengal Tenancy Act means all that the holder is entitled to by way of re-formation or accretion. C SECRETARY OF STATE FOR INDIA V. ANNADA MOHAN ROY, 34 C L. J. 205

brances, purchaser seeking to annul - Burden of proof-Presumption.

Where the purchaser of a patnitaluk at a sale in execution of a decree for rent, is resisted in his attempt to obtain possession by certain tenants who claim to hold their lands as revenue-free or as lakhiraj, and he seeks to avail himself of the provisions of section 167 of the Bengal Tenncy Act, and to annul these interests as incumbranaces, it lies upon him to show an origin subsequent to the creation of the taluk, and, in the absence of any indication that these holdings had an origin either by creation or by the sufferance of the patnidar since the creation of the taluk, the proper presumption is that they date back to a period. antecedent to the creation of the taluk. P C BIPBADAS PAL CHOWDHURY T. KAMINI KUMAR LAHIRI, 41 M. L. J. 638; 15 L. W. 180; 80 M. L. T. 128; 26 674 O. W. N. 435

execution of rent-decree—Previous purchaser in execution of mortgage-decree—Subsisting encumbrance.

On the 18th September 1913 the plaintiff purchased a holding in execution of a decree for arrears of rent obtained in a suit instituted on the 18th April 1912. In taking possession he was resisted by the defendant who had purchased the interest of one of the tenants in execution of a mortgage-decree on the 18th May 1912. Thereupon the plaintiff brought the present suit for recovery of possession on the basis of his right by purchase at the rent-sale:

compromise decree—Ejectment, provision for, legality of - Relief against forfeiture, jurisdiction of Court to

grant

Where a valid terancy is created, and it continues in operation, the tenant can only be ejected therefrom in accordance with the provisions of the Bengal Tenancy Act, notwithstanding that the tenancy was created under a consent decree which provided for the ejectment of the tenant upon a breach of any of its terms, as under section 178 (1) (e) of that Act, nothing contained in any contract between a landlord and a tenant ontitles a landlord to eject a tenant otherwise than under the provisions of that Act. C Gopal Krishka NATH v. HABI NATH KAPURTE, 34 C. L. J. 157 766

Bengal Tenancy Act-concld.

Sch. III, Art. I (a), applicability of -Suit to eject tenant of private land -Non-occupacny tenancy, creation of.

Article 1 (a) of Schedule III to the Bengal Tenancy Act, does not apply to suits to eject persons

who are not in law non-occupancy tenants.

The right of a non-occupancy tenant can only be acquired under Chapter VI of the Bengal Tenancy Act, and as that Chapter does not apply to private (ziraat) lands, no such right can be acquired in such lands.

Therefore, Article I (a) of Schedule III to the Bengal Tenancy Act would not apply to a suit by landholder for possession brought on expiry

of lease of private ziraat land.

The mere fact that a person has been for a term a tenant of private ziraat land, and has not been a raivat holding at a fixed rate, or an occupancy tenant, does not raise any presumption that he has acquired the status or the rights of a non-occupancy tenant. PC JAGAENATH DAS v. JANKI SINGH, 3 P L. T. 197; 35 C. L. J. 506 337

Bombay District Municipal Act (III of 1901) - Notified area, rules for—Application to erect new building—Committee, power of, to refuse permission.

A applied to the Committee of a Notified Area to build on his own land; the Committee, purporting to act under clause (3) of rule 27 of the rules framed under section 183 (1) of the Bombay District Municipal Act, refused permission. A, however, erected the building, and was convicted under

clause (5) of the above rule:

Held, that the conviction was not justified, as all that a Committee could do under rule 27 (3) was to pass a provisional order directing that, for a period not exceeding one month, the intended work should not be proceeded with, and that as such an order had not been issued, nor an order passed under sub-rule (2), A. was entitled to build. B ARDESHAB JIVANJI v. EMPEROR, 24 BOM. L. R. 102; 23 CR. L. J 257

not proved—Magistrate, whether can convict for offence not charged—"Building," meaning of—Construction of Statute—Penal provisions.

Where a person is charged with having committed a specific offence, and the Magistrate finds that that offence has not been committed, the Magistrate is not competent to alter the charge, and to convict the accused of an offence of which he has had no notice.

Although under section 3 (7) of the Bombay District Municipal Act word "building" includes any hut, shed or other inclosure, whether used as a human dwelling or otherwise, it does not include a hut or a shed at every other place where it is used in the Act.

All penal provisions of a Statute must be very strictly construed. B MATRUBHAI v. EMPEROR, 24 Box. L. R. 105; 25 Cg. L. J. 259

The words "any building," meaning of,
Bombay District Municipal Act are wide enough to
cover a building in a private Mahla and permission of

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Bombay District Municipal Actconcld.

the Municipality is necessary to build any building within the Mahla. S EMPEROR v. JANU FAKIR, 15 S. L. R. 171 999

122, **–** 85. 155-Notice to remove encroachment-Non-compliance with notice-Prosecution, whether justified.

Although a Municipality may, as a matter of courtesy, send a notice to a person alleged to have erected an encroachment to remove it, such notice is not authorised by section 122 of the Bombay District Municipal Act, and if a person to whom such notice is sent fails to comply with it, he cannot be convicted under section 155 of having disobeyed a lawful order, the proper step, according to law, in such a case is for the Municipality to remove the encroachment, and charge accused with the cost of removal, ATMARAM SHAMJI v. EMPEROR, 24 BOM. L R. 384: 817 23 CR L J. 321

Bombay Land Revenue Code (Act V of 1879), s, 83-Tenancy, commencement of,

traceable-Section, whether applicable.

Section 83 of the Bombay Land Revenue Code applies only where, by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming. Where the commencement of a tenancy can be traced, the section is not B CHIKKO BHAGWANT v. SHIDNATH applicable. 315 MARTAND, 24 BOM, L. R. 226

Bombay Rent (War Restrictions) Act (II of 1918), s. 9-Landlord carrying business in rented premises-Eviction of landlord-Landlord, right of, to eject tenant-Requirements of landlord, how to be judged -- Jurisdiction of Court.

A landlord, who carries on business in premises rented by him, is entitled on eviction to occupy, in premises of his own, by ejectment of a tenant therefrom, a space equal to the space previously rented by him, and it is not within the jurisdiction of a Court to decide upon the amount of space which would be adequate for the purposes of the business. B Nowroji Hormasji v. Shrinivas, 24 Bom. L. R 95

Bombay Salt Act (II of 1890)-Sub. lease of salt pans-Breach of condition as to permission of Collector, effect of.

A breach of the condition of a license under the Bombay Salt Act as to a sub-lease of salt pans without the written permission of the Collector makes the sub-lease invalid. B RABIABIBI U GANGADHAR VISHNU PURANIK, 24 BOM. L. R. 111 393

Buddhist Law-Adoption-Kittima adopted son entering priesthood-Return to civil life -

Adoption, how affected.

Under the Buddhist I aw, when a kittima adopted son enters the Buddhist Priesthood, he completely severs himself from all rights to inherit, and from all family ties, in the family of his adoptive parents, and on his re-entering civil life he would not ipso facto be entitled to resume the position and rights he might have been possessed of before, although it is open to the adoptive parents to again adopt him as their kittima son, and if he is received back in his home on the old status with the obvious intention that he should resume his old position as

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adopted son and heir, the years spent in the priesthood would not in any way affect his right to inherit the estate of his adoptive parents. LB MA NYUN SEIN V MAUNG CHAN MYA, 11 L. B. R. 124

 Burmese — Partition — Jointly acquired property of father and mother-Auratha son, right of, to claim share on father's re-marriage.

Under the Burmese Buddhist Law an auratha son has no right to claim a share of the property

jointly acquired by his parents merely by reason of his mother's death; his right to claim a onefourth share of that property, however, arises on the re-marriage of his father. LB MAUNG SHWE YWET v, MAUNG TUN SHEIN, 11 L. B. R. 199

Burden of proof—Contract—Minority, plea of-Plaintiff, onus on-Admission by executant at time of execution that he was major, value of.

When the validity of a contract is questioned on the ground that the executant was a minor, it is for the plaintiff to establish by prima facie evidence that the contract was valid and entered into by a person who was competent to do so.

An admission by an executant at the time that he executed the deed that he was major is sufficient prima facie evidence of his majority. A BACHCHA LAL v. HASAN KHAN 814

Burma Excise Act (V of 1917), SS. 12 (C), 30 (d) - Yeast balls, possession of -

. Offence.

Yeast balls are not excisable articles, but as they are materials for the manufacture of an excisable article, namely, liquor, the possession of them is prohibited by section 12 (c) of the Burma Excise Act, and is made punishable under section 30 (d) of that Act. L B NAN MA MYA v. EMPEROR, 11 L. B 665 R 136; 23 CR L. J. 313

SS. 37, 44—Possession of excisable article,

failure to account for-Offence.

A person who fails to satisfactorily account for being in possession of any excisable article, although the quantity he possesses is within the limit allowed for possession, renders himself liable to be convicted under section 87 of the Burma Excise Act. L B NGA HAN KYI v. EMPEROR, 11 L. B. R. 134; 514 23 Cr. L. J. 290

Burma Laws Act (XIII of 1898)-

Hindu-Kalai, whether Hindu,

If a twice-born Hindu migrates across the sea to Burma and marries a Burmese woman, his descendants, who are born and have always lived in Burma and who have inter-married with its people, form a community known as kalais, and as the usages and religion of this community are very divergent from Hirduism, the community cannot be regarded as Hindu within the meaning of the expression as used in the Burma Laws Act of 1898. PC MA YAIT v. MAUNG CHIT MAUNG, 11 L, B. R. 155; 30 M. L. T. 126; 42 M. L. J. 193

Calcutta Improvement Act (V of 1911). See LAND ACQUISITION ACT, 1894, s. 6 600 (3)

Calcutta Municipal Improvement Act (III of 1899), ss. 20, 357, 556. See LAND ACQUISITION ACT, S. 8 600 Cantonment land - Ejectment - Agra Tenancy Act (II of 1801), applicability of— Secretary of State—Owner of Cantonment lands— Adverse passession—Person occupying Cantonment land, position of.

The provisions of the Agra Tenancy Act do not apply to lands lying in Cantonment areas as they are under the direct administration of the Govern-

ment of India.

The Secretary of State is absolute owner of all Cantonment land, unless he has parted with the ownership. There can be no adverse possession

against him.

A person occupying land in Cantonments, which has not been specifically transferred by the Secretary of State, is in the position of a tenant or in the position of a licensee. A SECRETARY OF STATE FOR INDIA v. MULLA

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C. P. Land Revenue Act (II of 1917).

SS. 192, 229—Lambardar—Remuneration not fixed under s. 192—Remuneration, any, whether allowable — Admission in First Court, whether affected by denial in Appellate Court.

Section 229 of the C. P. I and Revenue Act, II of 1917, continued the state of things existing under Act XVIII of 1981 in regard to the remuneration of lambardars and the fact that the Deputy Commissioner did not fix the remuneration of a lambardar of a village under section 192 of the Act could not disentitle such a lambardar to the remuneration

A party cannot deny in appeal what he admitted in the First Court. N BHOLARAM v. TUKARAM

Chaukidari chakran land—Resumption
—Transfer to zemindar—Right of putnidar to hold
land subject to payment of additional rent to
Zemindar—Putni contract containing no reservation.

Where in a pulsi contract there is no reservation with regard to the chaukidari chakran lands, they, in resumption and transfer to the zemindar under the provisions of Act VI B. C. of 1870, are included in the pulsi, and the pulsidar is entitled to hold them subject to the payment of some rent to the zemindar in addition to the amount payable to the chaukidari fund. C Bejoy Chand Mohatap v Krishna Chandra Mukhrejee, 84 O L. J. 275

Civil Procedure Code (Act XIV of 1882), s. 443-Civil Procedure Code (Act V

of 150°), O. XXXII, r. 4 (3),

In the absence of a provision in the Civil Procedure Code of 1852 corresponding to Order XXXII, rule 4, sub-rule (3) of the Code of 1903, where a certificated guardian was proposed for appointment as a guardian ad litem under the former Code, the Court might, unless he declined the appointment, presume his consent. C SARAT CHANDRA MAITI v. BIBHABATI DEBI, 84 C. L J 302

Civil Procedure Code (Act V of 1908), S. 2, O. XX, r. 12, cl. (1), 8ub. Cl. (C) (ii) - Evidence recorded by Commissioner appointed for local investigation, value of — Parties agreeing to accept evidence recorded by Commissioner—Action of Judge on such agreement, if without jurisdiction.

A charge of improper working of a Colliery should not be decided on the evidence recorded by a Commissioner appointed to make a local investigation. But where the parties agree to a decision

Civil Procedure Code-1908-contd.

on a point by a Judge on the evidence recorded by a Commissioner to make a local investigation, the evidence must be treated as evidence recorded by a Commissioner appointed for the purpose of examining witnesses.

It is open to the parties to a suit to agree as to the materials to be placed before the Judge for his decision and if the Judge acts on such agreement he does not thereby delegate his functions as a

Judge.

Where the judgment-debtors are in possession under a bona fide claim of title and not "without any colour of title" or "in a manner wholly unauthorised or unlawful," they are entitled to certain allowances in the assessment of mesne profits and damages.

In India there is no reason why the measure of damages should depend on the nature of the remedy sought, or why any distinction should be made in this respect between a suit for damages for trespass and a suit for accounts. C SAMBHU NATH P SATISH CHANDRA, 25 C. W. N. 869

Act (IX of 1899) - Reference to arbitration—Award
—Suit to set aside award filed - Stay of award
proceedings.

Sections 10 and 11 of the Civil Procedure Code are concerned with the law of procedure and the mere user of the word "suit" in section 10 does not restrict its applicability to suits alone but the section can be extended to civil miscellaneous proceedings by virtue of section 141, Civil Procedure Code, if it is otherwise applicable.

Once an award is made, there is no equitable reason for staying proceedings under it because a

suit is filed to set it aside,

An order under section 151, Civil Procedure Code is to be made when the ends of justice require it or to frustrate an abuse of the process of the Court, and where in an application to stay proceedings under an award neither of the conditions prevail

there should be no stay.

Parties entered into contract of sale of certain bales of cloth with the usual clause as to reference to arbitration of any disputes arising between the Certain disputes arose and one party called upon the other party to join them in referring to arbitration and name their arbitrator. The other party failed to do so The first party nominated arbitrators, one on their own behalf and the other on behalf of the second party. Both the parties were present before the arbitrators who, after hearing them, made the award. The arbitrators then filed their award in the Sind Judicial Commissioner's Court and notices were issued to the parties to show cause why the award should not be filed. Objections were filed. The other party had filed a suit previous to the award at Delhi for a declaration that there was no contract between the parties and an appeal was pending in that case in the Lahore High Court. After the award the second party filed another suit against the first party in the Sub-Judgo's Court at Delhi questioning the validity of the arbitration proceedings An application was filed in the Sind Judicial Commissioner's Court that pending the appeal in the Labore High Court and the suit in

Civil Procedure Code-1908-coatd.

the Sub-Judge's Court, Delhi, the hearing of the petition to file the award be stayed under section 10 of the Civil Frocedure Code:

Held, that section 10 of the Civil Frocedure Code did not apply to the case as the parties in the proceedings sought to be stayed were not identical with those in the Delhi suits and as the Delhi Court was not competent to grant the relief claimed in the application S In the matter of Arbitration between Jainarain Babulal and Naraindas Janimal 796

___ s. II, Exp. IV.

In a suit for the specific performance of a contract it is open to the defendant to plead that the agreement is void on certain grounds, and if he fails to take up that plea, he or any other person claiming under him and litigating under the same title is debarred by Explanation IV of section II of the Civil Procedure Code from taking up that plea.

N Amolaksao v. Mahipat Rao

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District Judge for re-trial—District Judge, power of, to transfer appeal—Jurisdiction.

In the absence of express terms to the contrary, an order by a High Court remanding an appeal to a District Judge to be disposed of according to law, has not the effect of placing any limitation on the powers of the District Judge, under section 24 of the Civil Procedure Code, of transferring the appeal for disposal by an Additional Judge of his Judgeship, and where such an appeal is so transferred, the order of the Additional Judge disposing of the appeal is not liable to be set aside on the ground that it was wholly without jurisdiction.

A RAJKALI v GOPI NATH NAIK, 20 A. I. J. 44; 44 A. 211

decree for costs by attachment of mortgage-decree obtained by judgment-debtor and by sale of mortgaged property, validity of—Sale, if absolutely void.

A mortgage suit brought by A. against B and C. was dismissed with costs so far as B. was concerned and decreed against C. B. in execution of his decree for costs attached the mortgage-decree of A. against C. and the decree for costs was satisfied with the sale-proceeds of some of the mortgaged properties. In an application by C. under section 47 of the Code of Civil Frocedure to have the sale set aside:

Held, that the sale was not absolutely void, but was certainly irregular and could be let aside if proper proceedings were taken for the purpose, and that the judgment debtor could waive the irregularity and the sale could not be treated as a nullity.

C Kamini Kumar v. Protap Chandra, 25 C. W. N. 400

ejectment - Resistance to rossession by purchaser pendente lite-Order of removal - Appeal.

Orders of removal of obstruction are appealable if passed under Order XXI, rule 98, Civil Procedure Code, against the judgment-debtor or an obstructor at his instigation. The latter description does not necessarily apply to a person who merely relies on a title derived from the judgment-debtor. Such a person can prefer an appeal only if he is authorised

Civil Procedure Code-1908-contd.

to do so under section 47 of the Code, i.e., if he can show that he was a party, or the representative of a party, to the decree.

A decree-holder in ejectment was resisted in getting possession of the property in execution by a person who had purchased the property in suit pendente lite On an application under Order XXI, rule 97, the obstruction was ordered to be removed. The purchaser appealed:

Held, (by Oldfield, J., Ramesam, J., centra) that as the seller had no title to the property, his transfered could not be considered to be a representative

feree could not be considered to be a representative of a party to the suit to enable him to prefer the appeal under section 47 of the Civil Frocedure Code. Order XXI, rule 97 is permissive and merely affords a summary procedure which an obstructed

affords a summary procedure which an obstructed person has the option to use or forego. Failure to avail of it does not deprive a person entitled to possession of any further right to obtain it in execution. M MEYYAPPA CHETTI v. MEYYAPPAN SERVAI, (1921) M. W. N. 6 8 722

Rateable distribution.

The explanation to section 64, Civil Procedure Code, gives no priority to claims under section 72, Civil Procedure Code, apart from the attachment in connection with which they are made and under which they are enforceable, so that a claim to rateable distribution made in connection with an attachment ceases to be enforceable under it when the attachment is withdrawn.

Section 6¹, Civil Procedure Code, refers only to claims enforceable under the attachment effected prior to the alieuation, and not to claims enforceable under the decree in execution of which the attachment was made. O MUHAMMAD MUZAFFAR ALI v. BHAGWATI PRASAD SINGH, 8 O L. J. 358 642

ment) Act (I of 1914), s. 3-Agricultural land, sale of—Commissioner, sanction of, whether necessary—Insolvency—Insolvent, death of—Legal representatives, whether should be impleaded.

In the absence of any notification as contemplated by section 3 of Act I of 1914 the sanction of the Commissioner of the Division is not necessary as a condition precedent to the sale of agricultural land under the provisions of section 67 of the Civil Procedure Code of 1908.

There is no law that upon the death of an insolvent, who has been adjudicated as such, his legal representatives should be brought on the record in his place L FAKIR MUHAMMAD v. AMIR CHAND, 31. L. J. 5

It is necessary that limitation should be pleaded in all cases in which the suit is alleged to be barred. But particularly this is so where the bar is alleged under some special law.

The general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon

questions of fact.

Points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on the evidence.

Civil Procedure Code-1903-contd.

Where limitation has not been pleaded and where no issue has been raised, the Court cannot make any assumptions with regard to it. If limitation is urged as a bar the facts on which it is barred must

be proved after an issue has been framed.

The mere fact that a book was not referred to in the lower Court, may not of itself be a good objection in appeal. If, however, the book was used to establish the existence of facts which the appellant had no opportunity of meeting and which he desired to rebut, the admission of the book in the appellate stage might involve a remand. C SECRETARY OF STATE FOR INDIA v. ANNADA MOHAN ROY, 34 C. L. J. 205

r. 3, O. XLIII, r. 1 (m)—Compromise Refusal of Trial Court to record—Recorded by
Appellate Court—Decree—Appeal, whether lies.

During the pendency of a suit the defendants applied to the Trial Court to have an oral compromise recorded which they alleged had been arrived at between the parties. The Court refused to record the compromise on the ground that all the parties had not joined the compromise. Defendants appealed to the District Judge under Order XLIII, rale 1 (m) of the Civil Procedure Code. The District Judge held that all the parties had agreed to the compromise. On this a decree was passed in accordance with the terms of the compromise. The plaintiffs appealed to the High Court:

Held, (1) that the order of the District Judge recording the compromise was final under section 101

(2) of the Civil Procedure Code:

(2) that it amounted to a final decision that all

the parties had consented to the compromise;

(3) that, therefore, the decree which followed upon the compromise was a decree passed with the consent of the parties, within the meaning of section 95 (3) of the Civil Procedure Code, and no appeal lay against it. L GURCHARAN SINGH v SHIBDEY SINGH

kattubadi, whether of Small Cause nature-Second

appeal.

A suit for recovery of arrears of kattubadi is a suit of a small cause nature, and where it is under Rs. f.O. in value no second appeal lies. M BHUVANAPALLI SUBBAYA v RAJA OF VENCATAGIRI, 14 L. W. 849; 42 M. L J. 118

dismissed—Decree, appeal from -Interlocutory order,

when can be questioned.

Where there is some unappealable interlocutory order, its irregularity or any defect in it may be raised when the decree is appealed from, so far as it affects the decision of the case, although an appeal from the order has been dismissed on the ground that no appeal lay from it A SHANKER I AL V. MUHAMMAN AMIR, 20 A. L. J. 849

ing property of like amount," meaning of—Possible suits involving same points but not pending, applicability to

The expression "claims or questions to or respecting property of like amount or value" in section 110 of the Civil Procedure Code refers only to questions

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arising between the parties to the suit and not to questions affecting the title of one of the parties to the suit in suits that may hereafter be brought

but are not now pending

A decision on the meaning of section 12 of the Madras Estates Land Act is a question which involves a substantial question of law within the meaning of section 110 of the Civil Procedure Code. M RAJAH OF RANNAD v. KAMITH RAVUTHAN, 15 L. W. 140; (1923) M. W. N. 43; 30 M. L. T. 42; 43 M. L. J 78

lower Court as regards costs only—Judgment of affirmance—Leave to appeal to Privy Council, whether to be granted.

Where in an appeal High Court merely exercises its discretion as regards the costs of the suit in the lower Court and it entirely confirmes the decision of the lower Court on the merits of the case, its decree is one of affirmance within the meaning of section 110 of the Code of Civil Procedure. C CHAITANYA CHABAN SET v. MOHAMMAD YUSUF, 34 C. L. J. 299

- S. I 10-Leave to appeal to Privy Council
- Decree of affirmance-Substantial question of law.

Where a decree of the lower Court is varied by the High Court in favour of one of the appellants at the instance of the Vakilacting for all the appellants, the Vakil, in the absence of any reservation as to the rights or positions of other appellants, must be deemed to have made it with the consent of the other appellants, and consequently, the decree is one of affirmance and the other appellants are not entitled to obtain leave to appeal to the Privy Council unless they show that there is some substantial question of law involved. C UMA CHAND SETT U KANAI LAL SETT, 25 C. W. N. 775 621

partly in favour and partly against - Portion against in confirmance of lower Court's decree -

Right to appeal.

In the case of an application for leave to appeal to His Majesty in Council where a portion of the decree is in favour of the applicant and the other portion, which is adverse to him and against which he seeks to appeal, is in confirmance of the decree of the Court of first instance, he is not, as a matter of right, entitled to prefer the appeal A CHANDAR SEKHAR v. AMIR BEGAM 721

S. 110, scope of -Privy Council Appeal -Subject-matter of suit, value of, determination of

Principle governing.

In a suit for damages for erection of a bund and the alleged consequent inundation of the plaintiff's paddy field valued at above Rs 10,000, the First Court gave a decree for less than Rs. 10,000 which was set aside on appeal On an application to appeal to the Privy Council it was objected that this was merely a suit for damages and that, in dealing with applications for leave to appeal to the Privy Council, the Court could not go beyond the amount of damages actually decreed by the Court of first instance:

Held, (1) that in granting leave to appeal to His Majesty in Council, the correct principle to consider the subject-matter of the appeal was to look at the jadgment, as it affected the interests of the parties

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who were prejudiced by it, and who sought to relieve themselves from it by an appeal.

(2) that the subject-matter of the suit in the Court of first instance exceeded Rs. 10,000, and the decree or final order involved indirectly a question respecting property worth more than that sum, and that, therefore, the applicant was entitled to the leave.

Per Robinson, C. J.—The second paragraph of of the Civil Procedue Code is section 110 intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. If the decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. L B MAUNG BYA v. MAUNG KYI NYO, 11 L. B. R 152

- S. II5-Revision-Application supported by affidavit of Pleader's clerk not entertainable-Affidavit.

A High Court ought not to take cognizance of an application for revision supported by an affidavit of a Pleader's clerk swearing to all the material facts of the affidavit as true to the information derived by him from the petitioner C SURJA NABAIN DAS v. AMIRUDDIN MOHAMMAD

- S. 115-Revision-Error in exercise of jurisdiction.

No revision lies on the mere ground of an error of judgment of the lower Court in the exercise of its jurisdiction. A GANESH PRASAD SAHU U. DUKH HARAN SABU

- SS. 141, 144, applicability of-Application for restitution dismissed for default, whether can be restored.

Proceedings under section 144 of the Civil Procedure Code are not proceedings in execution of decree and, therefore, the terms of section 141 do apply to such proceedings.

Therefore, a Court is entitled to set aside an order of dismissal, of an application under section 144, Civil Procedure Code, for default and to restore it A . IWA RAM v. NAND RAM, 20 A. L J. 228 144

_ S. 144-Restitution, application for-Execution proceedings-"Party," meaning of.

An application under section 144 of the Civil Procedure Code is not a proceeding in execution under the Code although it is in the nature of proceedings in execution to enforce either directly or indirectly the final decree. A party to an application under section 144 of the Code need not necessarily be a party to the decree. The word "party" in section 144 means "party to the application."

An application for restitution under section 141 of the Civil Procedure Code consequent upon a decree of His Majesty in Council is governed by Article 183 of Schedule I to the limitation Act. A BIRJ LAL v. DAMODAR DAS, 20 A. L. J. 456; 4 U. P. 545 L. R (A.) 74

- S. 152-Plaint, rectification of error in,

after disposal of suit.

Under section 152, Civil Procedure Code, errors in judgments and decrees can be corrected at any moment; and if those errors follow from clerical or accidental mistakes committed in the plaint or other

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proceedings it is open to the Court to ascertain by enquiry whether any accidental slip has occurred and to rectify it if the real points at issue are not affected thereby. O PAHALWAN SINGH v. GANGA BAKHSH SINGH, S O. L J. 416

- S. 152, O. XLVII - Decree, amendment of-Amendment not merely clerical-Court expressly acting under s, 152-Order, whether appealable.

Plaintiff sued to recover a certain sum of money as his share of certain trees sold from common land. The suit was decreed, but according to the calculations of the Court the amount payable to plaintiff was found to be less than demanded by him. He objected to the calculations and stated that the distribution of the amount involved had been worked out on an incorrect area. The Court professing to act under section 152, Civil Procedure Code, allowed the objection and amended the decree:

Held, that the Court must be deemed legally to have acted under Order XLVII and not under section 152 of the Civil Procedure Code and that order amending the decree was appealable L RAMJI LAL v. GIANI, 3 L. L. J. 341

- O. 1, r. 8-Members, some, of community, suit by, if maintainable-Muhammadan Law-Shia sect-Dedication, proof of user, evidence as to, effect of-Origin of dedication unknown, effect of-Wakf-Dedication, partial and complete-Construction of document-Trust-Charge-Religious purposes, dedication for.

Where the plaintiffs in virtue of the fact that they belong to the Shia sect and perform religious ceremonies and other practices on a certain property and the graves of their relations also stand on that property seek for a daclaration that the said property is walf property and the defendants have no proprietary right over any part of that property or its income, they are entitled to maintain the suit irrespective of the provisions of O. I, r. 8, Civil Procedure Code.

In order to ascertain whether a property is wakf, user may be evidence of a dedication the origin of which is unknown, but it cannot be substituted for it. What is required is an indication that the wakif has divested himself of his proprietary interest in the subject of the waky. Besides cases of complete endowment there may be instances of less complete dedication, in which, notwithstanding a religious dedication, property descends and descends beneficially to heirs subject to a trust or charge or the purpose of religion. O SADIQ HUSAIN v. NAZIR HUSAIN KHAN, 9 O. L. J. 111; 4 U. P. L R. (J. U.) 25

____ O. I. r. 9, O. XLI, r. 4-Necessary party, omission of, in appeal, effect of-Lease-Kabuliyat, construction of-Produce rent stipulated -Arrears value, recovery of.

A person who is a necessary party to a suit is

also a necessary party to the appeal.

In a suit for the rent of a holding the plaintiffs, four in number, obtained a decree, the decree not being for specific sums in favour of each plaintiff the defendant appealed against the decree but joined only two of the plaintiffs as respondents:

Held, as the two plaintiffs joined as respondents could not have maintained the suit, the appeal

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was incompetent, and the decree passed therein a nullity.

In a Manthika Settlement stipulation as to rent

was as follows :

"We shall in respect of the kamat land deliver to the malik zemindar aferesaid at his place, grains, kalai and jai, two maunds per bigha on the average total 83 maunds 28 seers by way of rent in this way, viz, each year in the month of Pous 50 maunds of Kalai and in the month of Baisakh 33 maunds 28 seers jai (oats)the price approximately is fixed at Rs. 2-1-0 for kalai per maund, and Rs 2-2-9 for jai per maund....Approximate rent comes to Rs. 185." The price at which the produce was valued was not stipulated to be payable in default of delivery of produce:

Held, that on the true construction of the deed, the clear consequence of the non-delivery of produce as covenanted was that the tenants were liable for the market-value of these crops at the time when they were deliverable. rat Jatindbanath Chatterji v. Jhaku Mandar, 3 P. L. T. 456 780

O. I, P. 10 - "Wrong person as plaintiff,"

interpretation of Bona fide mistake Transposition from defendant to plaintiff Limitation Act (IX of

1808), s. 22-Addition of new party.

The words of clause (1) to Order I, rule 10 of the Civil Procedure Code "where a suit has been instituted in the name of the wrong person as plaintiff" are comprehensive enough to include cases where the original plaintiff has no cause of action and their interpretation must not be restricted to cases where the plaintiff has some right to sue.

A certain firm was adjudicated insolvent and their estate was vosted in the Official Receiver. Prior to their insolvency the firm had entered into contracts with various merchants for the sale and purchase of different commodities. Merchants were alleged to have committed breach and were alleged to be liable for damages to the firm. The Official Receiver sold by public auction the "outstandings due and payable to the estate of the insolvents" inclusive of the claims of damages. Plaintiffs purchased these rights and got a duly stamped assignment of these rights and sued the merchants within three years. It was pleaded that the assignment was wholly illegal and void so far as it involved a transfer of "a right to sue for damages" and the suits were not maintainable. Plaintiffs applied three years after the accruing of the cause of action for transposition of the Official Beceiver who was one of the defendants from the category of the defendants to that of the plaintiff:

Held, that us the suit was instituted in the name of the wrong plaintiff through a bona fide mistake of law and although the plaintiff had no cause of action, the Court could, under Order I, rule 10 of the Civil Procedure Code, transpose the Official

Receiver from a defendant to a plaintiff.

Held, also, that although the transposition was beyond limitation prescribed for the suit it was not barred as a transfer of a party from a proforma defendant to plaintiff was not an addition of a new party within the meaning of section 22 of the limitation Act. S FIRM OF GERIMAL-HARI RAM V. FIRM OF RUGHNATH-KALIANJI 873

(Ivil Procedure Code-1908-contd.

against schom no relief claimed, whether can be joined as respondent in appeal.

A party to a suit against whom the appellant claims no relief can be made a respondent to the appeal. N Kuksa v. Dajibi Buau 217

widow-Reversioner, separate suit by-Cause of action.

The estate of a Hindu widow is not a life-estate. She is a proprietor of the estate with a right of alienation subject to certain qualifications. Each alienation by the widow in the exercise of that right must be judged by the circumstances in which it is made.

An alienation by a Hindu widow of her estate or a portion of the estate is not void ab initio but is only voidable if it transgresses the limitations imposed by the Hindu Law on the power of alienation, The death of the alienor does not necessarily render the alienation inoperative. The death of the alienor widow only enlarges the reversioner's right of barely challenging the alienation into a right of entering into possession of the property covered by the particular alienation. His right to challenge the validity of the alienation is, therefore, a permanent factor of his title to the property which developes from a bare spes successionis into a vested interest as an effect caused by the death of the widow. Further, as the validity or otherwise of each alienation depends upon the circumstances in which it is made and, as these circumstances vary with each alienation, it follows that the reversioner's right to challenge the validity of one alienation is different from his right of impeaching the validity of a separate and independent alienation, though both the rights may arise out of the one and the same title. Again, he has a right of election; he may choose to challenge one alienation and assent to another, or he may challenge both or assent to both. He may exercise his right of election in regard to one alienation at one time and in regard to another alienation at another time.

Therefore, a reversioner has a separate cause of action in respect of each alienation made by the widow, and a suit to recover property comprised in one alienation is not barred by Order II, rule 2 of the Civil Procedure Code by reason of a prior suit for the recovery of property comprised in another alienation. O BAHADUR SINGH v SULTAN HUSAIN KHAN, 8 O. L J. 535; 3 U P. L R. (J. C.) 83

O. 11, r. 2, s. 96 (3)—Relinquishment of portion of claim for purposes of jurisdiction—Relinquishment, whether can be made after filing of suit—Consent-decree, what is—Expression of consent at passing of decree, necessity of.

Per Sadasiva Aiyar, J. (Coutts-Trotter J., dissenting).

—The meaning of Order II, rule 2, Civil Procedure Code, is that a plaintiff in order to bring his suit within the jurisdiction of a particular Court may in his plaint relinquish a portion of his claim based on the same cause of action. But once the suit is filed in a Court having no jurisdiction to grant the relief prayed for in the plaint, the provision in Order VII, rule 10 at once becomes applicable and

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the only course open to the Court is to return the plaint for presentation to proper Court.

Per Coutts Trotter, J. A consent decree does not necessarily mean a decree passed with the consent of the parties expressed at the moment the decree is passed. M Govindaswami Kadavaran v. Kalia-Perumae Munayathiriyan, (1922) M. W. N. 83

O. II, r. 2, O. XXIII, r. 1-With.

drawal of suit-Sufficient cause.

It is not a sufficient cause for allowing a suit for interest on a mortgage to be withdrawn under Order XXIII, rule 1 of the Civil Procedure Code, that a subsequent suit for principal, if brought, would be barred under the provisions of Order II, rule 2 of the Code. L PARDUMAN CHAND v. GANGA RAM 285

-Suit ordered to be proceeded ex parte-Defendant,

whether can appear subsequently.

Where on the first date fixed for hearing, a defendant is not present and the Court makes an order directing the suit to proceed against the defendant ex parte, the defendant is not precluded from appearing on a subsequent date and offering to file his written statement and to produce his witnesses.

A BHAGWAT PRASAD v. MUHAMMAD SHIBLI, 20 A. L. J. 270

Courts Act (IX of 1887), s. 17 (11—Limitation Act (IX of 1908), s. 5, applicability of—Application to set aside ex parte decree—Payment of decree amount after limitation period—Power of Court to excuse delay.

A payment required by the proviso (1) to section 17 (1, of the Provincial Small Cause Courts Act is not independent of the petition for setting aside a decree passed ex parte but is an element required to complete such a petition.

Section 5 of the Limitation Act is applicable to the applications under Order 1X, rule 13, Civil Procedure Code, even when that procedure takes place

in a Court of Small Causes.

Therefore, a Small Cause Court Judge is competent to excuse the delay in depositing the decree amount in Court on an application under Order IX, rule 12, Civil Procedure Code. M Sudalamuthu Kudumban v. Andi Reddiar, 15 L. W. 494: 42 M. L. J. 484: (1922) M. W. N 266; 30 M. L. T. 312

several defendants—Appeal by some defendants without impleading others—Application by defendant not impleaded to set aside decree—Forum—Ex parte decree affirmed by Appellate Court—Decree of Appellate Court, nature of—High Court, power of, to excuse delay in filing application.

Where one of several defendants against whom an ex parts decree has been passed is not impleaded in an appeal preferred against that decree, the Appellate Court has no jurisdiction to entertain an application by that defendant to set aside the ex parts decree. Where he is made a party to the appeal, an application to set aside the decree made by him during the pendency of the appeal, or after it has been disposed of, should be made to the

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Court which passed the decree and not to the

Appellate Court.

Where a defendant, against whom an ex parte decree has been passed, prefers an appeal against that decree, and appears in support of the appeal, the decree of the Appellate Court affirming that decree cannot be described as an ex parte decree of that Court.

The proper course for a defendant seeking to set aside an ex parte decree against which an appeal has been preferred, is to apply to the Appellate Court for an adjournment of the hearing of the appeal to enable him to apply before the first Court to set aside the decree.

Although under O. IX, r. 13 2) of the Civil Procedure Code, as amended by the Madras High Court, that Court has power to excuse delay in making an application to set aside an ex parte decree, that power will be exercised only when there is justification for failing to make the application in time. M PALANIAPPA CHETTY v. SUBRAMANYAM CHETTY, 14 L. W. 609; (1921) M. W. N. 796; 42 M. L. J. 12 59

cation to set aside, who can make—Minor defendant not properly represented by guardian, whether can apply.

A minor defendant who is not represented in a suit by a properly appointed guardian is not a party to the suit in the proper sense of the term, and the proceedings in the suit cannot bind him.

Under Order IX, rule 13, of the Civil Procedure Code it is the defendant in the suit who may apply to set aside an ex parts decree. A minor not represented by a competent guardian not being a defendant, cannot maintain such an application, N PERMANAND v. LAKHMICHAND 460

- O. X, r. 1-Pleadings-Examination of

parties - Duty of Court.

The proper way of clearing up pleadings after the plaint and written statement have been filed is that prescribed by Order X, rule 1, Civil Procedure Code. The Court must, under that rule, at the first hearing of the suit, ascertain from each party or his Pleader whether he admits or denies the allegations of fact made by the opposite party except where such admissions or denials are already contained in the written pleadings and must record such admissions or denials. A written replication is not a substitute for this oral examination of the parties and their Pleaders, and it is of the utmost importance for the purpose of doing justice between the parties that this oral examination should be duly and carefully carried out by the Court. O ANJAMAN-UN-NISA v. ASHIQ ALI, S O. L. J. 439; 3 U. P. L. R. 222 (J. C.) 65

O. XI, rr. 15, 18-Inspection of docu-

ments-Unnecessary documents.

A defendant is not entitled to the production and inspection of documents which are referred to in the plaint merely as part of the narrative of the history of the dispute and which are not necessary either for proving the plaintiff's case or for assisting the defendant in his defence. B L. & I. RAPAPORT v. KILLIANJI HIRACHAND, 23 BOM L. R. 1255

Civil Procedure Code-1908-contd.

O. XXI, r. 16, provision of-Execution -

Decree, who can execute.

No one can execute the decree except the decreeholder or a person to whom the decree has been transferred by assignment in writing or by operation of the law. The provisions of Order XXI, rule 16 must be complied with. A SHIB CHARAN DAS v. 878 BAM CHANDER

- O. XXI, r. 16-"Transfer by assignment in writing or by operation of law," meaning of-

Mortgage, whether included.

The words "transfer by assignment in writing or by operation of law" in Order XXI, rule 16 of the Civil Procedure Code, mean a transfer of all the transferor's interests in the decree. Unless the interests of the transferor in the decree are exhausted, there is not a transfer, as the rule contemplates. The words do not include the transfer of rights in a decree by means of a mortgage. A MAZHAB HUSAIN 679 v. AMTUL BIBI

- O. XXI, r. 57-Order putting an end

to attachment.

Where there is an explicit order putting an end to the attachment, Order XXI, rule 57, Civil Procedure Code, has no application, nor is there anything in the rule which limits the power of the Court to pass such an order. O MUHAMMAD MUZAFFAR ALI v. BHAGWATI PRASAD, 8 O L. J. 3:8 642

- O. XXI, r. 89-Civil Rules of Practice (Muffasil), r. 1-1-Payment of money and filing of lodgment schedule without formal application to set aside sale, effect of-Order setting aside sale,

legality of.

The mere payment of money in Court and filing of lodgment schedule without an application oral or in writing to set aside the sale under Order XXI, rule 89, Civil Procedure Code, cannot be the basis of an order cancelling the sale. The lodgment schedule cannot be treated as equivalent to the application required by rule 89. M RAYAPATI VENKATASCHBA BAO U KALAPATAPU NABAYANA RAO, (1922) M. W. N. 171; 15 L W. 450

- O. XXI, rr. 89, 92-Decree, preliminary, in redemption suit-Deposit by mortgagor,

application for-Limitation.

The right of a mortgagor to pay in the amount due under a preliminary decree is a continuing right and can be exercised at any time until an order absolute is passed. No period of limitation applies, therefore, to an application by the mortgagor to deposit money O BANKE BIHARI LAL v. GHANI AHMAD, 9 O. L. J 14

- O. XXI, rr. 89, 92, O. XLIII, r. 1 (1), S. 104 (2)—Possessory mortgagee, status of-Right to apply to set aside sale-Appeal,

second - Sale, order setting aside

A possessory mortgagee holds an interest in immoveable property auflicient to justify the application of Order XXI, rule 89, Civil Procedure Code, to his case.

No second appeal lies from an order setting aside a sale under Order XXI, rule 42, Civil Procedure Code. O JAGMOHAN SINGH v. BACHCHI, 9 O. L. J. 601 929 25 Q. O. 73

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- O. XXI, r. 90-8ale, how set aside.

Order XXI, rule 90 of the Code of Civil Procedure not only covers a case of material irregularity but also a case of fraud in publishing or conducting the sale. C ABDUL SAMAD v. BASIRUDDIN

- O. XXII, rr. 2, 4—Death of respondent

-Legal representative on record-Procedure.

Where the representatives of a deceased respondent are already on the record in another capacity and no application is made for substitution within time, an entry should be made in the record under Order XXII, rule 2, of the Civil Frocedure Code and such a case is not governed by rule 4 of Order XXII of the Code. O HAFIZUNNISA v. JAWAHIR SINGH, 24 O. C. 374

- O. XXII, r. 9 (2)-Abatement of appeal-Formal order, necessity of, before application

for restoration.

A formal order declaring that a suit or an appeal has abated is necessary before an application under Order XXII, rule 9 (2) can be entertained. A GUJRATI V. SITAL MISIR 554

- O. XXXII, rr. 3, 4-No appointment of guardian ad litem-Ex parte decree-Nullity-

Minor, not bound by decree.

Under the Civil Trocedure Code when there is a minor defendant in a suit it is incumbent upon the Court to appoint a guardian with his consent to act as a guardian in the suit on behalf of the minor.

A mere irregularity in the appointment of a guardian ad litem will not render the decree obtained against the minor null and void unless the interest of the minor has suffered by reason of such an irregu-

An ex parte decree passed against a minor without appointment of a guardian ad litem is null and void and is not binding on the minor. Pat CHHATTRA KUMARI DEBI V. RADHAMOHAN SINGARI, 3 P. L. T. 451

137 - O. XXXII, r. 4 - Minor defendant-Guardian ad litem-Proper person not appointed-Illegality—Court, duty of.

Where a Court appoints a person as guardian ad litem who is disqualified under rule 4, Order XXXII of the Civil Procedure Code, it commits an illegality

rather than a mere irregularity.

Where a minor sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into to find out if the person appointed as guardian ad litem was the proper person to be so appointed. A MUBLI DHAR U. PITAMBAR LAL, 20 A. L. J. 329

- O. XXXIV, r. I-Mortgages-Suit by prior mortgagee - Puisne mortgagee not made party. effect of-Subsequent suit by prior mortgagee for possession against puisne mortgagee - Transfer of Property Act (IV of 1982), s. 52-Lis pendens, applicability of.

Where a mortgagee sues for foreclosure without impleading a puisne mortgagee, and after that suit is barred by time as against the puisne mortgagee, the latter sues the same mortgagor for foreclosure of the same property without impleading the prior mortgagee and gets his decree first and obtains possession of the property, the prior mortgages is entitled to a decree for possession subject to the

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puisne mortgagee's right to redeem, inasmuch as the transfer to the puisne mortgagee was made during the active prosecution of the prior mortgagee's suit.

Per Dhobley, A. J. C.—Order XXXIV, rule 1, Civil Procedure Code, is merely a rule of procedure enacted with the object of preventing multifariousness of suits in respect of the same property and cannot affect the plaintiff's rights. Its object is not to punish a plaintiff for his failure to join as parties, persons of whose interest he is ignorant and whose title-deeds he has no means to inspect. N Jogeshwar v. Moti

when to be granted -Balance of convenience.

The granting of a temporary injunction is a matter of discretion, albeit a judicial discretion. One of the principles the Court has to bear in mind is that it must first see that there is a bona fide contention between the parties and then, on which side, in the event of success, the balance of incovenience will lie if the injunction does not issue. The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in status quo until that question can be finally decided.

Defendant obtained a decree for possession of a house. The execution of that decree was resisted by the plaintiff who objected that the house belonged to him. His objection was dismissed and he filed a suit for a declaration of his title. He also prayed for the issue of a temporary injunction prohibiting the execution of the decree for possession pending the decision of the suit:

Held, that if the plaintiff was evicted from the house, the suit for declaration, as framed, would probably be thrown out and that, therefore, the balance of convenience was in favour of the plaintiff, and that the injunction prayed for should be granted.

L KANSHI BAM v SHARF DIN

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injunction pending appeal-Irreparable injury.

Plaintiff, who was the mortgagee of a plot of land, built a house on the plot under the terms of the mortgage deed. The plot was subsequently sold by the owner to the defendant. Plaintiff sued for possession of the plot by pre-emption. His suit was dismissed by the first Appellate Court and he preferred a second appeal to the High Court. Defendant in the meantime obtained a decree for redemption and wanted to pull down the house. Plaintiff applied to the High Court for a temporary injunction restraining the defendant from pulling down the house pending the decision of plaintiff's pre-emption appeal:

Held, that if the defendant were permitted to pull down the house, the plaintiff would be deprived of the very ground on which he based his preferential right of pre-emption and would thus suffer irreparable loss, and that, therefore, this was a fit case in which a temporary injunction should be granted. L ALLAH DIV v. SHANKAR DAS 599

(n)-Injunction - Appeal,

Civil Procedure Code-1908-contd.

Under Order XLIII, rule 1 (n) of the Civil Procedure Code, an appeal lies from an order issuing an injunction subject to a condition passed under Order XXXIX, rule 1 of the Civil Procedure Code.

A GANESH PRASAD SAHU v. DUKH HARAN SAHU
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decree against sub-tenant for possession—Suit by landlord against tenant for possession and injunction not to execute decree—Temporary injunction, legality of—Proper remedy.

Plaintiff let a house to defendant on lease which expired on 30th June 1920; defendant sub-let the premises, and as he could not get possession from his sub-tenant he brought a suit and obtained a decree. Plaintiff then filed a suit against defendant claiming possession and that the decree obtained against the sub-tenant was not binding on him, and for an injunction against defendant not to take possession. After the suit was filed he applied for, and was granted a temporary injunction restraining defendant from executing his decree against the sub-tenant:

Held, that plaintiff's suit not being of the nature prescribed in either rule 1 or rule 2 of Order XXXIX of the Civil Procedure Code, the Court had no jurisdiction to restrain defendant from obtaining the benefit of his decree, which had nothing to do with plaintiff's claim, and that plaintiff's proper remedy was to ask for the appointment of a Receiver pending settlement of the dispute between himself and the defendant B NASARVA JI CAWASJI ARJANI U. SHAHAJADI BEGAM, 21 BOM. L. R. 378

r. I (r)—Temporary injunction, disobedience of— Order refusing attachment—Appeal, whether maintainable.

An order refusing to attach property for disobeying an injunction is an order passed under Order XXXIX, rule 2 (3) of the Civil Procedure Code and is appealable under Order XLIII, rule 1 (r) of the Code. L DIWAN CHAND v. JHARRIA COAL CO.

Court, Original Side-Application to whom to be made-Practice.

If a party, against whom judgment has been given on the Original Side, desires to obtain a stay of execution, pending an intended appeal, and desires in the first instance to apply on the Original Side, he must apply to the Judge who decided the case without unreasonable delay. C CHATURBHUJ CHANDANMULL v. BASDEO DAS DAGA, 48 C. 793; 25 C. W. N. 928

- Appellate Court, competency of, to add respondent.

Under the provisions of Order XLI, rule 20 of the Civil Procedure Code, it is competent for an Appellate Court to add respondents to an appeal, even though the time within which an appeal against those persons might have been preferred has expired. UB MAUNG AN GALE v. MA MIN DUN, 4 UB. R (1921) 87

O. XLI, rr. 22, 33-Appeal-Cross-

objections against co-respondent.

Civil Procedure Code-1908-contd.

Order XLI, rule 22, Civil Procedure Code, should ordinarily be confined to cases of cross-objections urged against the appellant; rule 33 of the same Order, however, gives the Court a very wide discretion, and cases may occasionally arise where justice requires that cross-objections against a corespondent should be heard. But, where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, the rale does not revive his right simply because a codefendant has instituted an appeal against the plaintiff on entirely different grounds The same principle applies in the case of a respondent objector who does not file any appeal himself whose interests are identical with that of the appellant and who might, had he chosen, have joined in the appeal. O MUHAMMAD MUZAFFAR ALI U. BHAGWATI PRASAD SINGH, 8 O. L. J. 358

case can be remanded.

The remand contemplated by rule 23 of Order XLI of the Civil Procedure Code is a remand to the Court from whose decree the appeal is preferred, but if the Appellate Court making the order of remand has power to transfer a case from one Court to another, there is nothing illegal in its

remanding the case to some other Court.

An Additional Judge, however, has no power to transfer a case from one subordinate Court to another, and, therefore, cannot remand a case to a Court other than that which originally tried it L CHAJJU v. SHAM LAL

on merits-Appellate Court, whether can reminity under r. 23-Procedure.

Where a Trial Court has decided a suit on the merits, it is not open to an Appellate Court to remand the case under rule 23 of Order XLI of the Civil Procedure Code as though the suit has been decided on a preliminary point; but it should take the course indicated in rule 24 or the course indicated in rule 24 or the course indicated in rule 25. C NURUL GUNI v. A. S. A. KAZIMAINI

- O. XLI, r. 27-Appellate Court-

Additional evidence.

The legitimate occasion for the admission of additional evidence by an Appellate Court under Order XLI, rule 27 of the Civil Procedure Code is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, or where a discovery is made, outside the Court, of fresh evidence, and an application is made to import it. L FIRM RAM RICHEPAL SHAM LAL V. FIRM BANSI DHAR & SONS

1. 7-Order granting review-Appeal-Jurisdiction of Appellate Court

Although Order XLIII, rule 1 (w) of the Code of Civil Procedure allows an appeal against an order granting a review, that clause must be read with rule 7 of Order XLVII by which the grounds, on which an order granting a review can be set aside on appeal, are limited Unless the facts of a case are sufficient to bring the grounds of appeal within those limited grounds, an Appellate Court has no juris.

Civil Procedure Code-1903-contd.

diction to set aside the order of review on appeal.

C SCRIYA NARAIN CHOWDHURY v. KUNJA BEHARY

MAL, 25 C. W. N. 884

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XXVI of 1920 -Appeal to Privy Council-Security-Time for applying to change nature of security.

Although, under the proviso to sub rule (1) of rule 7 of Order XLV of the Civil Procedure Code, added by Act XXVI of 1920, an applicant for leave to appeal to His Mejesty in Council may move the High Court to permit security to be furnished in some other form than in cash or in Government Promissory-Notes, it is essential that the Court should be so moved before or at the time of the hearing of the application for leave to appeal, and if no such order is obtained at the date of the grant of the certificate, security must be furnished in cash or in Government securities within the period allowed by rule 7 of Order XLV. L B MRS. KIRKWOOD P. MAUMG SIN, 11 L. B. R. 213

for, grant of—"Other sufficient reasons"-Appeal, maintainability of.

No appeal lies from an order granting a review for "other sufficient reasons" within the meaning of Order XLVII, rule 1 of the Civil Procedure Code.

A TIBBENI KUNWAR V. MOHAN LAL 558

Act (XXVI of 1891), s. 32—Sale of goods—Arbitration clause in indent—Suit on bills—Stay of suit.

The defendant firm placed an indent for the purchase of certain goods with the plaintiff firm, One of the clauses of the indent was as follows:—

The plaintiff firm after shipment of goods drew two bills of exchange against the defendant firm which the latter accepted but refused to pay on maturity. The plaintiff firm accordingly sued them and their claim was based, in the first instance, upon the accepted but unpaid bills, and, in the alternative, they sued for the price of the goods and

for certain expenses:

Held, (1) that the claim of the plaintiff firm was based primarily on the accepted but unpaid drafts as contemplated by section 32 of the Negotiable

Instruments Act;

(2) that, therefore, the defendant firm could not demand that the dispute must be referred to arbitration under the provisions of the indent, and were not entitled to get a stay of proceedings under paragraph 18 of Schedule II to the Civil Procedure Code. L RADHA BIHARI-DIWAN SINGH v. G. B. ALEZENDER, 2 L. 835

Civil Procedure Code-1908-concld.

- Sch. III, para. II - Julgment-debtor agreeing to sell property-Charge forbidden by para 11, whether created.

A judgment-debtor by contracting to sell a property which is in the hands of the Collector does not charge the property in a manner forbidden by paragraph 11 of the Third Schedule of the Civil Procedure Code. N AMOLAKSAO v. MAHIPATRAO

Sch. III, para. II-Execution of decree-Decree transferred to Collector-Debtor, power of, to alienate property-Permission of Collector-Power of Civil Court.

Paragraph II, Schedule III, Civil Procedure Code, creates an absolute disability on the part of a debtor to deal with property while the powers conferred by the Schedule on the Collector are in

No special form of permission is required by paragraph '1, Schedule III, Civil Procedure Code, to enable a judgment-debtor to execute a mortgage of his immoveable property. It is sufficient that the Collector knows that the mortgage is being executed and that he does in substance sanctionits execution by an order in writing. Nor is it necessary under that paragraph that every detail of the transaction should be sanctioned by the Collector or even that there should be a separate permission in respect of each deed. All that is required is that the judgmentdebor should have his written permission to mortgage the property. The permission mentioned in the paragraph need not take the form of a certificate under Order XXI, rule 83, Civil Procedure Code, for this rule and paragraph 11 of Schedule III are two entirely independent provisions and there is no warrant for reading the former into the latter.

The provision contained in paragraph 11, Schedule III, Civil Procedure Code, makes it illegal for a Civil Court to issue process against the property during the period powers conferred by the Schedule are exercisable by the Collector, and a process which was illegal when it was issued cannot become effective when the Collector ceases to be in charge of the execution proceedings. O MUHAMMAD MUZAFFAR ALI v. BHAGWATI PRASAD SINGH, 8 O. L. J. 358 642

Code of Civil Procedure (Amendment) Act (1 of 1914), s. 3. See CIVIL PROCEDURE CODE, s. 67 893

Common carrier - Loss of goods-Loss measureable in sterling-Damages-Rate of exchange,

Where in a suit for damages against a common carrier for loss of goods by negligence, the loss caused is, in the first instance, measureable in sterling, judgment must be based upon such sterling sum converted into rupees, at the rate of exchange prevailing on the date of the judgment and not the rate prevailing at the date of the loss DERHABI TEA CO. LTD. v. ASEAM-BENGAL RAILWAY Co., LTD, 48 C. 886

Compromise — Minors — Procedure — Privy

Council Appeal.

In Privy Council appeals where it is desired to bind persons under disability by a compromise, it is of the utmost importance that there should be clear expression of opinion by the proper Court in

Compromise—concid.

India that such compromise is a beneficial one for those persons. P C GOBINDA CHANDRA PAL v KAILASH CHANDRA PAL, 14 L. W. 396; 26 C. W. N 103. 3 U. P. L. R (P. C.) 77; 10 M. L. T. 181; 48 C. 991

Compromise decree_Time fixed for compliance-Extension of time-Decree and compromise bearing different dates - Time, when begins to

Where a compromise decree fixes a period of time for the payment of a sum of money under it that period cannot be extended on the ground of the Courts being closed on the day fixed for payment when it was not necessary under the compromise that the money should be paid into Court.

A compromise becomes operative when it is embodied in a decree, and if it fixes any time for the doing of any act, the time begins to run not from the date of the compromise, but from the date of the decree. O ILAHI RAZA KHAN v. TAIBA BEGAM, 9 O. L. J. 53 273

Construction of document.

If a document is open to a construction which makes all parts of it harmonise with one another, that construction is always to be preferred to one which introduces a repugnancy between one part of the document and another. O HAFIZUNNISA v. JAWAHIR SINGH, 24 O. C. 374 24

Construction of document.

In order to construe a document the Court must look to all the covenants in it. O BISHESHAR DAYAL, v. HAR RAJ KUAR, 8 O. L. J. 316

- Deed of gift-Right to recover compensation, whether assigned.

Defendant sold two shops and in the deed of sale covenanted that in case of eviction by the Municipality the vendee would be entitled to refund of the purchase-money. The vendee made a gift of the shops in favour of the plaintiff and the deed of gift contained the following clause: "The donee like the donor will be bound by all the terms and all the rights to realise rents, to do repairs, etc., which I had under this deed vest in the donee," Plaintiff was evicted from the shops by the Municipality and brought the present suit to recover the purchase. money from the defendant:

Held, that the right to recover compensation had not been assigned to the plaintiff under the deed of gift and that his suit must, therefore, fail. L 256 MUHAMMAD SAID U ABDUL ALI

Lease, perpetual, interpretation of-Re-entry or reversion, right of-Absolute interest-Underproprietor, rights of-Oudh Rent Act (XXII of 1886), 8, 3 (1).

The true construction of a document does not depend upon the name which is given to it, but it must be determined with reference to its terms.

A document was christened with the name of a "perpetual lease." After reciting the area of the lands which were the subject-matter of the deed, the document prescribed a jama of Rs. 102-2-0, annually payable by the lessor and then proceeded as follows:-"I do hereby agree and reduce to writing that the said" lessee "having his possession over it shall annually pay the pay of the Patwari and Chaukidar, i. e., the entire amount of Rs. 10: 2.0 shall be paid

Construction of document-concid.

to the Government and he shall remain in possession and enjoyment of the same generation after generation (naslan bad naslan, batnan bad batnan) and shall exercise all sorts of proprietary powers (akhtyarat bator malikana)." The grantor did not reserve any right of re-entry or reversion in his favour in any event. It was found that the donee and his sons used to pay rent to the donor and her transferee :

Held, that the above document created an absolute interest in the donee with this qualification that a liability to pay the annual jama of Rs. 102-2-0 was imposed on him, so that he became an under-proprietor of the lands as defined in section 8 8) of the Oudh Rent Act. O KARIM DAD KHAN v. BIBI 110 GHAFUBAN, 9 O L. J. 101

Construction of judgment - Foreclosure decree, final-Extension of time-Setting aside of decree - Benefit of doubt.

On an appeal from a decree final for foreclosure, the Appellate Court granted the judgment-debtors two weeks' time within which to pay the balance of the decretal money and directed that if the payment was made the mortgagors would be put in possession of the property mortgaged, but that if they failed to make the payment, their rights in the mortgaged property would be extinguished:

Held, that inasmuch as the judgment contained no provision that in case of failure to pay, the decree final for foreclosure would stand, the decree must be treated as granting an extension of time and setting aside the final decree and that, therefore, the judgment-debtors were entitled to pay the decretal money at any time before an order absolute was passed

Where the language of a judgment is doubtful, the benefit of the doubt ought to go to the judgmentdebtor. O GOKABAN SINGH v. MANGLI, 8 O. L. J. 407

Contract, C. I. F., breach of - Damages, measure

A. contracted to sell to B a certain quantity of rice at a certain rate per bag c. i. f. to Colombo, and undertook to make shipment at Bassein before a certain date and obtain payment by handing over bills of lading to B at Rangoon; he failed to ship any rice at any time to Colombo, whereupon B. brought the present suit to recover damages arising from the breach of the contract, and the question was as to the true measure of damages to be awarded:

Held, that a c. i. f. contract being a contract for the sale of goods by tendering the shipping documents, and not a contract for the sale of documents relating to goods, the principal and substantial breach for which damages were awardable was the failure to ship the rice to Colombo, and B was entitled to be put in the same position that he would have been in, had the contract been duly performed, and the rice delivered to him on due date, and that the true measure of damages was the difference between the contract rate and the rate at which the rice could have been sold by him at Colombo had it been delivered on due date. LBS. K. R. S. L. CHETTY FIRM U. AMARCHAND MADHOWIEE & Co. 11 L B. B. 141 579

Contract-contd.

for sale of shares—Share certificates— Moveable property-Contract obtained by fraud or cheating, effect of-Certified brokers of Native Stock and Share Brokers' Association - Del credere agents -Transfer forms, blank, delivered to brokers-Transferce for value without notice

Share certificates are moveable property and are therefore, "goods" within the meaning of section 103

of the Contract Act

If a contract is obtained by fraud or cheating, it is voidable at the instance of the party defrauded or cheated, but if the performance of the contract is obtained by fraud or cheating, the contract can-

not be aroided.

Where a seller is induced to perform his part of a valid contract of sale and to deliver the goods to the buyer in performance of that contract by fraud or cheating on the part of the buyer, the property in the goods delivered to the buyer passes to the buyer, and if the buyer sells and delivers the goods to a bona fide purchaser for valuable consideration without notice, such a purchaser gets a good title to the goods and the seller cannot recover the goods from such a purchaser. The seller has his remedies against the buyer under the contract and can sue him for the price of the goods.

An agent by express contract with his principal or by the usages and rules of the particular place, market or business in which he is employed, may

become personally liable to the principal.

Certified brokers of the Bombay Native Share and Stock Brokers' Association are del credere agents of their constituents. They are in a fiduciary relation. ship to their constituents. Their duties are strictly to adhere to the position of agents, to act diligently for their principals, and to make enforceable bargains for them and keep those bargains open.

Where an owner of shares either signs the trans. fer forms and delivers the same with the certificates to a broker or where, never having had possession of the blank transfer forms and share certificates but knowing them to be in such condition that a broker could deal with them, he allows them to remain in the broker's possession and thereby enables the broker to part with them to another who takes them upon the faith of the apparent authority of the broker to deal with them, then the true owner is estopped from questioning the title of the person taking upon the faith of the apparent authority of the broker to deal with them. B FAZAL D. ALLANA MANGALDAS M. PAKVASA, 23 BCM. L. R. 1146 726

- Goods, sale of - Delivery period all October -Tender and refusal - Breach of contract - Re-sale -Subsequent tender and refusal-Suit for damages-Assessment of damages-Contract Act (IX of 1672). s, 107,

D. bought certain goods from P. and it was agreed that delivery was "to be taken ex-scale in all October 1919." On October 2nd P. called on D. to take delivery but D refused: P. repeated his demand on October 4th, and on the 4th threatened to re-sell if delivery was not taken, but D. again refused. whereupon P. sold the goods and called on D. to pay the difference. Subsequently, on October 15th P. informed D, that he would give delivery on any

J. 358

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Contract-contd.

date convenient to F. between October 15th and October 31st, but D. refused to take delivery on the ground that the re-sale having taken place before expiration of the contract period, he had exercised his option to treat the contract as rescinded. P. thereupon brought the present suit claiming as damages the difference between the contract price and the market rate of October 31st:

Held, that under the contract D. had not the option to take delivery whenever he liked in all October; that the goods having been tendered D, by refusing to take delivery had committed a breach of the contract, and P. was entitled to sue for damages on the footing of the market price on October 31st, it being immaterial whether the suit was based on the breach of contract on October 3rd, or on the breach committed on October 18th; that as at the time of the re-sale the property in the goods had not passed to D., P. could not exercise the right of re-sale under section 107 of the Contract Act, so as to enable P. to sue for damages on the footing of the results of the re-sale, and that P. was entitled to recover as damages the difference between the contract rate market rate of October 31st. L B HUNT HUAT & Co. v. SIN GEE MOH & Co., 11 L. B. R. 182 510 - Money borrowed by executor to supplement

Upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator.

Where there is no necessity for an executor to borrow money for the purposes of the estate and he borrows the money to supplement the assets left by the testator, the liability of the executor is a personal one. O ANANT RAM v. NATIONAL BANK OF UPPER INDIA, LTD LUCKNOW, 9 O. L. J. 94

not enforceable—Covenant to re-pay, whether can be enforced.

A. executed a bond in favour of B. to secure a loan of money: the bond provided that it would be re-paid by a certain date: that the creditor would be given possession of certain tenancy land in lieu of interest, and that in case of default, the creditor would be entitled to continue in possession. The bond was unregistered and the tenancy was not transferable.

A. brought a suit on the bond and asked for a simple money-decree against B.:

Held, that the bond being unregistered there was no valid mortgage, but merely an agreement to deliver possession, and that although the arrangement made to re-pay the debt failed partly from want of registration and partly on account of non-transferability of the land, the covenant to re-pay the money borrowed could still be enforced.

If a contract prescribing a particular mode of re-payment of a debt fails, the primary obligation can still be enforced, provided the transaction is not one in which the consideration is forbidden by law or is opposed to public policy. O RAM AUTAR v. RAM ABRE, 8 O. L. J. 414

defence—Onus of proof—Witness—Abstention of party to enter witness-box—Presumption.

Contract-concld.

Where in a suit to recover damages on the basis of a contract, the defendant pleads that the contract was in the nature of a wager, the onus of proving that the contract was wagering lies upon him, his mere statement that the contract was of a wagering nature is not proof of the fact asserted.

Where a defendant abstains from going into the witness-box on his own behalf to be cross-examined by the plaintiff, the Court is entitled to infer every thing against him. B RAJMAL RAMNARAYAN v. BUDANSAHEB ADULSAHEB, 24 BOM. L. R. 115 943

Contract Act (IX of 1872), s. 16-

Undue influence – Necessity—High rate of interest.

In order to establish undue influence as defined by section 16 of the Contract Act, it must be shown that the lender took advantage of the necessity and of the position of the borrower and imposed unconscionable terms. The mere fact that the borrower was under urgent need to borrow is not of itself sufficient to raise the presumption that undue influence was exercised, nor does the existence of urgent need, accompanied by the fact that a high rate of interest is charged, establish such a presumption. O Mahraj Prag Din v Bhagwati Sahai, 8 O. L. J. 418

borrower. 16—Undue influence—Urgent need of

Urgent need of money on the part of a borrower is not in itself sufficient to place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act. O MUHAMMAD MUZAFFAR ALI v. BHAGWATI PRASAD SINGH, 8 O L.

engage in business—Contract in contravention of covenant—Concealment.

M., was employed by the defendant firm as a clerk under an agreement one of the conditions of which was that he would not engage in any business of his own or join any other firm so long as he remained in the service of the defendant firm. Subsequently, he joined with S for the purpose of entering into certain transactions with the defendant firm, and induced the latter to enter into certain contracts with S. and himself, without disclosing the fact of his being a party to the contracts to the defendant firm. In a suit upon the contracts:

Held, that the contracts were vitiated by fraud inasmuch as M. had induced the defendant firm to enter into the contracts by the active concealment of a fact of which he had knowledge and which he was bound to disclose to the defendant firm, viz, that he was entering into the contracts in contravention of the terms of his agreement with the defendant firm. L SEDH MAL v. MOTH PRASAD

s. 25 - Promise by junior member to pay,

whether enforceable.

D. and his sons, F and H, constituted a Hindu joint family: D borrowed money from the plaintiff for the family: On 11th September 1907 a balance was struck and acknowledged by D. Dealings with the plaintiff went on and on 16th September 1910, during the absence of D, F and his mother, in order to save the bar of limitation,

Contract Act-concld.

signed an acknowledgment of the debt in the plaintiff's account-book. The dealings with the plaintiff continued and on 4th September 1913 accounts were settled and F and his mother, during the absence of D., signed a promise to pay the amount due. Plaintiff brought the present

suit to recover on the said promise:

Held, that as the debt contracted by D for the joint family was a debt due by the members of the family within the meaning of section 25 of the Contract Act, the promise signed by F. and his mother undertaking to pay the debt was binding on them, and they were liable. M RAMA PATTER v. VISWANATHA PATTER, 4 M. L J 567; 15 L. W. 130; (1922, M. W. N. 27; 30 M. L. T. 209; 45 M. 345 155 - S. 62-Novation-Failure to perform-

Rescission.

Defendant executed a bond in favour of plaintiff in 1914. In 1916 he executed a lease of certain land in favour of A. On the same day he sold to the plaintiff and other creditors the right to recover the lease-money from A in payment of their debts. Defendant refused, however, to perform his contract with A and to deliver possession of the land :

Held, that the defendant by refusing to hand over his land to A, having disabled himself from performing his promise that the plaintiff should recover his money from A, the plaintiff was entitled to rescind his sale contract and revert to his previous consideration 4. NAJAF SHAH v. RANGU 47 RAM, 2 L. 323

- 8. 73—Non-delivery of goods contracted -

Damages, assessment of.

In an action for non-delivery or non-acceptance of goods under a contract of sale, the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. S FIRM OF SANTDIS DEVEISHENDAS V. FIRM OF NIDHANSING JAVAHIRSING, 15 S. L. R. 214 267

- S. 211—Principal and agent—Liability of agent - Directions of principal not carried out.

Plaintiff appointed one N. as his agent for the sale of cylinders or flasks of gas used for the manufacture of aerated waters. One of the terms of the agency was that N was to return the empty flasks to the plaintiff. After the death of N. plaintiff sued his representatives for an account of the agency. It was found that a certain number of flasks had not been returned by N. and that they were still with customers to whom the gas had been sold:

Held, that the plaintiff was entitled to a decree for the value of the flasks against the estate of N. L FRAMJRE SHAPURJEE GANDHI v. KARM DEVI

446 CO-OWNERS-Tenant inducted by one co-owner-Right of other owner - Joint possession - No presumption of creation of tenancy by long acquiescence by landlord.

Where a tenant has been inducted into the land only by the 12 annas landford, the 1-annas landford is entitled to get joint possession with the tenant so Pat BALGOBIND MANDAR U. DWARKS inducted PRASAD, (1922) PAT. 142; 8 P. L. T. 409 55

Co-sharer-Joint land-Profits, suit for-Lease -Proprietor, full rights of, whether acquired-Mortgagee as well as lessee, position of.

A co-sharer cannot always deal with joint land

against the wishes of the other co-sharers.

A lessee or a grantee may be a co-sharer for the purpose of a suit for profits, but he does not thereby acquire the full rights of a proprietor for all pur-

Where a person obtains a lease with regard to a certain plot appertaining to joint (shamilat) land from one of the co-sharers and also obtains leases and mortgages from some of the other co-sharers, he is not entitled to deal with the lands as he likes, but is bound by the terms of the leases obtained by him. O SRI NATH U. NAJMUNNISA, 9 O. L. J. 92

Costs-Milrimonial cases - Christians-Husband liable for wife's costs in any event.

In Matrimonial cases the parties should not be ordered to pay their own costs for, although a wife's defence fails, or her counter-charges break down, or she has been proved guilty of adultery. the husband has to pay her costs.

The policy of the Matrimonial Law in England, and it is the same among the Christians in India, has always demanded that the husband shall be responsible for his wife's costs. A DWYER v. DWYER

494 - Plaintiff suing in wrong Court and on wrong cause of action but succeeding - Defendant's costs, liability for.

Where a plaintiff institutes a suit in a wrong Court on a wrong cause of action and on assertions, which he is unable to prove, but ultimately succeeds on appeal, he should pay his own costs throughout and those of the defendant. 582 SECRETARY OF STATE FOR INDIA v. MULLA

Criminal Procedure Code (Act V of 1898), S. 35, Cl. (3)-Conviction by First Class Magistrate of several offences-Concurrent nonappealable sentence for each offence-Appeal to Sessions Judge, competency of

An appeal does not lie to the Sessions Judge when a Magistrate of the First Class has convicted an accused person of more offences than one and has sentenced him for each offence to a term of imprisonment, which by itself is not appealable, but the sentences are directed to run concurrently. C ABDEL JABBAR v. EMPEROR, 25 C W N 613; 23 CR. L J. 245

- S. 45-Sudden and suspicious death-Duty of Mukaddam and Kotwar to report deaths - Failure -Offence-Death resulting not fairly soon after cause, whether reportable-False defence, whether indication of quilt - Mens rea-Ingredient of offence under s 45 -Technical offence - Duty of Magistrate - Measure of punishment

Under section 45 of the Criminal Procedure Code every Mukaddam and Kotwar is bound to communicate forthwith to the nearest Station House Officer or Magistrate the occurrence in and near the village of any sudden or unnatural death or any death under any suspicious circumstances.

However unnatural, in the ordinary sense of the word, the cause of a death might be, it would not come within the meaning of the word 'unnatural' as used in section 4) of the Criminal Procedure Code so as to require to be reported immodiately unless it occurred fairly soon after the cause.

Criminal Procedure Code-contd.

The guilt of an accused should not be inferred from the omission by the accused of an available true and complete defence and substitution for it of unsustainable falsehoods. It is the duty of a Magistrate to find out whether an accused person is guilty or innocent, not merely to decide whether the pleas he chooses to put forward are sound or not.

Intention necessarily implies a mens rea, a consciousness of doing wrong. A Mukkaddam or Kotwar cannot be convicted under section 45 of the Criminal Procedure Code for an omission to make a report of a sudden accident or suspicious death if he honestly believes that there was no necessity for him to make the report and the view held by him is a reasonable view.

A nominal penalty of a pie only need be imposed if the accused is guilty of nothing more than a slight error of judgment which had no harmful consequences whatsoever if in such a case the responsible authorities choose to prosecute and the Magistrate is bound to convict when the offence is proved. N Domarsing v Emperor 1001

District Magistrate, powers of - High Court, power of, to interfere.

The provisions of section 125 of the Criminal Procedure Code do not confer upon a District Magistrate either an appellate or revisional jurisdiction in respect of orders passed under section 107 binding down persons to keep the peace. The section merely empowers a District Magistrate to cancel a bond for any sufficient reason, and confers no power on him to set aside a proceeding under section 107, even though the Subordinate Magistrate had acted without jurisdiction.

Where a District Magistrate, acting under section 125 of the Criminal Procedure Code, sets aside a proceeding under section 107, he acts without jurisdiction, and the High Court has power to interfere and set aside his order. Pat Durga Singh v. Amar Dayal Singh, 3 P. L. T. 103; 23 Cr. L. J. 281

tional District Magistrate, whether appealable to District Magistrate.

An appeal lies under section 406 of the Criminal Procedure Code to the District Magistrate against an order of an Additional District Magistrate under section 118 of the Code, made in a proceeding under section 110 of the Code. C Mohendra Brumij v. Emperor, 25 C. W. N. 383; 48 C. 874; 23 Cr. L. J. 229

Failure to give security-Subsequent sentence, whether can be ordered to run after expiry of period of detention.

An order detaining a person in prison under section 123, Criminal Procedure Code, until he gives security is not a sentence of imprisonment and, therefore, section 397 of the Criminal Procedure Code does not authorise a Magistrate to direct that a subsequent sentence should take effect on the Expiry of the previous detention. S EMPEROR v. SUKHALSING, 15 S. L. R. 205; 23 CR. L. J. 255

Criminal Procedure Code-contd.

to be dealt with - Enquiry obligatory - Magistrate, duty of.

No man can be permitted to deal with his property in such a way as to cause public nuisance to others.

In cases of public nuisance an enquiry is obligatory and the Magistrate cannot make his conditional order absolute without taking such evidence as the parties may adduce as in a summons-case. O SANT SAHAI v. LACHMAN SINGH, 9 O L. J. 64; 23 CR. L. J. 250

refusal to return verdict—Procedure.

Where a Jury, or a majority of the Jurors, appointed under section 13% (1) of the Criminal Procedure Code, refuse perversely to return a verdict, the Mazistrate should appoint a fresh. Jury, and decide the matter before him under section 139 of the Code A GIRWAR LAL v. BANSI-DHAR, 20 A L. J. 472; 23 CR. L. J. 276 420

Nuisance—Order under s. 141—Accused challaned under s. 291, Penal Code—Case withdrawn—Withdrawal, effect of—Accused subsequently proceeded against under ss. 18°, 200, Penal Code—Proceedings, validity of—"Competent to try" in s. 433 (4), meaning of—"Competent jurisdiction" in s. 537, meaning of—S. 537, scope of—Revision—Report by Sessions Judje—High Court, power of.

A District Magistrate issued an order to the public under section 144 of the Criminal Procedure Code for prevention of a public nuisance in a certain locality within his jurisdiction. The order had not the desired effect, as the nuisance was repeated, with the result that the Police challaned the accused and others before the City Magistrate, for an offence under section 291 of the Penal Code. The case was not proceeded with, but after three or four adjournments, the Public Prosecutor, under instructions from the District Magistrate, withdrew it under section 494 of the Criminal Procedure Code, and, armed with a fresh sanction from him, filed a fresh complaint on the same facts before another Magistrate under sections 183 and 290 of the Penal

Held, that as the withdrawal of the charge under section 291 of the Penal Code amounted to an acquittal under section 494 (b) of the Criminal Procedure Code, that acquittal operated as a bar under section 403 (1) of the Criminal Procedure Code to subsequent proceedings under sections 188 and 290 of the Penal Code, as in the trial under section 291 of the latter Code, the accused could have been convicted under section 188 thereof, though not under section 291, and that, therefore, he could not be tried again on the same facts for any other offence of which he might have been convicted under section 237 of the Criminal Procedure Code though not charged with it.

The expression 'competent to try" in clause (4) of section 403 of the Oriminal Procedure Code refers to the character and status of the Tribunal when it refers to the competency to try the offence.

The term "competent jurisdiction" in section 537 of the Criminal Procedure Code refers to the

Criminal Procedure Code-contd

character and the status of the Court which has decided the case.

The restriction imposed by section 537 of the Criminal Procedure Code, not to reverse or alter a finding or order or sentence on the gound of any absence of sanction unless it has occasioned a failure of justice, clearly indicates that a Court may be of competent jurisdiction to try a case in the absence of sanction; and, therefore, a sanction is not a condition of the competency of the Tribunal, but only a condition precedent for the institution of proceedings before a Tribunal.

Section 537 only cures the want of sanction in those cases which are covered by section 95 of the Criminal Procedure Code: the absence of sanction required by any other provision of the law cannot be remedied,

Although in a report to the High Court under section 438, Criminal Procedure Code, a Sessions Judge does not recommend that the proceedings against the accused be quashed, yet, as a consequence of the report, the facts of the case are brought to the knowledge of the High Court, that Court has jurisdiction under section 449 to stop further proceedings, if it is satisfied that they are barred. S EMPEROR U. ME'GHRAJ DEVIDAS, 23 CR. L. J. 301

--- S. 145, proceeding under-Possession, delivery of, by Civil Court-Criminal Court, whether can investigate question of possession.

Where in a proceeding under section 145 of the Criminal Procedure Code in respect of a house, it is established that possession was delivered by a Civil Court to one of the parties, the Criminal Court is bound to maintain that person in possession and is not competent to re-open the question and to investigate it under section 145 of the Code. But in order to find out whether the possession is disputed or not, the Criminal Court can investigate the actual service of the writ of delivery of possession, and if dakhal dehani is proved, to its satisfaction, to have been effected, it is bound to maintain the possession of the person so obtaining it either by an order under section 145, or by having recourse to action under section 144 or sention 167 of the Criminal Procedure Code. Pat RAM KRISHNA SINGH v. EMPEROR, 3 P. L. T 335; 28 CR L. J. 821 817

- S. 145-Witness, summoning of, whether obligatory-Refusal to summon witnesses, effect of.

It is not obligatory on a Magistrate to assist the parties to a proceeding under section 145 of the Criminal Procedure Code, to produce their witnesses, and they cannot claim as a matter of right that processes should be issued by the Court to enable them to bring forward their evidence. The refusal by a Magistrate to issue summonses to witnesses is not tantamount to refusing a fair trial. Pat Arjon Manton r. Juggarnath Singh, 23 Cr. L, J, 275; 8 P, L, T, 433 419

---- SS. 145, 146-Attachment of property-Procedure.

Before attaching property under section 146 of the Criminal Procedure Code, the Magistrate should make some inquiry in order to ascertain, if possible, who was in possession. An order of attachment

Criminal Procedure Code-contd.

made without such inquiry cannot be sustained. Pat PARSCRAM RAI U SHIVAJATAN UPADHAYA, 25 CR. L. J. 277; 3 P. L. T. 431 421

- ss. 145, 253, 494 (a)-Warrant-

case-Discharge-Fresh complaint.

An accused person cannot be tried in several Courts on the same facts, although the complainants in the several cases may be different.

An order of discharge under section 491 (a) or under section 253 of the Criminal Procedure Codo in a warrant-case does not prevent the Magistrate from taking cognisance of a complaint on the same facts if there are new materials before the Magistrate which were not before him formerly. Pat BISO RAM P. EMPEROR, 23 CR L. J. 256

- SS. 145, 439-Dispute concerning land -Magistrate, duty of -Co-sharers-Failure to make enquiry -Refusal to exercise jurisdiction -Revision.

Where a person makes an application under section 145 of the Criminal Procedure Code alleging that he is in possession of the land in question, it is the duty of the Magistrate to decide whether or not he is or has been recently in actual passession. The mere fact that the revenue records show that the holding is joint is not sufficient to stop the enquiry contemplated by section 145 of the Code. In proceedings under this section it is incumbent on the Magistrate to examine the parties and to take. evidence.

Section 145, Criminal Procedure Code, applies to a case where the dispute is between co-sharers, each claiming to be in possession of the disputed land to the exclusion of the others; sub-section (b) does not, render the section inapplicable to a case in which the parties are jointly entitled to the land in question.

Where a Magistrate refuses to take action under section 145 of the Criminal Procedure Code, merely on the ground that the parties are jointly entitled to the land in question, a High Court has jurisdiction to interfere in revision where such irregularity has been committed. L. MALAN v. MAKHAN SINGH, 2 L. 372; 13 CR. L. J. 225

- S. 145 (1) - District Magistrate, power of, to cancel order under-Revision-High Court, power of, to interfere.

Where a District Magistrate, upon information received, is satisfied that there is no probability of any breach of the peace, he is competent to cancel an order, made by his predecessor, under sub-section (1) of section 145 of the Criminal Procedure Code, and a High Court has no jurisdiction to interfere in revision, as the Magistrate's order is not without jurisdiction. L SANTOKH SINGH v RAM SINGH, 2 L. 364, 23 CR. L. T. 193 516

---- S. 172 (2) -Police diaries, use of.

Under section 17%, sub-section (2) of the Criminal Procedure Code any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and may use such diaries, to aid . in such inquiry or trial but it is not open to a Court to use the zimnis as evidence in the case for the purpose of corroborating the statements of witnesses made before it. L SUNDAR SINGE V. EMPEROR, 23 CB, L. J. 251

Criminal Procedure Code-contd.

- SS. 195, 537-Sanction to prosecute not in force at date of trial-Conviction, legality of-

Failure of justice, absence of.

Where a person is sentenced upon conviction for an offence mentioned in section 195 of the Criminal Procedure Code, the sentence is not liable to be reversed or altered on appeal, or revision, on the ground that the sanction required by that section was not in force at the time when the prosecution was instituted, unless it is established that this has in fact occasioned a failure of justice within the meaning of section 537 of the Criminal Procedure Code. C KHETRA MOHAN DAS v. EMPEROR, 48 C. 867; 23 CR. L. J. 310 662

S. 230 - Magistrate, power of -Complaint. Under section 200 of the Criminal Procedure Code it is illegal for a Magistrate to whom a complaint is presented to deal with it in any way without examining the complainant. S MULCHAND PAMANMAL v. KESSOMAL RAMCHAND, 15 S. L R. 200; 23 CR. L. J. 179 243

- SS. 202, 203-Magistrate-Inquiry-Local investigation-Procedure-Irregularity.

Under section 202 of the Criminal Procedure Code a Magistrate, when not satisfied with the truth of a complaint has the option of only one out of two alternatives, viz., either to enquire into the case himself, or direct a previous local investigation. If he proceeds to inquire into the case himself, an order thereafter directing local investigation is irregular and the whole proceeding against the accused is vitiated if a material portion of the irregular proceedings has a share in the formation of his judgment. A EMPEROR v. DURGA PRASAI, 20 A. L. J. 355; 23 CR. L. J. 279

- ss. 225, 233, 537-Charge, separate, offence-Omission to frame

charge-Irregularity, whether material.

Although section 233 of the Criminal Procedure Code requires that for every distinct offence of which any person is accused there shall be a separate charge, yet under sections 215 and 537, where this is not done, the irregularity is immaterial, unless the accused was misled by the error, and it has occasioned a failure of justice. S EMPEROR v. MEHRALI BACHAL, 23 CR. L. J. 320 672

- ss. 234, 235-Joinder of charges Irregularity-Penal Code (Act XLV of 1863), 88. 408, 477.

Under section 235, read with section 234, of the Criminal Procedure Code there cannot be a joint trial of three charges for offences under section 408, Penal Code, and of one under section 477 (A), Penal Code. A SHUJA-UD-DIN AHMAD U EMPEROR, 20 A. L. J. 320; 23 CR L. J. 258 322

____ ss. 236, 237, applicability of.

The provisions of section 237 of the Criminal Procedure Code which are controlled by section 236, only apply when, from the evidence led by the prosecution, it is doubtful which of several offences has been committed by the accused. If that evidence leads to one conclusion only the provisions of that section would not apply. Pat GOVIND MARTON V. EMPEROB, 3 P. L. T. 127; 23 CR. 334 L. J. 270

Criminal Procedure Code-contd.

- SS. 239, 537—Joinder of charges—Same transaction - Misjoinder - Illegality.

The foundation for the procedure sanctioned by section 239, Criminal Procedure Code, is the association of two or more persons concurring from start to finish to attain the same end.

A series of acts, however, separated by intervals of time are not excluded from the purview of section 239 of the Criminal Procedure Code, provided that those jointly tried have been directed

throughout to one and the same objective.

Four persons were discovered committing theft, They ran away and lay in wait, at a short distance, for the persons who had surprised them. the latter passed near the spot they were attacked by the thieves, and one of them was killed by two of the latter. Subsequently three more persons came up and joined two of the thieves in beating the companions of the deceased and thereby committed riot:

Held, (1) that the riot did not form part of the same transaction with the theft and the murder, and could not be tried jointly with those two

(2) that the four persons who had gone to commit theft were prepared to use force in the event of any interference with them, and that the fatal assault on the deceased was made simply because he and his companions had prevented the thieves from taking away their booty;

(3) that the two acts were connected together by proximity of time, community of criminal intent and the relation of cause and effect, and they con-

stituted the same transaction:

(4) that, therefore, they could be tried jointly at

The disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by section 637 of the Criminal Procedure Code, nor can it be cured by the consent of the accused. L MUHAMMAD SHAH v. EMPEROR, 28 332 CR L. J. 268

- S. 248-Withdrawal of complaint against

some accused, effect of.

The withdrawal of a complaint against one person out of several accused does not amount to a withdrawal of the complaint against others. ROHTI SINGH v. MAKHDUM KALWAR, 9 O. L. J. 54 335 23 CR, L. J. 271

- S. 250-Compensation-Award of compensation by Magistrate in case triable by Sessions, validity of.

Where a case ordinarily triable only by a Court of Session is tried by a Magistrate empowered under section 30 of the Criminal Procedure Code, the Magistrate is not competent to award compensation. The special provisions of section 3) which enable a Magistrate to try offences only triable by a Court of Session "as a Magistrate" do not make such offences "triable by a Magistrate" for the purposes of section 250, Criminal Procedure Code. L B MA E DOK v. MAUNG PO THAN, 11 L. B. R. 151; 23 CB. L. J. 259

- S. 250 (1)—Discharge—Offence triable by Court of Session-Magistrale, whether can award compensation,

Criminal Procedure Code-conid.

Where after an inquiry in respect of an offence triable by a 'ourt of Session, the accused is discharged the Magistrate is not empowered to award compensation to the accused A SARUP SONAR P. RAM SUNDAR THAKURAIN, 20 A. L. J. 453; 25 'R.'.

J. 3.9

Direction mandatory Failure to comply, effect of

The directions contained in provess (a) to section 250 of the riminal Procedure Code are mandatory, and the failure by a Magistrate to record and consider each and every objection urged by a complain-

ant vitiates the proceedings.

The provisions of section 337 of the Criminal Procedure Code apply to appeals against an order directing a complainant to pay compensation, and where an appellate judgment in such a case omits to set forth the points for determination, the objections of the appellant, the decision thereon, and the reasons for the decision, the judgment is not in accordance with law, and is liable to be set aside. Pat Deonarain Mahto r. Chhatoo Raut, 3 P. L. T. 708: 23 Cr. L. J. 261

325

offence triable by Sessions-Trial by Magistrate for lesser offence-Dismissal of complaint-Compensation,

grant of, legality of.

The facts appearing in evidence constituted an offence under section 467 but the Magistrate, regarding it as one under section 465, Indian Penal Code, proceeded under Chapter XXI of the Criminal Procedure Code and not under Chapter XVIII and dismissed the complaint awarding compensation to the accused under section 250 of the ode:

Held, that as the Magistrate did not proceed illegally in trying the accused for the lesser offence, he did not act illegally in awarding compensation, when he found the accusation to be frivolous or vexations. M MAHAJANAM VENCATRAYAR v. KODI VENKATRAYAR, 14 L. W. 247; (1 2) M. W. V. 613; 41 M. L. J. 89°; 30 M. L. T. 75; 23 CR. L. J. 232; 45 B.

on -Practice.

In case of murder it has long been the practice of the Allahabad High Court not to accept the plea of guilty Murder is a mixed question of fact and law, and unless the Court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried. A Dalli v. Emperor, 20 A. L. J. 326; 28 Cr. L. J. 288

monegar-Corroborative or substantive evidence.

A statement made by a person before the monegar of a village shortly after the commission of a crime cannot be used as substantive evidence against an accused person tried for such offence as it is not a statement recorded on oath in the presence of the accused by a Magistrate empowered to take down evidence.

The only use of such statements is to corroborate or contradict statements made on oath at the trial. M MALAYA GOUNDAN v. EMPEROR, 14 L. W. 612, (1921) M. W. N. 872; 42 M. L. J. 278, 28 CR. L. J. 26;

Criminal Procedure Code-contd.

of-Alibi, plea of, not proved - Presumption - Misdirection

A Judge presiding at a trial by Jury should always be careful that he does not usurp the functions of an Advocate and that the evidence in the case is presented to the Jury in as dispassionate and impartial a manner as is expected of the presiding officer.

The fact that an accused person has failed to establish his plea of alibi does not give rise to a presumption against him as to his complicity in the crime. C EMPEROR P. TARIBULDAN SHAIKH, 25 C. W. N. 682; 23 CR. L. J. 244

s. 344 - Compensation to complainant on accused's failure to attend not allowable—Court, power of.

A Court cannot take any proceedings against an

acca ed person in his absence.

In a criminal case an accused person cannot be ordered to pay compensation to the complainant on an adjournment of the complaint against him occasioned by his failure to appear on the date fixed for the hearing. A BEEDHA v. EMPEROR, 20 A. L. J. 23; 23 CR L J. 213

Adjournment at request of prosecution - Complainant; whether liable for costs.

Where a Magistrate takes cognizance of an offence on a Police report, the complainant is merely a witness, and if an adjournment takes place because of the absence of the prosecution witnesses on the date fixed an order under section 314 of the Oriminal Procedure Code directing the complainant to pay the expenses incurred by the accused is not justified, as the adjournment was not cau-ed through any fault of his. B EMPEROR v. LAXMAN NATHA. 24 Bom, L. R. 380; 23 CR. U. J. 318

Magistrate to another -Accused, right of, to resum non witnesses - Time for making demand - Evidence recorded by first Magistrate, whether can be re ied on.

When a case is transferred from the Court of one Magistrate to that of another, the accused has a right to demand that the witnesses or any of them shall be re-summoned and re-heard, and he has such a right not only in warrant-cases, but also in the case of summary trials, and trials of summons-cases, and when an accused person makes such a demand, his demand must be complied with, as it is not competent to the second Magistrate to treat the evidence recorded by the first Magistrate as evidence in the case. The time when an accused person must exercise the right is, when the second Magistrate comin noes his proceedings

When a witness is re-summoned under the proviso to section (51) of the Criminal Procedure Code, and he retracts his former statement, it is not admissible to treat the former statement as evidence in the case. L. Sahib Din v. Emperor 28 UR, L. J. 830-8 L. 11

Purda-nashin accused—Personal attendance till conviction, whether can be excused.

Criminal Procedure Code-contd.

A Sessions Judge has powers under the provisions of section 353, Criminal Procedure ode, to dispense with the personal attendance of a purda-nashin accused and permit her to appear by Pleader during the Sessions trial, inasmuch as in the interests of justice, purda-nashin ladies should not be compelled to appear in public at least until they are convicted. M KANDAMANI DEVI v. EMPEROR, (19:2) M. W. N. 165; 42 M. L. J. 337; 15 L. W. 550; 30 M. L. T. 346; 23 CR. L. J. 266; 45 M.: 59 330

- s. 423 (d) - Expunging remarks against witnesses by subordinate Courts-High Court, power of-"Amendment", meaning of.

A High Court has no authority to expunge remarks from judgments of subordinate Criminal Courts which reflect on certain witnesses in cases in which the effective orders of the lower Courts are not before the High Court in appeal or in revision.

The word "amendment" in section 423 (d) of the Criminal Procedure Code means amendment of an effective order of the Court below. A C. DUNN v. EMPEROR, 20 A L. J. 261; 23 CR. L. J. 349 1005

- ss. 435 (3), 145, proceeding under-Finding as to breach of the peace, whether essential-Revision.

Where the notice issued by a Magistrate purporting to act under section 145, Criminal Procedure Code, shows that he was satisfied that there was a serious dispute between the parties, the pro. ceeding is one contemplated by section 45, Criminal Procedure Code, even though there is no finding in it about any likelihood of a breach of the peace.

Under section 43, clause (3), of the Criminal Procedure Code a High Court is precluded from interfering in revision in a matter under section 145 of the Code. A BABUA SINGH v ANGNU KEWAT, 527 23 CR. L J. 3(3

- s. 438-Revision - Acquittal - Magistrate,

power of-High Court, power of.

A District Magistrate has no authority to set aside an order of acquittal by a Subordinate Magistrate in revision or to act otherwise than as provided by section 438 of the Criminal Procedure Code. A High Court can take action of its own motion and set aside an order of acquittal and direct a re-trial. O ROHTI SINGH P. MAKHDUM KALWAR, 9 O. L. J. 54; 335 23 CR. L. J. 271

____ s. 439-Revision-Interference on facts-Reasonable doubt - Acquittal.

The rule of the Allahabad High Court, not to interfere on facts found by the lower Appellate Court, when sitting as a Court of Revision, on the Criminal Side, is not an absolute one and the Court will interfere where it is not satisfied as to "the propriety of the finding."

Where a High Court is not satisfied beyond a reasonable doubt of the guilt of the accused, the accused is entitled to an acquittal A SHIAM SUNDER v. EMPEROR, 2 A L J : 76; 28 CR L. J. 2 1 - ss. 439, 562-First youthful offender -

Release on probation of good conduct-Kerisien

Accused, a young man of () years, who was said to be of good character by one of the witnesses, was for the first time convicted of theft and sentenced to two months' rigorous imprisonment;

Criminal Procedure Code-contd.

Held, on revision, that having regard to his youth and character he might be dealt with under the provisions of section 56°, Criminal Procedure Code. C ABDUL KADER v MON MOHAN GOPF, 25 C. W. N. 720: 23 CR L. J. 235 75

- S. 439 (5)—Acquittal—Revision at the instance of Local Government.

A High Court is prohibited by section 439 (5) of the Criminal Procedure Code from entertaining proceedings in a case of acquittal by way of revision at the instance of the Local Government as the latter can appeal from the acquittal under section 417 of the said Core. S EMPEROB v. JANU FAKIR, 15 S. L. R. 171; 23 CR L. J. 343

- S. 476, order under-Complaint-High Court, power of, to interfere-Civil Procedure Code (Act V of 1908), 8 115.

Where a Judge, acting under section 476, Criminal Procedure Code, orders a trial under section 193, Indian Penal Code, a High Court can only interfere under section 115 of the Civil Procedure Code.

A District Judge concluded an order under section 476 charging certain persons with various offences

"A copy of this order will be sent to the District Magistrate...with a request that he will cause proceedings to be instituted against the other three persons If the District Magistrate decides to institute proceedings he should inform the C. I D. who investigated the matter":

Held, that the order was not in the terms of section 476, Criminal Procedure Code: but that it amounted to a complaint, and that it was in the discretion of the Magistrate to take such proceed. ings as he was advised. A SIMEON v. EMPEROB, 23 CR. L J. 291

= 2. 476, order under, whether open to revision-Order against witness, whether can be passed-Penal Code (Act XLV of 1860), ss. 115, 415.

An order passed under section 476, Criminal Procedure Code, by a Civil Court is not appealable and is not open to revision under sections 435, 438 of the Criminal Procedure Code.

No revision lies against an order of a Civil Court directing a prosecution for an offence under section 195, Indian Penal Code.

An order under section 476, Criminal Procedure Code, for prosecution for an offence under section 465, Indian Penal Code, can be passed also against a person who is not a party to the civil suit, e. g, a witness. O EJAZ ALI KHAN v. EMPEROR, 24 O. C. 357; 23 CR L. J. 228

- S. 488-Maintenance-Husband agreeing to maintain wife, but refusing to cohabit with her-Wife, whether entitled to separate maintenance.

Where a husband agrees to protect and maintain his wife in a manner suitable to her condition in life, it is a sufficient offer under section 4% of the Criminal Procedure Code, and the mere fact that he refuses to cohabit with her is not a ground for granting her separate maintenance M Jaggava-RAPU BASAWAMMA v. JAGGAVARAPU SEETAREDDI, 15 L. W. 5 5; 89 M. L. T. 815; 42 M. L J. 56°; 1922) 832 M. W. N. 16; 23 CR L. J. 336

Criminal Procedure Code - coueld.

of trespass - Jurisdiction to order possession to com-

plainant-Courts, duty of

A Magistrate, after acquitting an accused person of trespass under section 447, Indian Penal Code, cannot proceed to pass an order under section 52 of the Crimical Procedure Code and put the complainant in possession of the land in dispute, inasmuch as section 52: of the Criminal Procedure Code gives jurisdiction to the Criminal Court only when a person is convicted of an offence attended by criminal force.

Courts are not to deal with questions of abstract justice but are tied down by the wording of the Statute Law on the subject. O EMPEROR & ALI BAHADUR, 24 O. C. 352; 28 R. I. J. 260 324

S. 545—Compensation, when awardable.

Accused dishonestly induced the complainant to part with her ornaments, and these he pledged with D. He was convicted under section 420 of the Penal Code and sentenced to imprisonment and fine, and the Magistrate directed that out of the fine, a sum should be paid to D as compensation under section 545 of the riminal Procedure ode:

Held, that the order under section 547 could not be sustained, as under it compensation is only awardable to a person for the injury caused by the offence committed, and that as the offence committed in this case was cheating, no injury was caused to D. thereby. B EMPEROR v. RAMCHANDRA BAPUJI DESHMUKH, 24 BOM L. R. 382; 23 CR L. J. 841 997

Cross-objection, admission of, after 80 days - Notice.

A cross-objection can be admitted after the expiry of 30 days from the service of notice of the appeal on the respondant even though it be put in in the course of the arguments in appeal. N Kuksa v. Dajiba Bilau 217

Court's decision, basis of.

A statement in a judgment as to an admission made before the Court of first instance should not be doubted lightly by the Appellate Court, especially in the absence of an affidavit by the Vakil who appeared in the Court of first instance. C SARAT CHANDRA MAITI V. BISHABATI DEDI, 34 C. L. J. 202 433

A decision of a Court should rest, not upon suspicion but upon legal grounds established by legal testimony. C Berin Krishna Ray v. Jogesh. WAR BAY, 31 C. L. J 256; 26 C. W. N. 31 345

Court-fee-Appeal, second-Cross objections by appellant in Appellate Court insufficiently stamped -High Court, power of, to order deficiency to be made

good before proceeding with second appeal.

Where in a second appeal it is discovered that a memorandum of cross-objections by the appellant in the lower Appellate Court was insufficiently stamped, a High Court has an inherent jurisdiction to insist upon his paying the proper Court-fees throughout the litigation as a condition precedent to proceeding with the appeal, even though he does not appeal from that part of the decree which disallowed his cross objections. Pat Rasik Behari Prasid v. Hriddy Nariyan, 3 P. L. T. 317; (1922)

Court Fees Act (VII of 1870), s. 7
(IV) (C) -Suits Valuation Act (VII of 887), s. 8
-Suit for declaration with consequential relief-

A suit for a declaration that the plaintiff is the owner of certain property and that he is not bound by an ojectment decree obtained against him by fraud, and for an injunction that the defendants shall not interfere with his possession, falls within clause (c) of sub-section (iv) of section 7 of the Court Fees Act.

In a suit to which section 7, clause 4 (c) of the Court Fees Act applies the Courts are bound to accept the valuation placed by the plaintiff upon the relief sought by him, even though such valuation is arbitrary and inadequately represents the value of the property.

As a general rule, under section 8 of the Suits Valuation Act, the jurisdictional value of suits falling under section 7 (iv) (c) of the ourt Fees Act is the same as the value for purposes of Courtfee, L Nandan Mal v. Salig Ram 34

S. 7 (IV) (f)—Suit for accounts—Preliminary decree—Defendant's appeal—Valuation of

appeal.

In an appeal from a preliminary decree in a suit for accounts an appellant has under section 7 (iv) (f) of the Court Fees Act the option of placing his own valuation upon the memorandum of appeal and of paying Court-fee according to that valuation. A KANHAIYA LAL C. HAM SARUP, 20 A. L. J. 416 841

(VII of 887), s. 8—Court-fee pryable in suit for specific performance of contract to grant lease—Principle.

In order to determine the jurisdiction and the Court fee payable in a suit for specific performance of a contract to grant a lease the suit must be first valued for payment of Court fees in accordance with the rule embodied in section 7, sub-section (x) clause (c) of the Court Fees Act; then the value so determined for computation of fourt fees should be adopted as the value for purposes of jurisdiction.

The right construction of section 8 of the Suits Valuation Act is, that the valuation for the purposes of jurisdiction should, in the cases mentioned there, follow and be the same as the valuation for Court-

the valuation for assessment of Court-fees controls the valuation for purposes of jurisdiction. C SAILENDRA NATH MITRA v. RAM CHABAN PAL, 25 C W. N. 63; 34 C. L. J. 91

Custom - Adoption - Collateral succession

In the case of an adoption made under the customary law of the Punjab it is to be determined whether it was intended that the adopted boy should be altogether taken out of his natural family and introduced into the adoptive father's family as his son; in other words, whether the adoption was a complete adoption having the effect of severing the connections of the boy with his natural family.

In the case of an adoption in a particular community, where there is no standard of formality and no precise customary rule as to what is to be done to produce all the offects of adoption, all that can be said in

Custom-contd.

that where the adoption is as complete as an adoption in that community ever is, and where the intention to make a complete change of family is manifested, there the right of collateral succession may be presumed till the contrary is shown. L WARYAMAN v. KANSHI RAM, 3 L. 17

Adoption-Daughter's son-Dhanoi Jats of Tahsil Kharar, Ambala District-Wajib-ul-arz-Riwaj-i-am.

Among Dhanoi Jats of Tahsil Kharar, Ambala District, the adoption of a daughter's son is valid by custom.

A waiib-ul-arz is a part of the Revenue Record and is, therefore, of greater authority than a riwaj-i-am which is of general application and is not drawn up in respect of individual villages. L GURBAKHSH SINGH v. PARTAPO, 2 L. 346

Alienation—Appointed heir, right of, to challenge Appointed heir also remote collateral—Rights as against nearer collateral.

An appointed heir as such has no locus standi to impeach an alienation of ancestral land where, however, he is also a collateral, he not only can impeach the alienation but, by reason of the appointment in his favour, is entitled to possession even in preference to others who are near collaterals. L. PADAM NATH & KANSHI RAM, & L. L. J 20 913

____ Alienation-Necessity - Proof-Enquiry.

An alience is not bound to see to the application of the money paid by him as consideration for the alienation. But an alience who deals with a person with a limited power of alienation, must satisfy himself that, if money is required for the liquidation of an alleged debt, there is in fact such a debt in existence.

The onus of proof of the validity of an alienation of an ancestral land by a male proprietor always lies, in the first instance, on the alienee whether he be a third party or a person whose debts have been paid off by the alienation L Sahib Din v. Raja

re-founded — Succession — Self-acquired property—
Daughters—Collaterals—Burden of proof—Near male collaterals.

The inhabitants of a village left the village abadi and the village land became deserted and passed out of cultivation. I ater on, some of the proprietors or their descendants returned, re-founded the village and brought the land again under cultivation:

Held, that those persons who returned to the village re-acquired the land and it became their self-acquired property and could no longer be regarded as their ancestral property

The expression 'near male collaterals' means collaterals not more remote than the th or the tth

There is a general custom in the Punjab that daughters are usually preferred to collaterals so distantly related as the 6th degree even in regard to ancestral property, while in the case of self-acquired property daughters usually exclude even nearer collaterals. It is quite opposed to all the principles of customary law that collaterals so distantly related as the 5th degree should exclude daughters in the case of property which is non-

Custom-contd.

ancestral, and a mere entry in the rivaj.i.am, unsupported by instances, that daughters can under no circumstances inherit their father's property, is of very little weight, and it is quite insufficient to shift the onus on to the daughters. L MANOHAR v. NANHI, L. 266; 2 L 366

fact. Finding as to custom-Question of law or

where a question arises as to the existence or non-existence of a particular custom and the lower Appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and a High Court is entitled in second appeal to consider whether the finding is based on sufficient evidence.

But where the Court has not rejected admissible evidence, has applied its mind correctly as to what the essentials of a custom are, and at the end has found that it is not satisfied on the evidence produced that such a custom exists, there is no point of law which can be taken in second appeal. A SHAKIRA BIBI V. NANDAN RAI

Gonds of Bhagi in Bhandra District— Guardianship of minor's property - Step-brother or mother Rule of decision in absence of custom.

As regards guardianship, the Raj Goud family of Zemindars of the Shikmi Zemindari of Bhagi in the Bhandra District is not governed by the Hindu law, and, in the absence of proof of any custom, a question of guardianship in that family must be decided according to justice, equity and good conscience.

here certain minors of a Gond family with their mother are living jointly with their step-brother, who manages the whole estate, and is regarded by the family and all the world as the natural and rightful guardian of the minor's property, he must, according to equity and justice, be treated to be, as against the mother, a guardian both de facto and de jure, more so if the personal law of practically the whole population amidst which the family resides recognises a step-brother as the natural and rightful guardian in presence of the mother. N Kolhu v. Belsingh, 17 N. L R. 303

Daughters - Widow-Re-marriage-Husband's estate,

Under the general custom of the Punjab the daughters of a kamin or non-proprietor, have a right to reside in their father's house un il they marry or die, whichever event first takes place.

According to the general custom of the Punjab as prevalent among agriculturists on the re-marriage of a widow her rights in her deceased husband's estate come to an end. L MAHANDA v. GAUHRE 433

Tahsil Moga, Ferozepore District.

The initial presumption in the case of Khatris is that they follow their personal law.

The Khatris of Mauza Salina in the Moga Tahsil of the Ferozepore District follow Hindu Law in matters of alienation and succession. L SUNDAR SINGH U. SUNDAR SINGH

Custom-conold.

property-Sister - Fathans of Ludhiana District.

Where a female intervenes in the line of descent she simply acts as a conduit to pass on the property as ancestral property to her sons and their descendants.

Among Pathans of the Ludhiana District sisters and their sons do not succeed in the presence of any collaterals who can prove their relationship to the deceased. L Khwaj Muhammad v. Ahmad Khan

Rohtak, whether follow custom or personal law— Brother's daughter preferred to sister's son—Alienation, female, right of, to contest

In matters of succession, the Sayads of Kharkhauda in the Rohtak District, follow custom, although somewhat influenced by their own personal law, and have widely recognised the rights of succession of females Among them there exists a right of representation in favour of females, and the rights of a brother's daughter to succeed are superior to those of a sister's son, and she is entitled to contest alienations, by a widow of the last male owner. L NASIR-UN-NISA v AUMDI-UN-NISA, L. 883

Damages-Defamatory statement by Vakil in course of argument, whether actionable-No statutory provision-Judges, duty of.

An action for damages cannot be maintained against a Vakil for defamatory statements uttered by him in the course of the administration of law.

In all cases for which no specific statutory directions are given, udges are bound to act according to justice, equity and good conscience. Pat JAGAT MOHAN NATH SAHI DED v. KALIPADA GHOSH, (1922) PAT. 85; 3 P. L. T 376

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nent, malicious - Reasonable and probable cause -Malice-Inference-Attachment incomplete, effect of.

An action lies for the taking out of a malicious attachment before judgment under Order XXXVIII, rule 5, of the Civil Procedure Code, and the party aggrieved is entitled to compensation for the injury actually sustained even though the attachment was not completed.

The absence of reasonable and probable cause for taking legal action in execution or otherwise is itself some evidence from which malice may be inferred.

Where an attachment before judgment is taken out only with the object of securing, for satisfaction of the plaintiff's debt, money in the possession of the defendant, the order must be held to have been obtained not only without reasonable and probable cause but also without any justification and the latter is entitled to substantial damages. M Joseph Nicholas v Sivarana Alvar, 15 L W. 442; 80 M L. T. 269; 19-2) M. W. N 243

The cause of action for a suit for damages for illegal distraint arises on the date of the actual loss or damage or at the latest when the plaintiff comes to know of such to s and not on the date of the release of the property from di traint. A ANAR KUAR v. POHAP SINGH

Decree, construction of—Court, duty of—
Indicatory decree—Decree capable of execution—
His Minesty is, ouncil, order of, transmission of,
for execution—High Court, power of, to give directions
—Civil Procedure Code (Act V of 1908), O. XLV,
11 Consent order—Finality.

It is the duty of a Court to avoid such a construction of a decree as must in future result in multiplicity of suits between the parties in respect

of a matter which has been finally settled.

A taluq lar executed a Will, under which he devised his estate to his nephew, and by the same Will he granted a maintenance allowance of Rs. 500 per mensem to his wife. By a subsequent codicil he granted another sum of Rs 500 per mensem to his wife The lady later on brought a suit in the Court of the Subordinate Judge to enforce her right to the annuities against the legatee. She not only claimed the arrears of maintenance but also asked for relief as to her right for the same in future and paid Courtfees both under clause (i) and clause (ii) of section 7 of the Court Fees Act. The Subordinate Judge held that she was entitled to an allowance of Rs - 0 per mensem, under the Will and that she was entitled to nothing under the codicil appeal, the 'udicial 'ommissioner's Court decreed her claim "for a declaration that she is entitled to maintenance at the rate of Rs. 1,000 per mensem out of which half will be recoverable from the talugdars and the other half from the non-taluquari property, if any." On a further appeal, their Lordships of the Privy Council upheld this decree and observed as follows: "The respondent's Counsel expressed a fear that the declaration granted was insufficient. It does not so seem to their Lordships. It is a corollary of the declaration granted that any income which has since the death been received from the nontaluquari estato will be liable as well as the future income to pay the extra 500 rupees, including arrears, from the death up to the date of the declaration ":

Held, that the decree was not merely declaratory of the lidy's right to maintenance but that it empowered her to recover that maintenance from the taluquari and non-taluquari properties to the ex out to which they were respectively liable.

In transmitting an order of His ajesty in Council to the Court below for execution under Order XLV, rule 5, Civil Procedure code, a High Court is perfectly competent to give directions to the lower Court for the payment of the money only in the event of a sufficient security being filed by the decree-holder.

An order passed by consent is conclusive between the parties. O BIJAI RAJ KOER v. THAKUR JAI ANDRA BAHADUR SINGH, 9 O L J. 6 982

as minor - Consent of certificated guardian to act as guardian ad litem, when can be presumed.

Where a decree was obtained against a defendant in a suit in which he had been misdescribed as a minor and a guardian ad litem was appointed, although he had in fact attained majority, a suit subsequently instituted by him to set aside the decree should be dismissed on the ground that he was bound by the decree in the former suit, inasanuch as, though aware of the suit, because orders for the appointment of a guardian ad litem are

Decree-concld.

made only after notice to the alleged minor and the proposed guardian, he still allowed the guardian to conduct the defence on his behalf as guardian for the suit. C SARAT CHANDRA MAITI V. BIBHABATI DEVI, 34 C. L. J. 332

Defamation, suit for, against Pleader - Pleader acting in professional discharge of his duty.

While commenting on certain documents in the course of his argument in a suit for rent, the defence Pleader used the expression that the plaintiff, a lady, had forged the documents by means of fraud "Juschuri Kariya Kagaj Pata Jal Kariyache") In a suit for defamation against the Pleader:

Held, that the rleader was not liable for damages for defamation inasmuch as what he did was in the professional discharge of his duty and in good faith for the protection of the interest of his client, and his remarks were not irrelevant but pertinent to the enquiry which was being made before the Judge and had a direct bearing on the case. C SHIVA KUMARI DEVI v. BECHARAM LAHIRI, 25 C. W. N. 835

Definitions:— Account, mutual, open & current 30

Adventure or concern in the nature of trade. See Excess Profits Duty Act, s. 2 473
Amendment. See Criminal Procedure

Code, 8 423

Any building. See Bombay DISTRICT
MUNICIPAL ACT, 8 98

1005

DISTRICT
999

Building. See BOMBAY DISTRICT MUNICIPAL ACT, S. 3 7) 323

Business. See Excess Provits Duty Act, s 2

Capacity. See Majority Act, s 2 (a) 265 Claim or question to or respecting property of like amount. See Civil Procedure Code, s. 110 685 Compensation. See Limitation Act,

Sch I, Art 115
Competent. See Majority Act, 8. 2 (a)
265

Competent jurisdiction. See
CRIMINAL PROCEDURE CODE, S. 144
Competent to try. See CRIMINAL PROCEDURE CODE, S. 144
657

Contentious suit. See Transfer of Property Act, s 55

Court. See Transfer of Property Act, s 55

(6) (b) 850
Defendant. See Sonthal Parganans
Settlement Reculation 5 945

SETTLEMENT REGULATION, S. 5 945
Estate. See BENGAL TENANCY ACT, S. 95 (a)

Extradition offence. See Extradition 517
Act, s. 7
Fastened. See Fenal Code, s. 445
Fraudulently. See Penal Code, s. 193

Full proprietary rights. See HINDU 198

Goods. See Limitation Act, Sch. I, Art 52

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1... Drt. See U. P. Excise Acr, s. 3

Definitions-concld.

Malik:

See Hindu Law-Will 198
See Will 628, 720
Obligation See Special Relief Acres 2

Obligation. See Specific Relief Acr, s. 3
533

Other sufficient reasons. See CIVIL PROCEDURE CODE, O. XLVII, R 1 553
Party. See CIVIL PROCEDURE CODE, 8. 145

Price. See TRANSFER OF PROPERTY ACT. 8, 54
622

Profits. See INCOME TAX ACT, S. 9 979
Settlement. See BENGAL LAND REVENUE
SALES ACT, S ?7 911

To enforce. See LIMITATION ACT, Sch. I, ART. 183 545

Transfer. See MADRAS SALT ACT, S. 11 356
Transfer by assignment in
writing or by operation of law.
See CIVIL PROCEDURE CODE, O. XXI, R 16 679

Varis. See WILL 720
Wholesale. See Madras District MuniciPalities Act, s 249
429

WIII. See GUARDIANS AND WARDS ACT, S. 7 (8)

Wrong person as plaintiff. See CIVIL PROCEDUBE CODE, O. I, R 10 878 Wrongfully raceived. See LIMITATION ACT, SCH. I, ART. 100 879

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 1, 3, 11, applicability of -Extension of Act, meaning of Agriculturists residing in other Provinces, whether governed by Act.

The Dekkhan Agriculturists' Relief Act is not applicable to an agriculturist who earns his livelihood wholly and principally by agriculture at a place in the unjab, or at any place to which the Act has no application.

What is meant by the extension of an Act to a district is, the extension of a substantial portion of the Act and not merely the extension of a particular section or one or more sections. S

FIRM OF AYARAM TOLARAM v. FIRM OF RAI HITRAJ

BODRAJ

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Doc'rine of constructive posses-

The doctrine of constructive possession cannot be applied in favour of a wrong-doer, where possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed only as regards the portion of the land in suit of which he proves actual possession for the statutory period.

A suit must be deemed to have been instituted on the date when the plaint was filed in Court and not on the date when it was ordered to be registered.

C Maharaja of Cooch-Behar v. Mahendra Ranjan Rai Chaudhuri, 31 C. L J. 465

Document, construction of—Lease, new—Registration Act (XVI of 1908), s. 17 d)—Lease for indefinite period - Registration, whether necessary— Lease unregistered—Oral evidence, whether admissible.

Document-concld.

One T. held an ordinary monthly lease of some shops on Rs. 3.9.0 a month. A dispute as to enhancement of rent was settled by the landlord executing a document as follows: "I have given the shops on a rental of Rs. 2-N-O a month. So long as I occupies the shops, the rent shall not be raised or lowered Accordingly this kirayanama is written for record in case of need". The document was unregistered.

In resisting a suit for ejectment, T wanted to put in the unregistered document saying that it was not a new lease but merely a variation in the terms of

the old:

Held, that the lease was a totally fresh lease and not being limited to one year, was inadmissible in evidence for want of registration, and being inadmissible, it was not open to the tenant to resort to oral evidence to prove the original transaction. L FIRM OF KARIM BAKHSH TAJ UD. DIN P. NATHA SINGH, 3 L. L. :4

Easement-Parnala, old-Easement, whether established

The mere finding that a parnala is old is no finding in law that an easement has been established with respect thereto. L AHMAD BAKHSH P. PALL, 3 L. L J. 58

Easements Act (V of 1882), ss. 15, 26-Right of way through another's land, acquisition of -Access for scavenger-Enjoyment of right for over

statutory period—Acquisition of right,

An easement can be acquired to a right of way

through a dwelling house,

Section 15 of the Easements Act which deals with the requisites necessary to acquire a right under the Act is not exhaustive and does not exclude or interfere with other titles and modes of acquiring easements.

Where user is proved, the presumption is that it is of right till the contrary is proved. Such a presumption is not in India a presumption de juris et de jure. It only starts a party with a presumption in his favour which can be rebutted by proof of facts which are inconsistent with or which militate

against, the inference.

It is competent to a person to acquire a right of way for a scavenger to gain access to his house by passing through his neighbour's house by user for over the statutory period. Such user need not have been exercised as of right. M KUNJAMMAL v. RATHNAM PILLAI, 15 L. W. 263; (1922) M. W. N. 48

— S. 33—Right of privacy - Custom -Question of fact-High Court, power of, to interfere -Larkana Town-Privacy as to roofs of houses-Nuisance-Substantial damage-Injunction, grant of -Local custom-Civil Procedure Code (Act V of 1938), O XIII, r 25 - Issue new, Court, power of.

The question as to the existence of a custom of privacy in any locality is a question of fact only, and where evidence for and against the alleged custom has been properly taken and considered by the lower Court, a High court is not entitled in second appeal to disturb the lower Court's finding on the point.

Under Order XLI, rule 25 of the Civil Procedure Code, a Judge is authorised to frame new issues in a suit and allow additional evidence to be adduced

Easements Act-concld.

where he finds that question essential to the right decision of the suit upon the merits has not been properly raised and tried in the lower Court

In the town of Larkana in Sind there is a custom of privacy with respect to the roofs of houses which contain parapet walls round them and where the women sleep at night in the hot weather, and any threatened invasion of the right sufficient to cause substantial damage the person entitles

aggrieved to an injunction.

where, therefore, a person raises the roof of his house and opens a window overlooking the roof of the house of another person, he commits a nuisance implying substantial damage within the meaning of section of the Easements Act, as his act materially diminishes the value of the dominant heritage by diminishing its value as a house suitable for use by a family and he is liable to be restrained.

A local custom need not be shown to be immemorial if it is sufficiently certain and reasonable to satisfy the legal requirements of a valid custom 833 SHAH MAHOMED U. BANZAN

Endowments—Debutter property—Accretions - Custom-Gir Gossains-Dismissal-Punch, power of-Bhat's book, admissibility in evidence of-Evidence Act (1 of 187), 8. 82.

Properties acquired with the income of endowed property and treated by the shebait all along as properties belonging to the idol, form the property of the idol

During the lifetime of his guru, a chela who is of

age may be a member of the punch.

Among Gir Gossains marriage is not allowed and by custom if any one of the Gir Gossain sect drinks wine or marries or becomes addicted to vice the Punch can dismiss him and instal another shebait in his place.

Succession amongst the Gir Gossains is governed by Gotia relationship and in the absence of a chela

the nearest Gotia succeeds.

The Bhats are heralds who are interested in keeping family record which is evidence under section 32 of the Evidence Act if it comes from proper custody. C KARTIC CHANDRA v. GOSSAIN PROTAP CHANDRA, 25 O. W. N. 908

Evidence-Statement by deceased person provable against persons claiming through him.

Any statement made by a person in a previous suit against his own interest is provable after his death in a subsequent suit as against a party claiming through him A JHABBU LAL v. JWALA PRASAD 986

-, value of, determination of. Men, without deliberately intending to falsify

facts, are extremely prone to believe what they wish, to confound what they believe with what they heard and to ascribe to memory what is merely the result of imagination O ANJAMAN-UN-NISA v. ASHIQ ALI, 8 O. L. J. 439; 8 U. P. L. R. (J. C.) 65

Evidence Act (1 of 1872), s. 13-Judg.

ment between third parties, when relevant.

A obtained certain property under a gift. By virtue of the ownership of this property A. brought a suit for pre-emption against B. and obtained a . decree. In a suit by C. against A in which the

Evidence Act-contd.

question was whether the gift in favour of A was a real gift or was a merely fictitious transaction:

Held, that the judgment in the pre-emption suit was relevant under section 13 of the Evidence Act as an instance in which A's right under the gift was asserted and enforced, O ANJUMAN-UN-NISA v. ASBIQ ALI, 8 O. L. J. 439; 3 U. P. L. R. (J. 1. 65)

---- ss. 35, 40 to 43-Julgments not inter

partes, recitals in, admissibility of.

A recital in a jugilment not interpartes of a relevant fact is not admissible in evidence under section 35 of the Evidence Act. M TRIPURANA SEETHAPATI RAO DORA v. BOKKAM VENKANNA DORA, 15 L W. 216; 90 M. L T. 160; (.922) M W. N. 147; 42 M. L J 374; 45 B 332

to investigating Police Officer by third persons, when admissible—Substantive or corroborative evidence.

In a proceeding under section 1:0 of the Code of Criminal Procedure, the statement of a witness that he heard from certain persons who have not been examined that articles stolen in certain dacoities were made over to the accused, is inadmissible in evidence.

Where in a proceeding under section 11°, Criminal Procedure Code, a person has not been exalined as a witness by the Court the evidence of an investigating Police Officer with regard to the statement made to him by that person is inadmissible in evidence. If, however, the person has been examined as a witness by the Court, the evidence of the investigating Police Officer is admissible. But the statement made to the investigating Police Officer cannot be relied upon as substantive evidence against the accused. It should be used in order merely to contradict or corroborate, as the case may be, the statement made by the witness in Court. C Ashutosh Das v. Emperor, 34°C. L. J. 53: 23°CR. L. J. 289.

--- s. 63 (5) - Mortgage, proving of -Illiterate

person, whether proper witness.

where the only witness in support of a mortgage is an illiterate person Le cannot be deemed to be one who has seen the mortgage within clause (5) of section 63 of the Evidence Act A Janki v. Ram Kishore 557

inadmissible in evidence—Secondary evidence

Where a loan is granted on the security of a hundi, the execution of the hundi being, however, postponed till a short time after the money is actually paid to the defendant, there is no cause of action independent of the hundi, and if the hundi is inadmissible in evidence for want of proper stamp, secondary evidence of the transaction is shut out by section 91 of the Evidence of the plaintiff must fail L Chanda Singh & Ambitsab Banking Company, 4 L. 330

mortgage, executed but unregistered-Evidence,

admissibility of.

Evidence is admissible to prove the terms of a mortgage by deposit of title-deeds aliunde, in spite of the execution of a subsequent unregistered simple mortgage which is not admissible in evidence

Evidence Act-contd.

and such evidence is not barred by section 91 of the Evidence Act M ELUMALAI CHETTY v. BALA-KRISHNA MIDALIAR, 41 M L J. 297; 14 L. W. 79; 192 M. W. N. 704; 44 M 9 5

sibility of, to prove variation of terms of deed

Oral evidence to prove variations in the terms of, a sale-deed is inadmissible, unless such evidence comes within any of the provisor to section 9' of the Evidence Act. BAI ADHAR v. LALBHA HIBACHAND, 24 BOM. L. R 239

- s. 92 (3), scope of Parol evidence to

vary written document, admissibility of.

It is not intended by proviso (3, to section 92 of the Evidence Act to permit the terms of a written contract to be valied by a contemporaneous oral agreement but having regard to the illustrations (b) and (j) the proper meaning of the proviso is that a contemporaneous oral agreement to the effect that a written contract is to be of no force or effect at all and that it is to impose no obligation at all until the happening of a certain event may be proved.

A ALI JAWAD v. KULANJAN SINGH, 20 A. L. J. 47

Ambiguity—Patent or latent-Extrinsic evidence -

Where in a grant of land there is a repugnancy between the terms of the grant and any plan or diagram the general rule is that the former will prevail. But this is subject to the qualification that where the plan or boundary is a part and parcel of the description itself, the general rule ceases to apply.

The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, and where the ambiguity is patent as well as where it

Where a deed of conveyance of a house contained an ambiguity, in respect of the description of the property conveyed of such a nature that one portion of the description referred to the entire house and another portion referred only to a portion of the house, and both read together did not apply correctly either to the whole house or to a portion of it:

Held, that the case was covered by the provisions of section 37 of the Evidence Act and that extrinsic evidence was admissible for the purpose of solving the question whether by the description of the property taken as a whole the intention was to convey the house in its entirety or only a portion of it.

O Abdul Grani v. Ashiq Hussin, 80 L. J. 521: 3 U. P. L R (J. C. 93

S. 112-Paternity, proof of -Presumption

In a suit by plaintiff to establish his paternity in A, the defendant alleged that he was the son of B. The defendant failed to establish his allegation, but, on the other hand, there was nothing to prove that the wife of A had ever borne a child. Plaintiff urged that as the defendant had failed to fix his paternity in B, a conclusive presumption of his

Evidence Act-could.

paternity in A arose under section 112 of the

Evidence Act: Held, that section 11 might have been applicable had the plaintiff been able to prove that about the time he might be supposed to have been born, the wife of A. had given birth to a child As the facts were the section had no application A had NARSINGH RAO C. LETI MAHA . AKSHMI dai, 4 A L. 902 J. 274

- S. 118-Examination of child witness-Mode of testing its capacity-Criminal Procedure Code (Act V of MAY), s. 14: - Procedure.

When the evidence of a child of tender years is adduced the Judicial Officer should for the sake of precantion, ascertain, as a preliminary measure, by means of a few simple questions, whether the intelligence of the child is such that whether sworn or not it is capable of giving testimony which is patent of credit, and it is desirable that something should, at the commencement of the record of the evidence of a wirness of this character, be entered to show that such a test has been in fact made, although it is not obligatory under the law to do so.

Where an accused is undefended the Tribunal may point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation, but where an accused is defended by a legal practitioner a Tribunal ought not to enter upon a lengthy examination of an accused person Pat PA CHU CHOUDERY D EMPEROR, & CR L. J. 233

- S. 124 - Privilege - Public document, production of Duty of Court Court of Wards -Statement of financial position of ward, nature of -Limitation Act (IX of 908), s 9-Acknowledgment-Nature of proof-Mortgage-Stipulation for payment of interest - Failure to pay-Suit by mortgages-Limitation terminus a quo.

Where in respect of a document privilege is claimed under section 121 of the Evidence Act, it is for the Court to decide whether or not the document is a communication made to a public officer in official confidence. If it decides that it was so made it has no authority to compel the public officer to produce it, inasmuch as the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests.

inasmuch as a person who desires his estate to be taken over by the Court of " ards cannot be compelled under law to make a disclosure of his debts, a statement by such a person, setting forth the financial position of his estate, sent to the Collector to enable him to decide whether or not the estate should be taken over, should be regarded as a communication made to him in official confidence and he is not obliged to disclose it by reason of section 124 of the Evidence Act

Where a person prosecutes a suit which is, on the face of it, barred by limitation and he tries to bring it within limitation by proving an acknowledgment under section 4 of the imitation Act, he must give cogent proof of his allegations.

Where a mortgage-deed stipulates for the payment of interest annually on a certain date, and provides that, in default of such payment in any year on the

Evidence Act-concld.

date so fixed, the mortgagee would have power to recover the amount remaining due, to him from the hypothecated property, and other property of the mortgagor by bringing a suit, the period of limitation for bringing such suit commences to run from the date of the first default. A OLLECTOR OF AUNPUR U JAMNA PRASAD, 20 A. L. J. 149, 4 U P. L. R. (A. 50

- S. 154-Hostile witness, who is-Evidence, admissibility of-Statement of insolvent in insolvency proceedings-Omission to object to reception of evidence, effect of-Plaintiff calling defendant as witness, whether entitled to cross-examine him as of right Basis of Court's decision.

An admission of an insolvent, if made after the act of insolvency, may be admissible against himself but it cannot furnish evidence against another insolvent oras against the Official Assignee.

The statement of an insolvent in the course of his public examination under section 27.1) of the Presidency Towns Intolvency Act is not admissible in evidence in a subsequent suit in which he is not examined as a witness by the Court

An erroneous omission to object to the reception of evidence does not make it legally admissible

in evidence

If the plaintiff calls the defendant as a witness, he is not entitled to cross-examine him as a matter

F party when called as a witness by his opponent cannot as of right be treated as hostile, the matter

being solely in the discretion of the Court.

A witness who is unfavourable is not necessarily hostile, for a hostile witness is one who frem the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court.

A 'ourt's decision must rest not upon suspicion but upon legal grounds established by legal testimony. C LUCHIRAM MOTILAL U RADHA CHARAN PODDAB, 84 C L. J U7; 49 U 93

Excess Profits Duty Act (X of 1919), SS. 2, 3-Turf Club-"Adventure or concern in the nature of trade"-"Business"-Excess profits duty, liability to pay-Test.

Where a Turf lub admits the public to its stands, paddocks and onclosures on race-days, on payment of entrance fees or gate money; allows persons, who are not members of the Club, to enter horses for the races which it conducts, on payment of entrance fees, allows book makers to carry on their calling in its enclosures on payment of license fees allows persons, who are not members of the Club, to make bets through its totalisators and takes a commission, the club carries on an "adventure or concern in the nature of trade" within the meaning of section : of the Excess Profits Duty Act, and consequently carries on a "business" within the purview of section 3 of that Act, in respect of the sums received under the foregoing heads, and is liable to pay excess profits duty The ultimate destination of the surplus, if any, received in respect of these matters, is immaterial. The test is, whether the moneys were received by the Club from non-members of the Club and in exchange for something which is given by the Olub, and in

Excess Profits Duty Act-concld.

respect of which profits are made. 'C CALCUTTA TURF CLUB V. SECRETARY OF STATE FOR INDIA, 25 C. W. N. 734; 48 C. 844 473

Execution application-Notice to judgmentdebtor-Failure to appear - Decision, ex parts -Objection, that application was time barred, whether maintainable.

Where notice of an application for execution is issued to the judgment debtor to appear on a given date to decide whether or not the application was barred by time and he fails to appear and the point is decided against him, his failure to oppose the application precludes him afterwards in raising that objection, not on the ground of res judicata but upon the ground of a decision in the very litigation upon the same application. A AUHAMMADI BEGUM v UMDA BEGUM

- Deposit of decretal amount - Application for refund by sons of decree-holder Notice to decreeholder - Ex parte order - l'ayment to sons - Decreeholder's application for refund - Procedure

A decree-holder applied for restoration of certain sums of money deposited in satisfaction of the decree and pail to his sons under an exparte order after notice to decree-holder The Cou-t took security from the sous for the repayment of the money and ordered the decree-holder to file a suit within three months to have his title declared :

Held, that the Court had no authority to direct the decree-holder to file a sait nor had it authority to take security for the return of the money and that the application of the decree-holder should have been treated as an application to set aside the ex parte order against him A BITHAL DAS v. IWAN RAM, 2) A L J. 53; 4 U P L R. A 89

Execution of decrie - Sale—Title of auc-

tion-purchaser.

A bona fide auction-purchaser need look only to the decree and order of sale of the Executing Court and is not bound to enquire further into title long as the decree remains valid, the proceedings taken under that decree, so far as they affect third parties in the same position as bona fid. auctionpurchasers, cannot be impugned. L INDAR SAIN v PRABBU LAL, 3 L. 88

Extradition Act (XV of ISO3), ss. 7, 9. 15. 8, Sch. I -"Extradition offence" -Absconding from jail, whether such offence-Warrant for arrest of such absconder to District Magistrate, validity of High Court, jurisdiction of, to interfere in case of invalid warrant Treaty prohibiting extradition in certain case, effect of

Absconding from jail is not an 'extradition offence" as described in the First Schedule to the Extradition Act, and, as section 7 of the Extradition Act applies only to extradition offences, a warrant issued under that section by an authority in a Foreign State for the arrest of a person so ab conding in British India is wholly illegal and without jurisdiction, and the arrest of that person in British India is without any authority

The procedure for requisitioning the surrender of any person accused of having committed any offence, not necessarily an extradition crime, is laid down in section 9 of the Act but the requisi-

Extradition Act-concld.

tion in such a case has to be made "to the Government of India or to any . ocal Government." Where such requisition is not made and the warrant is addressed to the District Magistrate, the latter has no jurisdiction to make an arrest under it.

Although section 15 of the Extradition Act emp wers the Government of India and the Local Government to stay any proceeding taken under Chap er III of the Act, and to direct any warrant to be cancelled and the person arrested to be discharged, yet in a case where action is taken under the Act under a warrant which is not valid, the jurisdiction of the High Court to interfere is not necessarily ousted

here a Treaty with a Foreign State prohibits extradition for offences not specified therein, such prohibition overrides the provisions of the First Schedule to the Extradition Act by virtue of section In of the Act: but where there is no such provision in the Treaty, section 9 of the Act would not in any way derogate from the Treaty. Pat JAIPAL BHAGAT v EMPEROR, 23 CR L. J. 293

Fraud-Collusion-Suit to recover money paid in satisfaction of traudulent decree, when maintainable

A suit for refund of money paid to the defendant in satisfaction of a decree on the ground that the suit in which the decree was obtained was a false suit and was supported by false evidence, is not maintainable in the absence of evidence in support of the collusion. A SHEO PRASAD v SRI PAL, O A. I. . 5

- Mere non-service of summons does not amount

to fraud Proof of fraud

Mere non-service of summons is no evidence of fraud In order to charge a party with fraud in the suppression of summons it is essential to prove that the non-service is the result of some active part taken by that party in not having the summons served and thereby keeping the opposite party from the knowledge of the suit at CHATTRA KUMARI DEBI V. RADHAMOHAN SINGARI, 3 P. L. T. 451 137

Gift, imperfect-Shares in limited Company-Transfer-leed executed-Transfer not made in Company's register, effect of-Transfer, intended, whether can be treated as trust

A. executed a transfer deed whereby he transferred certain shares in a Company to his wife and gave possession of them to her. She, however, did not, till after his death, complete the transfer-deed by getting her name entered in the registers of the Company as share-holder nor was it in his lifetime presented for registration with the Company :

Held, that the gift was not perfected as the donor did not do everything which, according to the nature of the property comprised in the gift, was necessary

to be done to transfer the properly

Held, also, that as there was no equity to perfect an imperfect gift, the gift having been intended to take effect by way of transfer, the 'ourt would not hold the intended transfer to operate as a declaration of trust. . AMARENDRA KRISHNA DUTT v Most-586 MU JARY DEBI, 48 C. 9.6

Government of India Act, 1915, (5 & 6 Geo, V, C, 61), S, 107

Guardians and Wards Act (VIII of 1890), s. 7 (3)-"Will," meaning of-Court,

power of, to appoint guardian of minor.

Inasmuch as the word 'Will' in section 7 (3) of ards Act occurs in intimate the Guardiars and collocation with the words "or other instruments" it must be interpreted as meaning a written Will

An appointment of a testamentary guardian s ands in the way of the appointment of a statutory guardian by the Court but in the case of an appointment of a gnardian by an oral testament a 'ourt can ignore the appointment and make statutory appointment of its own if it considers best in the interests of the minor. M PARVATEI AMMAL ". ELAYAPERUMAL KOVAR, (19'21 M. W. N. 67

- S. 9 (2)-Minor heir-Guardian of propappointment of Estate of decrased under

Administration The appointment of the mother of a minor as administratrix to his father's estate, does not deprive the minor of his interest in the estate of his father, and an order of the 'ourt within whose jurisdiction such property exist- appointing a guardian of the property of the minor is not without juris. diction and cannot be treated as a nullity. C LALIT KUMAR MUKERJEE v DASARATHI SINGHA, 48 0 90 4 26 I

Hereditary Village Offices (Mad. 111 of 1895), S. 7 Enquiry by Divisional Officer into Village Munsif's conduct · Framing of charges High Court, jurisdiction of, to interfere -Civil Procedure Code (Act V of 90-), s 15-Government of India Act, 1915, (& 6 Geo. V, c. 61), s. 107 - Letters Patent, (Mad) cl 16

The High Court has no power to interfere with an order passed by a Revenue Divisional Officer in an enquiry under section of the Wadras Hereditary Village Offices Act either under section 15, Civil Procedure Code, or section 07 of the Government of India act, or clause 16 of the letters Patent inasmuch as the Revenue Divisional Officer proceeding under the said section is not a court.

Per Ayling, Offg, C J - The two things required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. An officer acting under section 7 of Madras Act III of 895 cannot be styled a Court subject to the High Court's Appellate Jurisdiction M PALANIEUMABA CHINNAYA GOUNDER, In re, 14 L. W. 5.8; , 92 , M. W. N. 757 41 M 1, J. 566 577

High Court, rule of, regulating hours of sitting o Court Rule contravention of-Material irregularity - Revision

Where, in contravention of a rule of the High Court laying down that the ordinary hours of attendance of Judges of Civil Courts are from 10- 1) A. M. to 4 P. M., & Court, without any warning to the public and in the absence of exceptional circumstances, calls on a particular suit for hearing after the hour of 5 P M., it nots in the exercise of its jurisdiction with material irregularity, and its proceedings are liable to be set aside by the High Court in revision. A Bayes & Co. v. Ban Prasad, 20 A. L. J. 188 167

Hindu Law-Adoption - Acknowledgment, effect of-Widow-Maintenance, amount of-Prin-

Under the Hindu Law if in case of an adoption giving and taking is not established as a fact, no amount of acknowledgment would make one an

adopted son

No hard and fast rule can be laid down that a Hindu widow is entitled to a particular fraction of the income of her hasband's estate as her maintenance The circumstances of each case must be considered, such as, the value of the estate and its income, the position and status of the deceased hasband and his wifow the expenses involved by the religious and other duries which she has to discharge, and so for h, together with the fact that whether the widow has been given a senarate property by her husband for her maintenance KRISHNA BHAMINI DASI D. BRAJA MOHINI DASI, 25 C. A. N. 403

- Widows-Senior widow-Preferential right-Junior widow, when can adopt.

Under the Hindu aw. in the absence of any direction from the husband, the senior widow has the preferential right to adopt She does not forfeit that right by the mere fact of her having lived apart from her husband for a number of years.

Where a junior widow wants to make an adoption the p oper course for her is to ask the senior widow to get the consent of the male sapindis to perform

the adoption and to perform it herself.

Per Ramesam, J-A prohibition by the busband against adoption by the wife cannot be inferred by the nere fact that the husband and wife were living apart

Until a senior widow clearly gives up her preferential right of adoption the junior widow has no right W MUTHU-AMI NAICKEN D. PULAVAB ATTAIL. 15 L W. 4 . W M. L. T 60; (1982) M. W. N 5.9; 49 M. L J. 0 : 45 W 2.6

- A'lanation by widow-Legal necessity. proof of -R rital in deed, evidential value of

A mere recital in a deed as to the necessity for a loan cannot be taken as conclusive evidence of the legal necessity for it The recitals coupled with other evidence, circumstantial or otherwise, may amount to sufficient proof in circumstances that the transactions were binding upon the family A SARJU PRABAD U MUHAMMAD SHAKUR

- by widow-Reversioner, separate suit by -Cause of action. See Civil PROCEDURE (ode, O II, R 2

- Legal necessity - Presumption-Deel mentioning purpose of sale - Consideration, portion of, for legal necessity, effect of Family benefited, effect of Antecedent debt-Usufructuary mortgage creating personal liability, whether antecedent debt

Where a sale-deed, although jointly executed by the heads of all the branches of a family, mentions the purpose for which the sale was made, there is no room for raising any presumption with regard to legal necessity for the transaction. The Court has merely to examine whether that purpose is one which Hindu Law recognises as valid.

Where it is found that a portion of the sale consideration was taken by a father for legal necessity and that the family benefited by the transaction

to that extent, the sons can recover the property sold only by re-paying the said portion of the saleconsideration

In order to validate a transaction entered into by a father in consideration of antecedent debt, there must be not only antecedency in time but also true dissociation in fact. Once it is proved that the sale took place in consideration of such antecedent debt, the sons are precluded from attacking it, but they are not precluded from raising the prior question whether the sale really was in consideration of such a debt

A clause in a deed of usufructuary mortgage executed by a father, making the mortgagor personally liable for the mortgage money in case the mortgagee be dispossessed from the mortgaged property, does not constitute a personal liability such as may be treated as antecedent debt O MANZURAN BIBL v JANKI PRASAD, 9 O. L J 25 930

father of family estate to secure loan - Sons, liability of.

A loan obtained by the father of a Hindu joint family on the security of a mortgage on the family estate is not an antecedent debt binding on the sons. N BALOO v GODAWARIBAI 257

Mother's share, incidents of—Compromise decree— Matters outside scope of suit dealt with—Res judicata

In a partition in a joint Hindu family, it is quite competent for any members, who are so minded, to continue joint.

The share that a Hindu mother in Bengal takes on a partition among her sons is in lieu of the right of maintenance which is carved out of the son's shares and at her death goes back to and forms part of the shares out of which it came.

where in a suit a compromise decree is passed dealing with marters that do not relate to the suit, the decree is without jurisdiction and does not operate as res judicata

In a partition among certain brothers of a Dayabhaga Hindu family and their mother, some of the brothers separated and the rest continued joint with their mother. Subsequently a partition suit was fought out among the latter. The suit was compromised and a consent decree passed according to which the brothers who had previously separated relinquished in favour of the brothers suing for partition any rights they might acquire in the share of the mother at her death. The mother died and in the dispute over the share left by her the question was about the effect of the consent decree:

Held, that the decree, in so far as it dealt with the relinquishment of the rights of the previously separated brothers in the shares of the mother, was without jurisdiction, inasmuch as it dealt with matters with which the suit in which it was passed was in no way concerned, and that, therefore, it did not operate as res judicata. C Shashi Bhusan Shaw "Hari Narain Shaw, 25 C. W. N. 990; 48 C 10-9

Adulterous connection, effect of-Agreement between

Hindu Law-contd.

concubine and wilow, whether can be enforced-

A concubine who lives with a Hindu up to the time of his death is in general entitled to maintenance from his estate in the hands of his widow, but this right does not extend to the case of an adulterous connection

If a concubine's claim for maintenance under Hindu Law fails she cannot fall back on any agreement between her and the widow with regard to the maintenance, inasmuch as the agreement is a mere promise to pay unsupported by consideration.

O CHANDRA KUNWAR V RUEMIN, 40. L. J. 60 85

Court of Wards - Pious duty of son, whether arises - U. P. Court of Wards Act (III of 89), s 34.

It is not the pious dury of a son to pay off such loans as were contracted by his father during the time that the estate was under the Court of Wards as during such a time the father is incompetent uncer section of the U.P. ourt of Wards Act to enter into any contract which might involve him in pecuniary liability A BALDEO PRASAD v BINDESHRI PRASAD, 20 A. L. J. 241

Sons of same mother-Father different-Sons, status

Under the Hindu I aw of Inheritance sons of the same father are regarded as brothers, a distinction being made between sons by different mothers. But sons of the same mother by a different father, though born of the same womb belong to a different family, and as such are outside the category of the class of heirs under the heading of 'brothers'

Therefore, according to the Hindu Law a brother by the same father though by different mother is entitled to succeed in preference to a brother by the same mother but by a different father, as such a brother has no claim B EKOBA PARASHRAM ".

KASHIBAM TOTARAM. "4 ROM ". R 29 341

- Joint family-Ailenation by fatherDeclaration in favour of son - Consideration, return

Where a Hindu son obtains a decree that a sale of family property by his father shall not affect his rights as a co-parcener the vendee is not entitled to have a condition attached to the decree that the plaintiff should refund the sale-price paid by the vendee in respect of the portion of the property affected by the decree. L BADAM v. MADHO RAM, 2 L. 333

validity of -Appeal, second -New plea.

An alienation by a co-parcener in a joint Hindu family of the family property, which is not for the benefit of the family, is liable to be annulled in its entirety at the instance of another co-parcener

The High Court will not ent rtain an argument which is raised for the first time in second appeal.

L MUNSHI LAL v SCHAN LAL, 3 1. 1. 1. 7 881

accrues—After-horn son, position of Limitation, fresh start of Sons, elder, position of Limitation Act (1X of 1108), es R, application of

Under Hindu Law the cause of action in respect of an alienation accrues when the purchaser takes

possession and a new cause of action does not accrue upon the subsequent birth of a son in the family, and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer, and as he was not born on that date and was thus under no disability on that date, he could not obtain the benefits of section 6 of the Limitation Act And, when he could not obtain such benefit himself, he could give no benefit under section 7 to his elder brothers O RANODIP SINGH U. HAMESHAR PRASAD, 9 O. L. J. 45

- Joint family-Antecedent debt-Mort.

gage, whether antecedent debt.

In order to bring a case within the exception that family property in the hands of the sons is bound by a mortgage executed by the father during his lifetime to pay off an antecedent debt, two conditions must be fulfilled, first the mortgage must have been to discharge an obligation antecedently incurred and, secondly, the obligation antecedently incurred must have been incurred wholly apart from the ownership of the joint estate.

A mortgage whereby joint family property is charged cannot be regarded as an antecedent debt. L LAKHU MAL U BISHEN DAS, 3 L. 74 408

Bond in lavour of managing member -Joint property-Burden of proof-Presumption.

Where a bond is executed in favour of the managing member of a joint Hinda family, the presumption, in the absence of evidence to the contrary, is that the bond is joint property of the family. It is for those who assert the contrary to make good their case Mere proof that some of the members of the family had some private transactions, would not prove that the bond was the private property of the member in whose favour it was executed P. C. BANDHU RAM U I HINTAMAN SINGH, 3 P. L. T. . 95; 26 C. W. N. 406, 20 A. I. J. 402

- Debt incurred by manager for

benefit of family, nature of

In the case of a joint Hindu family, the debts contracted by the managing member for the joint family are binding on the joint family, but in enforcing the debt the liability of the members of the family is not personal, the liability being limited to the extent of the joint family property in which they are interested. M RAMA PATTER v. (1922) M. W. N. 21, 80 M. L. T. 209; 45 M. 345 155

- Decree against one member, when can be enforced against joint family property.

In order to make the other members of the joint family liable under a decree passed against the managing member it ought to be shown that the suit was brought against him in his representative capacity. L MELA WAL v. GORI

Manager, position of-Promissory note executed by manager - Other members, whether

can question.

The position of the head of a joint Hinda family is not the same as that of an ordinary business agent and, according to the true view, a joint Hindu family being a legal person according to Hindu

Hindu Law-contd.

Law, lawfully represented by and acting through the managing member or head thereof is included ordinarily in the term "a person"

Hindu family A joint can execute negotiable instrument through its manager, and its other members cannot escape liability on the ground that it was not made or signed by them although it is open to them to raise the question whether the promissory-note was in fact made for family purposes or as a breach of trust by the person whose signature appears thereon for and on behalf of the joint family. A KBISHNANAND NATH v RAJA RAM SINGH, 20 A L. J. 283 150

- Joint family-Mortgage by karta, suit on-Karta, whether proper guardian of minor member

In a suit on a mortgage executed by the karta of a joint Hindu family brought against the karta and the minor member of the family, the karta is not the proper person to be appointed guardian ad litem of the minor and a decree obtained against the minor in such a suit is a nullity. A MURCI DHAR T. PITAMBAR LAL, O A. L. J. 329

Mortgage by some members-Personal decree—Legal necessity—Interest - Limitation. Where a mortgagee from some members of a Hindu joint family seeks only a simple money. decree in respect of the mortgage-debt, no question of legal necessity arises In the absence of fraud. undue influence, or other circumstances which would invalidate the contract, the members who executed the mortgage are personally liable and the other members are liable to the extent of the assets of the executants who are dead which have come into their hands

Where a mortgage-deed provides that the interest will be paid year by year and in case of default it will be added to the principal and compound interest will be charged; that the mortgagee might realise the interest every year by suit or might have it added to the principal, and that at the time of redemption or foreclosure the total interest due would be deemed to be a separate item which the morigagee would be entitled to recover from the person and other property of the mortgagors, the mortgagee has an option either to sue for his interest year by year or to allow it to be compounded and to sue for it at the time of redemption or foreclosure and no part of the interest can become barred by time. O MARRAJ PRAG DIN v. BHAGWATI SAHAI, 5 O. L. J. 418

- Legal necessity-Recital of purpose, evidentiary value of-Loan for particular purpose-Buidence.

A recital in a deed of the purpose for which the money is borrowed may not by itself be sufficient to prove the purpose for which the money was borrowed and is not in itself sufficient against third parties, but it is clear evidence of the representation made to the creditor, and if the circumstances are such as to justify a responsible belief that an enquiry would have confirmed its truth then, when proof of actual inquiry has become impossible, the recital coupled with the circumstances will be sufficient evidence to support the deed.

In considering for what purpose a particular loan was taken evidence which proves that just before the loan two of the borrowers came to an independent third party and asked him to arrange a loan for a particular purpose, and that he did arrange the loan in suit for that purpose, is valuable and important evidence to show that the money was borrowed for that purpose. O RAM SARAN v. DAWAN SINGH, 24 O C. 3°C

--- Managing member-Power to alienate tamily property-Legal necessity-Consent of other members implied - Mortgage - No title in mortgaged property-Title subsequently coming-Mortgagor, duty of.

The head of a joint family cannot mortgage the joint family property without consultation with and consent of the other members but where in a suir legal necessity is proved it is unnecessary to prove consent because in such a case this is implied

Where a mortgagor morigages a certain property as having a right to do so but in fact has no such right and subsequently title to a portion of the property comes to him he must make good his representation to the extent of the property which comes to his hands Pat KAMLA PRASAD v. NATHUNI NABAYAN SINGH, 1922 PAT 1 16; 3 P. L T. 401 149

- Marriage-Sudras-Intermarriage between Bengali Kayastha and Tanti woman, validity of -Sons, whether legitimate.

A marriage which actually takes place between a Bengali Kayastha and a Tanti woman both regarded as Sudras in Bengal, is valid in law and the sons of the union are legitimate and entitled to inherit the property of their father BISWANATH DAS GHOSE V. SHORASHIBALA DASI, 48 C. H H; 5 590 C. W. N. 639

- Mortgage by father-Suit by mortgagee -Sons not joined - Mortgage decree against father -Suit by sons to set aside decree Want of legal necessity and antecedent debt-Pleas available to plaintiffx-Burden of proof.

In a suit by sons to set aside a mortgage-decree passed against their father in respect of joint family property including their share in it in a suit to which they were not impleaded as parties, it is open to them to plead that part of the debt secured by the mortgage was not for legal necessity and the balance was not advanced for the satisfaction of an antecedent debt

Per Hallijaz, A J. C .- The decision in Motiram v. Asaram (Ramgopal), 53 IND. CAS 76; 6 N 1, R 61, is correct and the plaintiffs in a suit to impeach a mortgage-decree passed in a suit against their father to which they were not impleaded as parties are entitled to advance the plea that the debt was not for legal necessity, nor was it an antecedent

debt of their father which bound them.

The doctrine of reasonable satisfaction after due enquiry as to the propriety of an alienation of joint family property by the manager of the family must apply just as much to an antecedent debt of the father as to family necessities or pressure on the

estate Per Kotwal, A. J. C .- In a suit by sons for a declaration that the mortgage-decree passed against their father in suit to which they were not parties

Hindu Law-contd.

is not binding as against their share in the joint family property as the mortgage was not for legal necessity or for antecedent debts. they are entitled to challenge the decree on grounds personal to themselves and it is open to them to have the question tried whether the mortgage executed by the father was binding on him.

In such a suit the onus is on the defendant who seeks to enforce the mortgage either on the ground of legal necessity or on the ground of its being for an antecedent debt.

Per Dhobley, A J. C. - The rights of co-parceners in a Hindu family consisting of a father and his son do not differ from those of a co-parcener of a like family consisting of undivided brothers The son occupies the same position and possesses the same right against his father in respect of the ancestral property, as brothers have against each other in a joint family.

It has been a settled law in Central Provinces and Berar that an alienation for value by a member of a joint Hindu family holds good to the extent

of his own share in the property.

No single co-parcener can alienate anything beyond his own share in the joint property, father being no exception to it When, however, a single co-parc ner alienates the joint family property for necessary family purposes the alienation is binding upon the other members and upon the whole prop-

erty covered by the alienation

In a suit brought on a mortgage executed by the father, the son can call upon the mortgagee to show that the mortgage was for one of the two purposes either for legal necessity or for the satisfaction of an antecedent debt. The son's position is not injuri usly affected by the mortgagee's omission to join him as a party to his mortgage suit and by the son being thus compelled to bring a separate suit for protecting his own interests.

In a suit brought by a person to avoid a mortgage-decree passed in a suit to which he was not joined as a party he is not confined to the plea that the debt was borrowed for immoral purposes but he can plead that there was no legal necessity for the loan or that no portion of it was an autecedent debt

A loan made to the father on the occasion of a grant by him of the mortgage on the family estate is not antecedent debt and the mortgage so created is not binding on the son's share in the

property.

The sale or charge by a father of joint family property in order to be binding on the son's shares should be made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate.

The maxim that everybody is presumed to know law and that its ignorance is no excuse cannot be applied when it has to be decided whether a certain act was or was not bona fide N DHUDABAI v.

NABAIN - Mortgage to pay off prior mortgage of date when son not born-Antecedent debt - Legal necessity.

A mortgage effected by a Hindu father to pay off a prior mortgage of a date when a son was not born to him is an antecedent debt for which the father can validly alienate family property, and no question of legal necessity arises for the validity of such a debt.

Pe Walsh, J. In an old transaction the failure on the part of a creditor to prove every pie raised by the debtor and expended for family necessity does not constitute a sufficient ground in law for interfering with the transaction even pro tanto. A SURAJ PRASAD V MAKHAN LAL, 20 A. L J. 236 131

- Partition, suit for, by purchaser of son's share-Mother, whether entitled to share-Stridhan received from husband or tather-in-law, whether should be deducted - Individual member, right of

A Hindu mother cannot compel a partition so long as the sons remain united, but if a partition does take place between the sons, she is entitled to a share equal to that of a son in the co-percenary property, and she is entitled to a similar share on a partition between the sons and the purchaser of the interest of one or more of them.

If the mother has received stridhan from her husband or father-in-law, its value should be deducted from her share, but the deduction to be allowed does not include stridhan received from the family of the father of the lady

A member of a joint Hindu family cannot, by alienation of his interest, prejudice the position of another member, because no owner of property is competent as a general rule, to convey to any person a higher right than what he himself possesses JOGOBONDHU PAL E. RAJENDRA NATH CHATTERJEE, 34 C L. J 29 121

- Temple property-Permanent lease -Rent - Construction - Shebuit's powers - Long lapse of time-Presumption of validity Parties, duty of, to define exact terms of dispute

A lease of acres of land was evidenced by a rent-note of 1-21, which provided for the payment of Rs 40 a year as rent and if the rent was not paid, the lessee was to be at liberty to remove the structures which he might have placed upon the property. The lessee sub-let the property in 87 , INNN and INCO and the lessors never raised any objection :

Held, that the lease was a permanent lease which could only be terminated by non-payment of rent

The disability of a shebait of a Hindu deity to make a permanent grant of endowed property is not absolute.

Although the manager of a temple property for the time being has no power to make a permanent alienation of the property in the absence of proved necessity for the alienation, yet, if there is a long lapse of time between the alienation and the challenge of its validity, that is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power.

Where, therefore, a lease made by a grantee of property for a deity is questioned after 00 years, when every party to the original transaction has passed away and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, the assumption is, on the principle of securing as far as possible

Hindu Law-contd.

quiet possession to people who are in apparent lawful holding of an estate, that the grant was lawfully and not unlawfully made

the attention of parties to litigation in India called to the importance of defining, at the earliest moment and in the simplest terms, the exact character and extent of the dispute which is going to be made the subject of litigation] P . MAGNIKAM SITARAM V KASTURBHAI MANIBHAI, 26 C. W N 473; 42 M. L. J. 50 : 30 M. L T 268; 20 A L. J 371; 35 C. L. J. 421; 24 BOM L. B. 584; (1922) M. W N. 319

-- Waste by widow of corpus of moveables-Reversioner, right of-Relief, nature and form of, against widow and her transferee-Limitation Act (IX of 04), Sch I, Art 120.

A Hindu widow is accountable to her reversioners for waste of the corpus of the moveables and she can be made to re-place it if she is in a position to do

A reversioner is entitled to sue for the moveable corpus in the hands of a Hindu widow being reduced to possession and handed over to a Receiver appointed in the suit subject to any question of limit tion

Transferees from a Hindu widow without consideration may be made to re-place any part of the moveable corpus of the estate of the last male owner which can be traced to their hands.

A reversioner's right to sue to restrain waste of moveables by a Hindu widow is governed by of the First Schedule of the imitation Article Act. M GOGULA VENKAN A v. GOGULA NABASIMHAM, 14 L. W. 95; (1921, M. W. N. 590; +1 M. L J. 2 11; 44 M. 984

 Widow — Alienation — Necessity — Future maintenance.

A widow is not always bound to sell exactly for the amount for which there is legal necessity

A Court must see in each case of an alienation by a widow whether having regard to the circumstances the alienation is a proper one.

The rule that a widow is not justified in alienating her husband's estate for future maintenance is not an inflexible one what is to be seen is whether in the particular case the widow has dealt fairly towards the expectant heir.

Where, in order to save the property from being sold by auction at an under-value, the widow sells it privately and pays off the decretal amount and some other debts and manages to save a part of the consideration for her future maintenance, the transaction must be upheld as an act of good management and prudence

"here the bulk of the consideration for a sale is for legal necessity, the sale ought to be upheld. L NAMAN MAL v. HAR BHAGWAY, L. 357 ---- Alienation - Accessity - Maintenance

-Reversioners when bound

Where a Hindu widow, knowing that she has not sufficient income to maintain herself, so improves the estate, by selling the land, as to provide sufficient for her own maintenance the arrangement is not merely a prulent arrangement but a necessary one, and is binding on her husband's reversioners L RADES RAM v. KHUSHI RAM 343

- Widow-Partition among family - Widow husband - Intention -Hus. given full share of ban i's heirs entitled to such property after widow's

here after the death of a brother the remaining brothers partition the joint family property and give to the widow of the deceased brother the full share of their deceased brother in the immoveable as well as in the move ble property and in the assets of the joint family business, and the share is much more than what is needed for her maintenance, it may be assumed that the intention of the brothers was to regard the widow as the representative of the late husband and in such a case the share thus allotted to the widow descends after her death to her husband's heirs. A JHABBU LAL P **58**6 JUALA PRASAD

to widow-Construction -- Will-Devise "Full proprietary rights" - Estate taken by widow -Alienation - Validity -"Malik," meaning of - Words in Will, construction of.

A Hindu governed by the Mithila School of Hindu Law made a will by which he directed that, after his death, his widows shall be heirs to all his immoveable properties and shall, in every way, exercis full power and all proprietary rights over all the moveable and immoveable properties:

Held, that the widows took an absolute estate with

full powers of alienation.

It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will, which was adopted by a Court in another case.

The term "malik', when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, means an owner possessed of full proprietary rights, including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not

intended to be conferred.

The meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it is related, and the locality of the testator from which it may receive its P. C. SASIMAN CHOWtrue shade of meaning DHUBAIN v. SHIB NARAYAN CHOWDHURY, 16 L. W. 434; 26 C. W. N. 425; 42 M. L. J. 492; 30 M. L. T. 212; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; 193 (1922) M. W. N. 26°; 49 I. A. 75

----- Woman's estate—Daughter, right of, to bargain away her son's estate-Minor party to suit-Guardian not appointed-Compromise, effect of-Res judicata.

A Hindu daughter in possession of a daughter's estate cannot bargain away her son's right which

is only a spes successionis.

A minor cannot be considered a party to a suit so long as a guardian for him has not been appointed in the case and cannot be personally bound as a party by any compromise decree arrived at before the appointment of a guardian.

A compromise entered into by a Hindu daughter in possession of the whole property by inheritance to her father, the last male-holder, whereby a certain portion of the property is given to the

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daughters of a predeceased member of the family with the full knowledge that they have no right to it is not a family arrangement binding on her son

The mere fact that a Hindu daughter joins her minor son who is quite an unnecessary party to suit, will not make the decision against her in that suit res judicata against her son. A NARAIN SINGH v RAJ KUMAR SINGH, O A L. J. 251

Woman's estate-Reversioner --Declaratory suit of reversionary title during widow's lifetime, maintainability of.

A declaratory suit by a reversioner during the lifetime of an hairess that he will be entitled to get the property on her death is not maintainable MUNNU LAL " RAJA RAM, 2) A L. J 28:

Income Tax (VII of 1918), s. 9-

"Profit." meaning of - Assessing officer, power of-Bank Goss earnings-Securities-Depreciation in value-Deduction, whether permissible

The term "profits" in section 9 of the Income Tax Act means chargeable income, and must be computed from the gross income after allowing for the sums paid and debited as detailed in sub section (2) of that section.

The assessing officer is not entitled to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in subsection (2 of section 9 of the Income Tax Act.

A deduction on account of depreciation on war bonds and securities held by a Bank, out of its gross earnings, is not a deduction proper and necessary to be made in order to ascertain the real asses able profits under the Income Tax Act. B THE TATA INDUSTRIAL BANK, LTD, In re, 24 Bom. L R. 118 979

Instalment bond-Entire amount payable on

default Limitation, operation of.

In a suit upon a money-bond which provides for repayment by instalments and which contains a condition that on failure to pay any one instalment the creditor would be entitled to recover the whole amount at once, the point to consider is, whether the creditor had an option to waive his right to bring a suit at once on the happening of the default, and whether, as a matter of fact, he did exercise this right of waiver; in each case the question is one of fact.

In the absence of anything to show such option and exercise of waiver limitation begins to run from the time when the first default in the payment of instalments is made. A JIWAN MAL U. JAGESHAR KASONDHAN

Interpretation of Statute-Equitable

panciples.

In interpreting law equitable principles as its consequences cannot be overlooked In determining the respective rights of parties the fact that by a certain interpretation unjust results would follow and that a rightful person would suffer for no fault of his, on account of circumstances over which he had no control and for which he could not be held responsible, cannot be lost sight of If by another interpretation this result would not follow that interpretation should be adopted. N JOGESHWAR IL MOTI

Jurisulction-Civil and Revenue Courts-Proceeding of Revenue Court-Fraud-Civil Court, whether can be moved

Per Walsh, J. - A Civil Court cannot set aside the proceedings of a Revenue Court, but it might declare that the conduct of the parties to the suit, in obtaining orders in their favour, no matter what they are, has been in fact fraudulent and that the plaintiff's interest, if he had any, in the property in suit is not affected by any order so fraudulently obtained It can declare, for instance, that the plaintiff is entitled to possession of the property as owner and can award damages for deceit or fraud. A JAMMU v. MAHADEO PRASAD, 4 U.P. L. R. (A) 84

action. Contract for delivery of goods-Cause of

Where a contract for the sale of goods is made in Bengal and the goods are to be sent to Bengal from a place in the U. P, the cause of action for a suit on the contract does not arise wholly or in part at the place in U. P. from where the goods are to be sent but arises at the place in Bengal where the contract is made. A PURAN CHAND-AMER CHAND.

7. JODH RAJ-RAM KUMAR

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The jurisdiction of a Court to try a suit must be judged by the averments in the plaint, and does not depend upon the relief the court finds itself able to give after trial. M ELUMALAI (HETTY & BALKRISHNA MUDALIAR, 41 M. L. J. 29.; 14 L. W. 37.; (1921) M. W. N. 7.14: 44 M 65

dispute as to—Tenancy itself, existence of, denied—
Document produced to prove tenancy—Genuineness of
document, finding as to

Where in a suit for possession, the defendant sets up a tenancy, and there is no dispute between the parties with regard to the nature of the tenancy, but the plaintiff denies the very existence of the tenancy, set up in defence and the defendant produces a document in support of his defence, the Civil Court is quite competent to give a finding regarding the genuineness or otherwise of the document. O Sheo Ratan v. Ram Narayan Pande, 9 O. L. J. 99

High Court, whether point can be raised in.

Where a point as to jurisdiction that the suit is not cognizable by the Oivil Court is not raised in the First Court, it cannot be allowed to be raised in the High Court, by reason of section 96 of the Tenancy Act A BHIKHARI SINGH v. JOKHAN 856 Land Acquisition Act (I of 1894).

8.6 (3)—Calcutta Improvement Act (V of 191)—Calcutta Municipal Act (III of 1899), ss 20, 357, 558—Evidence Act (1 of 1872), s. 4—Proceedings before Land Acquisition Officer—High Court, power of, to inquire—Specific Relief Act (I of 1877), s. 45 (e).

An application was made under section 45 of the specific Relief Act by the owner of certain premises situated in Calcutta and about to be acquired by Government for the widening of a street under the scheme of the Calcutta Improve ment Trust on the ground that there was no sanctioned project for the widening of the street near which the promises were on the part of the Trust nor was any sanction obtained by the Calcutta

Land Acquisition Act-contd.

Corporation which was acquiring the land at the cost of the Trust for any project in connection with that street. It was urged on behalf of the Corporation that under section 357 of the Calcutta Municipal Act the Chairman with the approval of the Corporation could acquire the land, that the procedure under section 4', Specific Relief Act, was not applicable and that under section 6 (3) of the Land Acquisition Act. The declaration was conclusive evidence that the land was needed for a public purpose:

Held, that though a notification issued under section 6 of the Land Acquisition Act was conclusive so far as section 4 of the Evidence Act was concerned, yet the High Court was entitled to inquire into the validity of the steps which led up to that declaration and into the legality and otherwise of the acts of the Calcutta Corporation and of the Improvement Trust.

Held, also, that it was not the policy of the Calcutta Municipal Act that the special powers given to the Corporation for acquiring land for certain purposes named in the Act were to be used to enable another, body to acquire land through the medium of the Corporation, however estimable the purpose and that the powers of acquisition of land under the Act, were limited to cases in which the Corporation itself intended to widen a street or effect an improvement

The Legislature when, under the Calcutta Improvement Trust Act, it conferred powers of acquisition of land with certain well-defined safeguards, did not intend that the Trust should abrogate those safeguards and acquire land through the medium of the Corporation of Calcutta for the purpose of street widening and street improvements C Maxick.

Chamber. Corporation of Calcutta, 43 C. 918

compensation—Special t setulness of land to be taken into consideration—Principle of re-instalement. Per Mookerice, J.—The assessment of the value of a land compulsorily acquired, regardless of the user for which it is specially fitted, cannot lead.

user for which it is specially fitted, cannot lead to an adequate award of compensation for the loss sustained by the owner. The special adaptability of the land acquired cannot accordingly be altogether ignored in the determination of its market-value.

Where land is compulsorily acquired, the fact that it has peculiar natural advantage, for a particular purpose is an element for consideration in the assessment of compensation, apart from any special value created or enhanced by the scheme of the acquisition.

Where a sum awarded to an owner of land compulsorily acquired under the Land Acquisition Act is not sufficient to re-place the premises or land taken, by premi es or land which would be to him of the same value, the compensation awarded is inadequate in view of the principle of re-instatement.

Per Buckland J. "here land is used for a special purpose in conjunction with other lands of its owner which are injuriously affected by its acquisition, and where it is established that the owner will be compelled by law to provide himself with

Land Acquisition Act—concld.

other land capable of being adapted in such a way as to restore to his land injuriously affected its former usefulness, one measure of the damage sustained by the acquisition injuriously affecting the other property is the difference between the sum awarded for the land acquired and the cost to the owner of providing himself with other land to be used in a manner similar to that in which the land acquired was used plus the cost of adapting it to such use. C SERAMFORE MUNICIPALITY C. SECRETARY OF STATE FOR INDIA, 25 C. W. N. 677; 49 C. 83 846

Land Improvement Loans Act (X!X of 1883), s. 7 (1) (c)-U. P. Land Revenue Act (III of 1901), ss.3160, 151, 162-Evidence Act (I of 1872), s. 114, Ill. (e) -Taqavi - Land sold for arrears-Incumbrance-Fresumption.

Where land is sold for arrears of tagari and the sale-certificate shows that it was sold under the provisions of sections 160 and 161 of the U. P. Land Revenue Act, free of all encumbrances, the Court may presume that the sale-proceedings were lawfully taken and that the facts stated in the salecertificate are correct.

A sale under sections '60 and '6' of the U. P. Land Revenue Act for arrears of tagavi can only take place if the taqavi had been granted for the benefit of the property sold where the salecertificate states that the sale has taken place under those sections, the burden of proving that the tagari had not been granted for the benefit of the property sold, lies on the person alleging it.

The plea that tagavi is not revenue and that land cannot be sold free of all encumbrances for arrears of tagavi is not maintainable in view of section 7 (1) (c) of the Land Improvement Loans Act, read with section 16. (1) of the U. P. Land Revenue O BARU RAM v. BARU RAM, S O. L. J 343 620

Landlord and tenant-Creation of intermediate tenure between putnidar and dur-patnidar, ralidity of -Suit by assignee of rent, maintainability

There is nothing in the policy of the law or custom of the country to prevent the creation of an intermediate tenure between a patnidar and a dur-putnidar. It is immaterial what name is given to it.

An intermediate tenure-holder who is merely an assignce of the rent is entitled to bring a suit for racovery of rent from the dur-putnidar C MADHU SUDAN SAHA CHAUDHURI v. DEBENDRA NATH SARKAR, 200 31 C. L J. 76

- Demolition of structures - Estoppel, equitable

-Acquiescence - Decree, form of.

Where, in a suit for demolition of structures erected by a tenant, acquiescence on the part of the landlord is pleaded, it is not enough for the tenant to show that the plaintiff landlord stood aside and allowed the structures to be erected, for one of the essential elements of equitable estoppel is that the person who sets up that estoppel must have acted in good faith and must have been under the belief that. he had a right to put up the buildings, which it is not possible for a tenant to put forward

Where a Zemindar brings a suit for demolition of structures erected 12 years before the suit, the decree

Landlord and tenant-concld.

should only declare the plaintiff as proprietor of the site but should not order demolition of the structures. A DULARI KOER v SALIG KAM, + U. P. 603 L. R. (A. 82

--- Occupancy holding, liability of, to sale in execution of decree obtained by sixteen-annas landlord for its own arrears - Landlord and Tenant

Procedure Act (VIII of 188.).

An occupancy holding in Sylhet, where the Landlord and Tenant Procedure Act, VIII of 359, is in force, is liable to be sold in execution of a decree obtained by the 16-annas landlords for its own arrears. C NEIPENDRA KUMAR DUTTA E, NADIR KHAN, 25 C. W. N 551

- Residential holding-Portion planted with fruit-bearing trees, if alters character of holding-Presumption of permanency-Statement in dakhilas, evidentiary value of.

The whole area of a residential holding caunot ordinarily be covered with buildings: the fact, therefore, that the surplus land is planted with fruit-bearing trees does not alter the character of the holding.

The evidence afforded by the dakhilas (rent receipts) as to the nature anon-permanency, of a tenancy is not to be regarded as conclusive. C SASHIBALA DEBI v AMOLA DEBI, 250, W N 375

- Tahsildar, when can recognise tenancy. Where a Tabsildar of a landlord has no authority

from his landlord to recognise a tenancy his act in granting a receipt for rent to a tenant cannot amount to recognition of the tenancy

The fact of a tenant's occupation of a land

for 9 years acquiesced in by the landlord does not lead to an inference that tenancy was created in favour of the tenant. Pat BALGOBIND MANDAR v. DWARNA PRASAD, (1822) PAT. 142; 3 P. L. T. 409

Landlord and Tenant Procedure Act (VIII of 1869)

Lease-Conditions to be fulfilled by lessee-Resumption of lease-hold-Under-proprietary title, whether can be acquired.

Where a lease imposes upon the lessee certain conditions to be fulfilled by him and provides for the lessor resuming the lease-hold in case the lessee fails to satisfy any conditions, but those conditions are no longer operative, and the possible bar to the lessee's under-proprietary title has been removed, the rights conferred by the lease are perfected into under-proprietary rights ORUTAR ALI V MUHAMMAD ZAMAN BEG, 9 O L. J. 10 Letters Patent (Cal.), cl. 12-Jurisdiction

-Agreement to mortgage land outside original jurisdiction-Suit for specific performance - Leave to sue.

A suit for specific performance of an agreement to mortgage lands situate outside the ordinary original jurisdiction of the Calcutta High Court, is a suit for land within the meaning of clause 12 of the High Court's Letters l'atent, and the plaintiff is not entitled to obtain leave under that clause to proceed with the suit in the High Court. C RATANCHAND DHARAMCHAND v GOBIND LALL, 48 C. 882

Letters Fatent (Mad.), cl. 33-Subs. tantial question of law though value trifling-Leave to appeal.

Letters Patent (Mad.)-coucld.

It is within the jurisdiction of the High Court, under clause 3. of the Letters Patent, to grant leave to appeal to His Majesty in Council in suits of small value where the right in dispute, though not exactly measurable in money, is of great private importance M RAJAH OF RAMNAD & KAMITH RAYUTHAN, 15 L W. 140; (1922) M. W. N. 46; 10 M. L. T. 42; 42 M. L. J. 78

Licensed Ware-house and Firebrigade Act (I of 1893., ss. 7, 15— Chairman, power of, delegation of—Order by Vice-Chairman, validity of—Bengal Municipal Act (III

of 1844), s 45—Application not disposed of within

30 days, effect of.

A Chairman may delegate, under section 45 of the Bengal Municipal Act, 1884, his duties or powers as defined by that Act to the Vice-Chairman but cannot by virtue of that section delegate to him his powers under the Licensed Ware-house and Fire-brigade Act, inasmuch as by virtue of section 9 of the latter Act the power can be delegated only to a Special Committee

Therefore, an order passed by the Vice-Chairman rafusing an application for license to use a building or place as a ware-house is no refusal under section 15 of the Licensed Ware-house and Fire-

brigade Act.

An application for license under section 7 of the Licensed ware house and Fire-brigade Act not disposed of within O days from the date of its being received by the Chairman, exempts the applicant from liability so long as the application is not finally refused. C Superintendent And Remembrancer of Legal Affairs, Bengal v. J. S. Mull, 25 C. w. N. 16J; c4 U. L. J. 20s; 23 Cr. L. '. 234

Life Assurance Companies Act (VI cf 1912), s. 8

Limitation, extension of-Review, application

jor, effect of -Appeal.

A petition in appeal of necessity re-opens in a Court of higher jurisdiction matters decided by a Court of lower jurisdiction. An application for review, on the other hand, does not of necessity by the mere fact of its being filed re-spen questions settled between the parties by the same Court The question whether an application for review will give a fresh starting time for limitation or not cannot be decided in the abstract but must depend on the facts of every case. If the application for review is not accepted and the 'ourt refuses to re-open the matter, no fresh starting point will be obtained by the applicant for the purpose of limitation O BHAOWAN BAKHSH SINGH V. MANRAJI KUNWAR, QO. 205 L. J. 899. 24 O C 250

, special law of.

In the case of a suit alleged to be barred under a special law of limitation, the party setting up the plea is not entitled to deduct the period of two months for service of notice under section 80 of the ivil Procedure ode C Secretary of State for India v. Annada Monan Roy, 24 C. L. J. O.

Limitation Act (IX of 1908), construction

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Limitation Act-contd.

The 'imitation Act being an Act of a restrictive character must be strictly construed. C NABENDRA LAU P. TARUBALA DASI, 25 C. W. N. 800 48 C S 7

Procedure Code (Act V of 1 08), s. 51-Application to set aside ex parte decree-Extension of time-Inherent power.

Section 5 of the Limitation Act is not applicable to an application to set aside an ex parte decree.

Section 151 of the Civil Procedure Code must not be used to defeat the imperative provisions of section 3 of the Limitation Act. L KHAIRATI v. UMAR DIN 270

position of—Suit by transfere, whether maintainable. A transferee from a minor cannot, under any circumstances, claim the benefit of section 6 of the Limitation Act, inasmuch as as soon as the transfer is made the special privilege which is vested in the minor is extinguished, so that the transferee cannot maintain a suit even if he brings it on the same date on which the transfer takes place, if it is otherwise not maintainable O Muhammad Nur Khan v Lachhmi Naravan, 9 O L.J. 38

trustee.

Section 10 of the 'imitation Act refers only to express trustees, and would not cover the case of a constructive trustee. M KRISHNAN PATTER v. LAKSHMI, 922, M. W. N. 117; 42 M. L. J. 1.9; 30 M L. T 2.8 45 M. 415

Application for leave to appeal to His Majesty in Council—Time requisite in obtaining copy of judgment, exclusion of.

In computing the period of limitation under Article 19 of the Limitation Act in a case of application for leave to appeal to His Majesty in Council the applicant is entitled, under section 12 (3) of the simitation Act, to diduct the time requisite for obtaining a copy of the judgment. Pat MAHABIR PRASID V. JAMUNA SINGH, P. L. T. 289; (1922 PAT 95 4 U. P L. R PAT.) 3

s. 12(2), (.)—Appeal Computation of time-Time requisite for obtaining copies of decree

and julgment, how excluded

In computing the period of limitation prescribed for an appeal, an appellant is entitled to exclude, under clauses 2) and 4 of section 1 of the cimitation Act, both the periods requisite for obtaining copies of judgments and decrees, respectively, so long as they are not counted twice over M VALLAIYAMMAL BIEL & KODLAYANNA, (.921) at. W. N. 351; 4 L W 268; 4 M u. J. 3.3 23

decree nisi-Application to make decree absolute-Limitation

An application to make a foreclosure decree final is governed in matter of limitation by Article 18. of the Limitation Act

A preliminary decree for foreclosure was passed by the High Court on the 3rd of uly 1914, but the mortgager preferred an appeal to His Majesty in Council which was ultimately dismissed for non-prosecution on the 9th October 1915;

Limitation Act-contd.

Held, that the limitation for applying for making the decree final began to run from the 3rd uly 1913 inasmuch as the result of the dismissal of the appeal for non-prosecution was to place the parties in the

same position as if there was no appeal

Where during the pendency of an appeal to the Privy ouncil in a suit on a mortgage an order is made for the appointment of a Receiver with a direction upon him to pay the interest due to the mortgagee, it operates in substance as an order staying further proceedings in the suit until the disposal of the appeal by the Privy Council and the period during which such order subsists should be excluded within section of the limitation Act in computing the period of limitation for making an application for a foreclosure decree Pat CHHOTEY NARAIN SINGH & KEDAR NATH SINGH 97

- s. 19-1cknowledgment of liability --

Mukhtar-i-am, power o'.

It cannot be assumed that a mukhlar-i-am has power to acknowledge liability within the meaning of section 19 of the Limitation Act, such a liability can only be fastened upon the principal by a person duly authorised in this behalf, that is, who ha been given authority to make such an acknowledgment of liability. A NABAIN RAO KALIA v. MANNI KUER, 20 A. L J. 3'9 39∶

___ S. 22, applicability of-Joinder of parties

-Appeals.

Section 22 of the Limitation Act does not prescribe any period of limitation for the joinder of a party to a suit under section 3 of the 'ivil Procedure Code of 1852 which is rule " of Order I of Civil Procedure Code, 1904 or to an appeal under section 559 of the old Code which is role of Order XLI of the new Code and there is nothing to prevent such a joinder in either a suit or appeal even after it is barred by time

Section 2: of the Limitation Act applies to appeals as much as to suits in principle. But a suit in which a defendant is joined, after the period of limitation has expired, must necessar ly be dis-

missed as against him In an appeal, however, there may be possibly reasons justifying its admission after time under section o of the Limitation Act. 217 N KCKSA C. D'JIGA BHAU

- Sch. I, Art. 46, applicability of-Statutes of Limitation-Rule of construction

Article 16 of the First Schedule to the Limitation Act bus no application to an order made under

section 11 of the Bengal Survey Act

It is contrary to round canons of construction to enlarge the scope of the provisions of a Statute of Limitation, by importing into them words which MAHARAJA OF COOCHare not to be found there BEHAR V MAHENDRA RANJAN SAI CHAUDHURI, "4 C. 923 L. J. 465

- Art. 47-Criminal Procedure Code (Act V of 1894), s. 145, proceedings under-Adverse order - Suit for possession by person succeeding by survivorship - Limitation

A member of a joint Hindu family made an application under section 145 of the Criminal 'rocedure ode, which was dismissed and the possession of the opposite party over the property in dispute was confirmed. The applicant died. More

Limitation Act-contd.

than three years after the order under section 145, his younger brother brought the present suit for possession of the property:

Held, (1) that there was nothing to show that the application made by the plaintiff's brother under section 145 of the Criminal Procedure Code, was made by him as head and manager of the joint family:

(2) that even if that were so the order under section 145 was the order of a Criminal Court directed to the

plaintiff's brother personally;

(3) that the plaintiff succeeded to his brother's interest in the property by survivorship and not as his heir .

(4) that, therefore, the plaintiff was not bound by the order and Article 4 of Schedule I to the 'imitation Act was not applicable to the suit O RAM 678 LAL THAKUR DIN, SO. L J. 410

- Sch. I, Art. 52-"Goods," whether include fruit-Suit to recover price of fruit-Limitation

The term "goods" in Article 5' of Schedule I to the Limitation Act is wide enough to include fruit

even before it has been gathered

A suit to recover the price of the fruit of a garden sold by the plaintiff to the defendant is, therefore, governed by Article 5' of Schedule I to the Limitation Act, as extended by the Punjab Loans Limitation Act. L. WASU SAM v RAHIM BAKHSH

- Arts. 59, 60-Suit to recover money kept with defendant-Demani, what is-Request for money on account, whether constitutes demand.

The plaintiff from time to time entrusted money with the defendants who were to hold the same for safe custody, and by way of deposit they were at liberty, if they thought it safe and on their own responsibility and risk to lend the money to others and, in case they did so, they were to pay a certain sum to the plaintiff as interest on the money so lent The money was payable on demand. The plaintiff on several occasions wrote letters to the def-ndan's for payment and finally addressed a letter through his Solicitor demanding the entire amount in deposit with the defendants. In a suit by the plaintiff brought within three years from the date of the "olicitor's letter for the recovery of the mon y due from the defendants:

Hell, I that the suit was governed not by Article 50 but by Article 10 of Schedule I to the Limitation Act and was not barred by limitation;

(that the relation between the plaintiff and the defendants was not that of a lender and a borrower, that the defendants did not take the money for their own benefit and did not agree to pay interest on it themselves:

3 that before the Solicitor's letter there were no demands properly so-called but only requests for money on account and limitation, therefore, did not run from those dates

Article 0 of the First Schedule to the Limitation Act is not limited in its application to claims against JOGENDRA NATH CHARRABARTY U. hankers only DINKAR KAM KRISHNA CHETTEL, 25 C. W. N. 981 900

Limitation Act-contd.

and mutual account Balance struck, effect of.

A suit to recover the balance due on crosstransactions in which each side supplied the other with goods in kind is governed by Article 85 and not by Article 64 or Article 57 of Schedule I to the Limitation Act.

An account does not become closed whenever a balance is struck. L JAWALA DAS v. HUKAM CHAND

agent against his principal to recover amount of loss on re-sale of goods—Limitation.

Where a commission agent buys goods for a principal, but through the latter's default in paying for the same they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses, must be brought within the period of limitation prescribed by Article 83 of Schedule I to the Limitation Act.

Limitation in such a case operates from the date of the payment made on behalf of the principal and not from the date of the sale. L FIRM KADARI PERSHAD CHIEDI LAL v. HAR BHAGWAN, 3 L. L. . 61

profits of immoveable property wrongfully received by defendant—"Wrongfully received," meaning of.

Subsequent to a mortgage-decree, in execution of which the plaintiff purchased the mortgaged lands, the mortgager granted a usufructuary mortgage in favour of the defendant who entered into possession and realised rents from certain tenants of those lands. The plaintiff after having obtained possession of those lands through the Court from the defendant brought a suit for recovery of the monies realised by the defendant from those tenants:

Held, that Article 1.9 of the First Schedule to the Limitation Act was applicable to the suit as the defendants' usufructuary mortgage was pendente lite and as such invalid as ngainst the plaintiff.

The words "wrongfully received" in Article 109 of the First Schedule to the imitation Act include receipt of profits that cannot legally be substantiated. C. NAGENDRANATH PAUL v. SCRAT KAMINI DASI, 26 C. W. N 38

Art. 113-Specific performance

- Limitation

A deed was executed in order to provide money for the defence of a suit brought against the executant for possession of his property The deed conveyed a share in this property to the transferee It was described as a sale-deed and was stamped as such and it contained a statement that the executant had made an absolute sale of the share. The ostensible consideration was a sum of Rs. 14,0 C, Rs. 3,8 0 of which were left with the vendee to be spent in the litigation, together with the "labour, efforts and hard work of the vendee." If less was spent the executant was not to be able to recover it while if more was spent he was not to be liable for it. In the event of success the vendee alone was entitled to the costs of the litigation recovered through the ourt. The vendee was to be entitled to have possession of the share sold after success u the suit. After obtaining a decree the manage-

Limitation Act-contd.

ment of the decreed property and the collections was to vest with the vendee and the vender and each party was to be entitled to have the partition made. After the registration of the deed the executant was not to be entitled to admit the right of inheritance of any one clse either directly or indirectly, by his act or word, with respect to the share sold. If the executant made collusions against the interests of the vendee or acquired any undue advantage for private benefit then the vendee was to be entitled to step in. Rs. 5, 00 of the consideration money were left with the vendee to pay off a certain charge on the property only in the event of his getting a title to it by success in the suit:

Held, (1) that the real intention of the parties to the deed was that the transfer of title as well as of possession should be conditional on the executant's success in the suit and should only take effect upon the passing of a final decree in his favour;

(2) that, therefore, the deed was only an agreement to sell;

(3 that the limitation for a suit to enforce the agreement was contained in Article :13 of Schedule I to the Limitation Act:

which the suit against the vendor was finally dismissed on appeal. O BISHESHAR DAYAL v HAR BAJ KUAR, O. L. J. 346

meaning of—Suit to recover money due on contract for materials supplied and work done—Nature of claim—Limitation.

The term "compensation" in Article 115 of Schedule I to the limitation Act, denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract, and a suit to recover a specified sum of money on a contract, is a suit for compensation within that Article.

D. contracted to erect a building, and employed P. as sub-contractor to supply certain materials for, and to do certain work in connection with, the building, for which he was to be paid a consolidated price for both materials and the work done, P. brought the present suit on the basis of this contract to recover the balance of the money due to him, without specifying the price of the materials or the price of the work done, and the question was as to the period of limitation applicable to the suit:

Held, that as the plaint in the suit made no mention of the price of the materials supplied, as distinct from the price of the work done, and contained no reference whatsoever to two claims, the claim was indivisible and could not be split up into two portions, and that, therefore, the period of limitation applicable was that contained in Article 115 of Schedule I to the Limitation Act.

L MAHOMED GHASITA v. SIRAJ-UD-DIN, 2 L 876

sharer landlord to recover rent collected - Limitation.
The period of limitation applicable to a suit against a co-sharer landlord to recover a share of the rent realized by him is contained in Article 180 of Schedule I to the imitation Act C BHUBANES.
WAR BHATTACHARJEE v. DWARJEESWAR BHATTACHARJEE V. DWARJEE V. DWARJE V. DWARJEE V. DWARJE V. DW

Limitation Act—contd.

- Sch. 1, Art. 120-Suit for declaration -Entry of name in village papers in 1901-Knowledge in 19 8 -- Cause of action, when arises

The name of the defendant was first entered as owner of the property in disoute, belonging to the plaintiff in 190, but the plaintiff first became aware of it in 1918:

Held, that the right to sue for declaration accrued

in '918 and that a suit brought in 1919 was well within time A GOPAL DAS v. SRI THAKUR GANGA 148 Brhariji, 20 A. L J. 231

--- Art. 140-Punjab Limitation (Ancestral Land Alienation) Act (I of 1960), Sch. I, Art. 2-Criminal Procedure Code (Act V of :898), ss. 87, 83-Absconder's property sold-Suit by reversioner for possession-Limitation

Where the property of an absconder is sold by an order of a Magistrate under the provisions of sections 87 and 88 of the Criminal rocedure Code, the sale is not by the owner and, therefore, a suit by his reversioners, after his death, to recover possession of the property is governed by Article 140 of Schedule I to the Limitation Act, and not by the provisions of Punjab Act I of .900. L HIBA SINGH v. LAL SINGH

- Art. 142-Possession, suit for-Properly not incapable of acts of possession-Presumption of possession following title-Adverse

possession Where in a suit for recovery of possession on a declaration of title the plaintiff asserts that the land is capable of possession and adduces evidence of definite acts of ownership, he must fail unless he proves possession within 12 years even assuming that the title is with him and he cannot rely upon the presumption that possession follows title. C RAM RATAN MANDAL & NILMONI CHOWDHURY

- Art. 152-Decree signed on date subsequent to judgment-Appeal-Period of limitation runs from date of judgment-Civil Procedure Code (Act V of 1: 08), O XX, r. 7.

The date of a decree is the date of the pron ouncement of judgment and the period of limitation for an appeal against the decree begins to run from the date of the judgment. even though the decree is drawn up and signed on a subsequent date N NARAIN C. BAMDULARE

Art. 167, application of-

Application against second obstruction.

An application for removal of a second obstruction though made more than 3 days after an acquiescence in an earlier one, is not barred by Article 67 of the Limitation Act as the obstruction referred to in the third column of the Article refers to that mentioned in the complaint and not to the one previous to it. M MEYYAPPA CHETTY v. MEYYAPPAN SERVAI, (1921) M. W. N. 6-8

----- Art. 182- Execution-Applica. tion for execution against two judgment-debtors one of whom already dead, whether saves limitation.

An application seeking execution against two judgment debtors one of whom is already dead saves limitation both against the living judgmentdebtor and the legal representatives of the deceased judgment-debtors though they were not brought

Limitation Act—concld,

on record on that date. N HASHAMALI E. BHAGWANT ATMARAM

- Sch. I, Art. 182 - Execution of decree

- Decree for injunction Limitation.

The occupancy tenants of a village obtained a decree against the proprietors of the village in 1.08 permanently restraining the latter from interfering with the grazing rights of the former in certain land in the village. No steps were taken in execution of the decree and the proprietors continued to cultivate the land till 1919 when the decree-holders applied for execution :

Held, that the cultivation of the land by the proprietors was an infringement of the decreeholders' rights of grazing, and that every successive season in which the land had been cultivated was the occasion of a fresh breach of the injunction, and that therefore, the application for execution was not barred by limitation. L UDNI r. SOHAN LAL

> Art. 183-" To enforce."

interpretation of.

Per Ryces, J. - The words "to enforce" in Article 183 of Schedule I to the Limitation Act are wider in meaning than the words "to execute" in Article 82 of the Act and should be interpreted as equivalent to 'to give full effect to" A BIRJ LAL v. DAMODAR DAS, 20 A. L. J. 456; 4 U. P. L. R. A.) 74 545

Lis pendens—Misdescription of property involved in litigation, effect of-Person having knowledge or notice of true state of things, how

affected.

The principle that misdescription of property involved in a litigation is sufficient to render the doctrine of lis pendens inapplicable cannot be invoked by a person who has either knowledge or notice of the true state of things C BEPIN KRISHNA RAY v. JOGESHWAR RAY, 31 C. L. J. 256; 26 C. W. N.

Lower Burma Courts Act (VI of 1900), S. 30-Appeal, special-Whole case whether re-opened - Facts, concurrent findings of, interference with.

The special appeal allowed by section 30 of the Lower Burma Courts Act re-opens the whole case, but, as a general rule, the Chief Court will not, in such an appeal, interfere with concurrent findings of fact, unless very good grounds for that interference are made out. LB . R M. CHETTY FIRM v MUTHU MAHOMED & Co, . L. B. R. 178 Madras City Municipal Act (IV of

1919), Sch. IV, rr. 7, 17-Case stated for opinion of High Court-High Court, whether tound to give opinion on points of law other than comprised in rejerence Life Assurance Companies Act (VI of 11.2), s 8--Income Tax Act (VII of

1917), rules under-Income, taxable.

When a case is stated to the High fourt under rule 17 of Schedule IV to the Madras City Municipal Act (IV of 9.9, that ourt is not bound to give a decision on questions of law involved in the suit other than those comprised in the reference

Under the rules made under the Income Tax Act read in conjunction with section s of the Indian Life Assurance ompanies Act VI of 1912, the tixable income of a Life Insurance Company, which makes

Madras City Municipal Act-concld.

default in getting an actuarial valuation once in five years, is regarded as the aggregate of the interest, dividends and rents received by it during the pre-

vious year.

The onus lies on the Company to show that such income did not exceed as 2,000 in the year previous to the year of taxation to entitle it to the benefit of the provise to rule 7 to Schedule IV of the Madras City Municipal Act. M SUN THE ASSURANCE CO. OF CANADA C. CORPORATION OF MADRAS, 15 L. W. 340: 42 M. L. J. 283; (1922) M. W. N. 155

Madras District Municipalities Act (Mad. V of 1-20), ss. 249, 365, Sch. V-Sale of grain wholesale without license-Wholesale, meaning of-Notification to take license under new Act not yet in force issued by Council constituted under old Act, validity of-Conviction for infringement, legality of.

The sale by a person of bags of grain from one to six at a time without opening them, constitutes a 'wholesale' trade within the meaning of Schedule V to the Madras District Municipalities Act V of 1920).

A notification by a Municipal Council constituted under the old District Municipalities Act (Mad. IV of 1884) directing dealers in wholesale grain to take out a license under section 249 of the new Act V of 1520 before that Act actually comes into force is ultra vires and void, as the notification being neither a rule, nor a bye-law, nor a Regulation cannot be validated under the proviso to sections 855 of that Act. M Sesha Prable v Emperor, (1922) M. W. N. 79; 42 M. L J. 159, 23 Cr L. J. 255

Madras Estates Land Act (Mad. 10f 1908), ss. 8, 115-Relinquishment of holding by ryot in favour of Zemindar subject to mortgage - Suit to enforce mortgage against mortgage result by auction-purchaser against Zemindar for possession, maintainability of Relinquishment and acceptance by surrenderce, effect of Madras Rent Recovery Act (Mad. VIII of 1855), s. 12.

A ryot in a zemindari relinquished his holding to the zemindar subject to a mortgage which he had oreated. The relinquishment was not made in the presence of witnesses as provided in section 12 of the Rent Recovery Act, but the zemindar accepted the relinquishment. Thereafter the mortgagee sued the mortgager's heirs for enforcement of his mortgage without impleading the zemindar as a party and obtained a decree for sale. The holding was put up for sale and purchased by the plaintiff's assignor. The plaintiff, on being obstructed by the zemindar while attempting to take possession, sued the latter for presession:

Held, (1) that the morigage suit was misconceived as the zemindar, who was entitled to redeem

was not made a party;

(2) that the decree for sale in the mortgage suit and the sale in execution did not bind the zemindar and that the plaintiff's assigner not having obtained title to the Kudivaram right by his purchase, neither he nor his assignee could maintain the present suit for possession.

Madras Estates Land Act-concid,

Per Sadasira Aiyar, J.—A mere relinquishment by the tenant to the landlord cannot put an end to the mortgage already created by the tenant so as

to prejudice the mortgagee's rights.

The term 'abancoument' denotes an unilateral act which does not necessarily imply that the act has been, or has to be, brought to the notice of any other person whereas an act of 'relinquishment' or 'surrender' implies that the act is brought to the notice of the landlord.

Per Napicr, J.—Relinquishment, acceptance and abandonment operate to terminate the estate of a tenant. The Kudivaram right is in abeyance until it comes into existence again by the admission of a new ryot and it continues in abeyance as long as the landlord does, in accordance with law, treat the

land as private land.

The words 'shall hold it as a landholder' in section 8 of the Estates Land Act do not necessarily imply that the land remains rooti land, and surrender is not an operation by which the entire interests become united 'otherwise.' M Venketa Ramiah Appa Rau r. Lanka Lakshul aranana, (192) M. W. N. 615; 15 L. W. 218; 42 M. L. J. 161; 30 M L. T. 188; 45 M. 39

Madras Regulation (V of 1804). s. 25

Madras Rent Recovery Act (VIII of 1865), s. 12 Madras Salt Act (IV of 1889), s. 11,

scope of-License-Transfer, meaning of-

Mortgage, validity of.

Section 1 of the Madras Salt Act, (IV of 1889) applies to transfers by way of mortgage and is not limited to absolute transfers of the entire interest of the licensee M GUJU NAGAMMA v. SECRETARY OF STATE FOR INDIA, (1922) M. W. N. 165; 42 M. L. J. 31; 31 M. L. T. 61 356 Majority Act (IX of 1875), SS. 2 (a),

3-"Competent," meaning of-" Capacity," meaning

The word "competent" in section 25 of the Madras Regulation Voi 1801 implies legal competency while the word "capacity" in section 20 of Act IX of 18; is wider in meaning and includes legal competency as well as other ability M ARULANANDA MUTHU v. PONNUSAMI, 15 L. W. 257; (1922) M. W. N. 9: 42 M. L. J. 129

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Mal.bar Compensation for Tenants Improvements Act (I of 1900), SS. 5, 6, scope of—Ejectment—Compensation—Re-valuation—Ecccution of decree, stay of.

Section 5 of the Malabar Compensation for Tenants Improvements Act does not make the payment of the compensation a condition precedent to ejectment

Where an application for re-valuation as provided by section 6 of the Malabar Compensation for Tenants Improvements Act is pending the section does not provide for a stay of execution of the decree for ejectment M NAKAL MURTHI SANKARAN V. AREEKARA AZUAKATH SANKARAN NAIR, (19.1) M W. N. 470; 4 · M. 9 · 0

Malabar Law - Trust-Grant of lease by majority of Uralars without consulting remaining

Malabar Law-concld.

Uralars, validity of - Uralars not consulted personally interested, effect of

Under Malabar, Law, the grant of a lease or melcharth by the majority of the Uralars of a religious trust without consulting the remaining Uralars is invalid. And the fact that the latter are personally interested in the subject of the lease does not disentitle them from being consulted.

M MATAMULLA MANIKOTH PATTAN CHANDE v. KUTTIYIL RATIRU, 15 L W. 264; 42 M. L. J. 280; (1922) M. W. N. 172

Malicious prosecution-Appellate Court differing with Trial Court-Discretion, exercise of.

Although a Court directing prosecution for malicious prosecution is endowed with considerable discretion, yet it is neither safe, nor desirable, on the part of an Appellate Court to conclude malice where there is a split of opinion on the point between the First Court and itself. Pat RAGHUPAT SAHAY C. EMPEROR, 3 P. L. T 93; (1922) PAT 26; 23 CR L J. 272

Merger - Mukarrari lease - Patni lease - Both to different members of same family - Intention

Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others—in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine of merger is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain?

Where a mukarrari lease is granted in favour of certain members of a joint Hindu family, and later on a patni lease is granted of the same lands in favour of certain other members of the same family and upon the documents and accounts it is plain that the two are kept alive there is no merger.

P C DULHIN ACHHANBATI KUMBI v. BODHNATH TIWARI, (1922) M. W. N. 58; 15 L. W. 343; 30 M. L. T. 216; 26 C. W. N. 565; 3 P. L. T. 383; 4 U. P. L. R. (P. C. 42

Mesne profits-Suit for recovery of possession of lease-hold Colliery-Relinquishment-Private

notice to decree-holder, effect of.

The plaintiff after having obtained a decree in a suit for recovery of a lease-hold Colliery, claimed mesne profits and damages for malicious or negligent injury to the Colliery from the judgment-debtor After the passing of the decree in favour of the decree holder the judgment debtor's Solicitor had written to the decree-holder's Attorney offering to deliver possession of the mine and requesting the decree-holder to take steps to obtain possession as early as possible Notice was given by this letter that in case of neglect the Colliery with its machinery and accessories would remain at the decree-holder's risk and the judgment debtor stopped working the mine The decree-holder, however, had taken no steps to obtain possession till the following year:

Mesne profits - concid.

Held, that the decree-holder was not entitled, in respect of the period after notice, to damages in the nature of mesne profits, that as the judgment-debtor had stopped working the mine the coal which the judgment-debtor might have got was still there and belonged to the decree-holder and that the question, therefore, whether under the provisions of the Civil Procedure Code the omission to give notice of relinquishment through the Court under Order XX, rule 2 1 (c) (iii, Civil Procedure Code, left the judgment-debtor liable for mesne profits did not arise

The definition of mesne profits in section 2 of the Civil Procedure Code, includes profits which the defendant "might with ordinary diligence have received" But mesne profits are in the nature of damages which the Court may mould according to the justice of the case

For the purpose of ascertaining meane profits mining differs from agricultural operations on the surface.

A relinquishments or stoppage of work with notice to the decree-holder is not in itself an improper or negligent act for which the judgment-debtor is liable in damages or mesne profits C SAMBHU NATH P. SATISH CHANDRA, 25 C. W. N. 269

Minor admitted to his deceased father's share in

partnership, linbility of

An infant inheriting his father's share in a partnership business cannot be made personally liable for any obligation of the firm but his share only is liable, and as regards the personal liability of his father he is liable only to the extent of the assets inherited by him. HARAMOHAN PODDAR v. SUDARSAN PODDAR, '5 C W. N 47

-, decree against, validity of.

Where a minor is entirely unrepresented before the Court which issues a decree against him, that decree is a nullity so far as the minor is concerned But where a minor is a party to the case and a decree is issued against him, that decree, so long as it stands, is not invalid, it is only voidable at the instance of the minor. L INDAR SAIN V. PRABHU LAL, 3 L. 88

avoid transfer - Benefit of minor - Registration, absence of - Agreement, dejective - Part performance, effect of.

Even where a compromise or settlement is considered to be defective or inchoate and insufficient to make a final and validly concluded agreement, the subsequent acts of the parties may be such as to supply all defects. In fact, when the actings and conduct of the parties are founded upon it, as in the performance or part performance of an agreement, the locus penitential which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded, for equity will support a transaction, clothed imperfectly, in those legal forms to which finality attaches, after the bargain has been acted upon.

Where the guardian of a minor effects a transfer of the minor's property for the benefit of the minor, and the latter after attaining majority continues to derive the benefit which the transaction

Minor-concid.

conferred on him, it is not open to him to take advantage of the absence of registration, particularly when the parties can no longer be restored to their old positions without material prejudice to the interests of one of them.

A minor can repudiate an act done by his guardian only if it is prejudicial to his interests. O RAGHUBAR V. RAM BHAROSE, 8 O. L. J. 392 412

- Trespass by guardian-Estate, when liable. A minor's estate is liable for the trespass committed by his guardian if his act was not on his own behalf but was on that of the minor and the estate of the latter had benefited by it. CHATARIA U. DAWLAT 468

Mortgage by delivery of possession-Delivery,

proof of-Redemption.

Where a mortgage is effected by delivery of possession, such delivery of possession, if proved, constitutes a valid mortgage, but before such mortgage can be redeemed, its terms must be proved. UB MAUNG PO DIN v. MAUNG PO NYEIN, 4 U. B. R. (1921) 80 360

- Integrity broken by mortgagee-Part redemption-Appeal-Appellate Court-Findings of

fact arrived at - Court, duty of.

Where a mortgagee acquires himself a portion of the equity of redemption, the integrity of the mortgage is broken, and a mortgagor of a part owner of the remaining equity of redemption is entitled to redeem just as much of the equity of redemption as does not belong to the mortgagees themselves on payment of a proportionate share of the mortgagedebt:

An Appellate Court, having found all the facts, should work out their legal consequences itself and uphold or amend the decree of the Trial Court according to the findings arrived at by it and should not send the case back to the Trial Court for the preparation of a new decree on the basis of its findings of : fact: A 'SHIAM SARAN v. BANARSI DAS, 20 A. L. J. 259

Occupancy holding, non-transferable-Rent-decree-Execution purchaser of holding in rent-decree, rights of - Encumbrance - Mortgagedecree-Purchaser, execution of mortgage-decree,

right of-Redemption.

A purchaser of a non-transferable occupancy holding in execution of a rent-decree purchases the holding itself and is entitled to take the holding free of encumbrance, if, in fact, there is no encumbrance valid in law outstanding against it which it is

necessary for him to annul.

A mortgage of a non-transferable occupancy holding is of no effect against the holding or the person who purchases the holding in a rent execution and a subsequent purchaser of the holding in execution of the mortgage decree is not entitled to redeem the holding from the purchaser of the holding in the execution of the rent-decree. Pat MURLIDHAR U. SURAT LAL CHOWDHURY, (1922) PAT. 185; 8 P. L. T. 862 152

Post diem interest, no stipulation as .to-Interest, whether allowable-Damages.

In the absence of any stipulation, express or implied, in an instrument of mortgage as to. the continuance of interest, after the due date, the mortgagee is not entitled to interest after

Mortgage-contd.

the due date but he is entitled to damages to be calculated ordinarily at the covenant rate of interest and for the entire period during which the principal sum has remained unpaid, unless the mortgagee is himself the plaintiff in which case the period is the same as that prescribed by the Statute of Limitation for a suit for the recovery of damages on the footing of the mortgage in his favour.

Per Rossignol, J.—In the case of mortgages comprising a stipulation of conditional sale, a covenant to pay post diem interest up to date of redemption must be implied, unless there are very strong reasons to the contrary. L MOTAN MAL v. MUHAMMAD BAKHSH 77 I

- Proof of execution-Validity of bond-Transfer of Property Act (IV of 1882), s. 59-Evidence Act (I of 1872), 88. 68, 70-Scribe signing the name of the executant, if can be an attesting witness.

The proof of the execution of a mortgage with reference to the provisions of section 68 of the Evidence Act and its validity with reference to the 'provisions of section 59 of the Transfer of Property Act are two different things. Therefore, where in a suit upon a mortgage bond the defendant admits the execution of the bond but raises the defence that the bond should not be regarded as a mortgage-bond, the plaintiff, although exempted from calling any attesting witness under section 68 of the Evidence Act by reason of the provisions of section 70 of the said Act, is still bound to show that the document was executed in the presence of attesting witnesses as required by section 59 of the Transfer of Property Act.

A scribe who signs the name of the executant on a mortgage bond on his behalf is not a competent attesting witness. C PABAN KHAN v. BADAL SARDAR, 34 C. L. J. 498

- Property situated within two Registration Offices - Property where deed registered not belonging to mortgagor-Fraud-Estoppel - Mortgage, validity

A. mortgaged two sets of properties situated within the jurisdiction of two Registration Districts. The deed was registered in the Registration Office within whose jurisdiction one of the properties was situated, but in a suit on the mortgage the mortgagor pleaded. that the property within the jurisdiction of the Registration Office where the deed was registered was not his property but was wasf property although it stood in his name. It was not proved that at the time of the registration the mortgagee knew that the property was waqf:

Held, (1) that the mortgagor could not take advantage of his own fraud by pleading that the mortgage-deed was not registered at the proper place; · · (2) that as the land in question was hypothecated and entered in the mortgage-deed, the deed could be. presented to the Registrar having jurisdiction over the property and could be properly registered and that, therefore, there was a valid registration and the mortgage could be enforced. A SAIYID. MUHAMMAD U. PARSSHOTAM SABAN, 4 C. P. L. R. (A.) 91

- Redemption - Improvements-Liability a mortgagor.

Mortgage-contd.

A mortgage-deed provided for the payment of costs with interest of re-building the mortgaged house in case the mortgagee chose to re-build it. Shortly after the execution of the mortgage, the mortgagors vacated the mortgaged house at the request of the mortgagee, as the latter wanted to pull it down and re-build it. The mortgagee then pulled down the house and constructed a doublestoried building in its stead. Subsequently, the mortgagors sold the house to the plaintiff, and in the sale-deed it was specifically stated that the vendee was to redeem the mortgage and a specific sum was left in deposit with him for the purpose, This sum was to include the principal and interest as well as any amount spent by the mortgagee and interest thereon, and the vendee undertook to be responsible for any sum in excess of the sum left in his hands. Plaintiff sued to redeem the mortgage on payment of principal and interest:

Held, (1) that the covenant in the mortgage-deed coupled with the subsequent conduct of the mortgagors left no doubt that the re-construction of the house took place with the assent of

(2) that, therefore, the plaintiff could not redeem the house without paying to the mortgagee the cost of re-construction of the house. L KIBPA RAM v. JOWANDA MAL 755

of mortgagee, effect of, on mortgage.

On 18th June 1908, G. S. executed a mortgage-deed in respect of five items of property in favour of L. P., and on the 25th August 1914 he executed a sale-deed in respect of this property in favour of B.P., the father of L. P., both living together as members of a joint family, and left in deposit with B.P. a sum sufficient to discharge the mortgage-debt. Previous to the sale-deed, however, on the 20th August 1914, three items of property comprised in the foregoing deeds were sold in execution of a simple money-decree against G. S., the purchasers purchasing the equity of redemption subject to the mortgage of 18th June 1908, L. P. brought the present suit on

Held, that the suit was not maintainable as the mortgage-deed of 18th June 1908 had been completely discharged by the execution of the sale-deed of 25th August 1914. A LACHMAN PRASAD v. LACHMESHWAR PRASAD, 20 A. L. J. 151

in each mortgage specified—Transaction, whether one or several—Redemption.

A. procured a loan from nine persons and executed a single mortgage-deed in their favour in which was set out the share of each in a schedule attached to the deed, and specific portions of the property mortgaged were made security in favour of each of the kine mortgagees whose names were mentioned in the deed:

Held, that, for the purposes of redemption, the transaction did not amount to nine separate mortages and that there was no impediment in law to the redemption of such a mortgage by one suit. A the redemption of such a mortgage by one suit. A LACHMI PRABAD v. GOKUL, 20 A. L. J. 157

ZOG

Suit on mortgage—Transferees not made party—
Decree—Execution—Sale—Purchase by mortgagee—

Mortgage-concld.

Mortgages, whether can recover possession from transferees.

As between two persons entitled to possession the party who acquires that right first cannot be

deprived of it by the other.

Where the puisne transferees of a property mortgaged under a simple mortgage are not made parties to the suit on the mortgage and the mortgage in execution of his decree on the mortgage purchases the property himself, he purchases whatever rights the mortgagor then possesses and the mortgagor not having the right to possession, the mortgagee-decree-holder cannot recover possession of the property from the transferees, his proper remedy being only to enforce his mortgage against them. L B S. P. S. CHETTY FIBM v. MAUNG PYAN GYI, 11 L. B. R. 119

of same mortgagee—First mortgage, person paying,

right of.

A person who pays off a prior mortgage in favour of a mortgagee who holds subsequent mortgages on the same property, is entitled, by the principle of subrogation, to hold up that mortgage as a shield against the mortgagee's subsequent mortgages. A MOHAN LAL v. PREMBAJ, 4 U. P. L. R. (A.) 78

from which period of limitation runs — Civil Procedure Code (Act V of 1908), s. 48, O. XX, r. 6— Insolvency of judgment-debtor—Application by decree-holder to have his name entered in list of scheduled creditors—Bar of time, whether available after adjudication—Provincial Insolvency Act (III, of 1907), s. 24 (2).

Where a mortgage decree directs that the available proceeds of the sale to be held thereunder be paid in satisfaction of the decretal debt, but that if the amount due is not satisfied by the sale of the mortgaged properties, the balance be realised from the other property and person of the mortgagor, the period of limitation applicable runs not from the date of the sale of the mortgaged properties, but from the date of the decree as fixed by Order XX, rule 6, Civil Procedure Code.

A debt barred by the Statute of Limitation is not provable in bankruptcy proceeding. But the bar of time ceases to run (or to further run) after adjudication—as the effect of the bankruptcy is to vest the property of the bankrupt in the trustee for the benefit of the creditors, and all personal remedies against the bankrupt are also thereafter stayed.

In bankruptcy a debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy. C BARAMASHI KORR v. BHABADES CHATTERJEE 34 C. L. J. 167 758

Mortgage-deed-Registration defective-

Evidence-Personal covenant.

Mortgage-deeds which are invalid for want of registration, or by reason of defective registration, are admissible in evidence to prove a personal covenant to pay, and, where there is no doubt that the consideration-money was paid, and there is an unqualified agreement to pay, the lender is entitled to a decree for the amount of the money lent with the interest due thereon. L B QUAR CRENE GWAN v. MAUNG PO MYI, 11 L. B. R. 148

Mortgage-Sult-Mortgage, denial of, by mortgager and stranger—Recital as to payment of consideration—Burden of proof—Question of onus of proof, when immaterial—Consideration recited not paid in full—Validity of bond, if affected—Parda-nashin lady, dealings with—Principles applicable—Alteration of document after execution, effect of—Material alteration, what is—Court's decision not to rest on mere suspicion—Execution purchaser—Property purchased subject to mortgage—Mortgage invalid—Benefit, by whom taken.

If an action to enforce a mortgage security is contested by the mortgagor and execution is admitted by or proved against him, the onus lies upon him to prove that the recital as to the payment of consideration for the deed which he executed is untrue. When, however, the claim is contested by a stranger who denies that the bond was executed and also asserts that there was no consideration for the mortgage, the onus is upon the mortgagee to prove his case.

The question of onus of proof arises only where there is no evidence one way or the other which will enable the Judge to come to a conclusion upon the question of fact to be determined; but where evidence has been adduced by both the parties and the relevant facts are before the Court, the question of burden of proof becomes immaterial and importance should not be attached to the question on whom the initial onus lay, in such circumstances, the question of the burden of proof is really not pertinent.

Though there may be ground for suspicion, though the conduct of the parties may engender doubt, the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony.

The validity of a bond is not affected by the fact that the consideration recited was not paid in full; the bond is operative to the extent of the sum

actually advanced.

The Court when called upon to deal with a deed executed by a parda-nashin lady must satisfy itself upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her, with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered, and, thirdly, that she had independent and disinterested advice in the matter. These principles fall broadly into two groups, namely, first, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence; and, secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically. The Court must have regard to the intellectual attainments of the lady concerned and will naturally be disinclined to set aside the deed where she is proved to have been of business habits, to have been literate and to have possessed a capacity to judge for herself.

Either party to a document may show that there was in fact no consideration though consideration

Mortgage-sult-concid.

was recited therein or that the consideration was in reality different from what was stated in the deed.

The addition to a mortgage-bond after execution and attestation, of anything perfectly immaterial does not affect the liability of the parties, and where the alteration is an immaterial one, it does not vitiate the instrument, even though made by a party thereto.

What alteration is immaterial must depend upon the nature of the instrument as also upon the nature

of the change.

The insertion of a schedule to a mortgage-bond, setting out the details of the consideration mentioned in the body of the bond does not constitute a material alteration as it does not vary the meaning of the instrument or change the rights or interests, duties or obligations of the parties in any essential particular.

If a mortgage notified at the time of an execution sale turns out to be invalid, the benefit is taken by the purchaser, and the judgment debtor is not entitled to claim from him a refund of the amount alleged to have been due on the mortgage; and the purchaser is free to contest the reality or validity of the mortgage when he is attacked by the mortgage. C Krishna Kisor De v. Nagendramala Chaudhurani, 25 C. W. N. 942; 34 C. L. J. 333 694

parties, effect of—Suit, whether should be dismissed

for non-joinder of parties.

A mortgage-suit in which all the heirs of the mortgager are not made parties should not be dismissed for non-joinder of parties but should be decreed for a proportionate share of the mortgage. money as against the defendants who are on the record. C HAR CHANDRA ROY v. MOHAMAD HASIM, 25 0 W N 594

Final decree, application for - Limitation - Limitation

Act (IX of 1908), Sch. I, Art, 181.

Where in a mortgage suit there is an appeal from the preliminary decree, the right to apply for a final decree under Article 181 to Schedule I of the Limitation Act accrues on the date of the decree or order of the Appellate Court, even though the Appellate Court does no more than dismiss the appeal. Pat Jowad Hussain v. Genda Singh, 8 P. L. T. 329; (1922) Pat. 164

Mortgage with possession-Interest on part of mortgage-money to be paid by mortgagor—Interest on rest set off against rent of property mortgaged — Mortgage, divisibility of — Suit for redemption—Limitation.

A shop was mortgaged for Rs. 200 and possession of it was delivered to the mortgagee and it was agreed that the interest on Rs. 100 of the mortgage-money would be set off against the rent of the shop, and the interest on the remaining Rs. 100 would be paid by the mortgagor at a certain rate from his own pocket. It was further agreed that the money would be re-paid within two years, and if not paid the mortgagee would have the right to realize the whole amount from the shop. The mortgagor sued for redemption on the payment of Rs .100 only on the ground that Rs. 100 which was payable with interest had become time-barred:

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Mortgage with possession-concld.

Held, that the mortgage was one simple mortgage on the security of the shop, that the mortgagor could not treat it as being in fact two mortgages, and that he was bound to pay the mortgage-money which included the whole of the principal and interest due upon it at the time of the suit. A SUNDAR LAL v. SHIB NARAIN 704

Muhammadan Law-Dower-Widow in possession of husband's cetate-Lien for unpaid dower-Gift - Possession, when not necessary-Mushaa, doctrine of, applicability of-Deed for maintenance-Life-interest.

Under the Muhammadan Law if a widow has obtained possession of her husband's property lawfully and peaceably, without force or fraud, she has a lien for her unpaid dower and it is not necessary that her possession should be the result of any agreement or consent of her husband or his heirs.

Under the Muhammadan Law, in case of a registered deed of gift executed by a donor in favour of his minor children under his own guardianship, delivery of possession is not absolutely essential. An unequivocal declaration that the donor has ceased to hold the property as owner is sufficient.

The doctrine of mushaa should be confined within the narrowest limits. Any defect due to mushaa is cured by taking possession of the property by the donees in definite shares.

A deed for maintenance prima facie imports only a life-interest.

Where a transaction is carried out openly and publicly and everything is done which ordinarily would be done to give effect to it, it certainly lies on the plaintiffs to show that the transaction was other than appeared on the face of it and was really intended to cover a fraudulent motive. O Hafizun-NISA v. Jawahir Singh, 24 O. C. 374

Legitimacy—Acknowledgment, effect

Under the Muhammadan Law an acknowledgment has only the effect of legitimation where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty.

Where there is a clear finding that no marriage at all took place between the parents of a child the presumption of legitimacy which results from acknowledgment cannot arise. L ABDUL AZIZ v. AMEER BEGAM

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Woman marrying stranger - Forfeiture of right.

Under Muhammadan Law the mother is the proper guardian of her infant boy, at any rate until the age of seven, and the burden of proving that, in the particular case, the mother is not entitled to be the guardian of her infant son lies heavily on anyone who would assert it.

Under the Muhammadan Law a woman who marries a stranger forfeits her right to the custody of her child by a former marriage. S BIBI FATIMA v. BAKARSHAH 15 S. L R 175

Bakarshah 15 S. L R

established-Conviction, whether justified.

In the absence of the corpus delicti, and of the best evidence as to the cause of death, a conviction for murder would be unjustified; the fact that the

Murder-concld.

accused has made it difficult to procure evidence, cannot be accepted as a substitute for the evidence. A JAGANNATH SINGH v. EMPEROR, 23 CR. L. J. 278

Production of ornaments belonging to deceased person—Presumption—Circumstantial evidence.

The fact that shortly after a murder a person is found to be in possession of ornaments belonging to the murdered person, creates a very grave suspicion that he was concerned in the murder.

Where, however, the ornaments are not produced until nearly two months after the murder, during most of which period the accused was detained by the Police, and any one could have placed the ornaments where they were found, the suspicion is not nearly so strong.

In order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This is said to be the fundamental rule, and to be experimentum crucis, by which the relevancy and effect of circumstantial evidence should be estimated. L SUNDAR SINGH v. EMPEROR, 23 CR L. J. 251

Mutation, party consenting to, effect of -Appellate Court, whether bound to give findings on every plea in memorandum of appeal.

Where a person consents to land being mutated in favour of another, it is a clear indication of the relinquishment of his rights in it.

An Appellate Court is not bound to record a finding upon every plea entered in the memorandum of appeal unless it is urged before it. An appellant may take as many pleas as he likes, but a Court is bound to give a decision on those pleas only which are urged and argued before it. L RAJA v. SALABAT, 3 L. L. J. 26

Negligence—Collision—Suit for damages— Weighing of conflicting evidence—Appellate Court, duty of.

A Court of Appeal should, in order to reverse the decision of the Court below upon a point where there is a conflict of testimony, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

Although the parties to a cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, it should always bear in mind in deciding a point on which there is conflict of oral testimony that it has neither seen nor heard the witnesses and should consequently make due allowance in this respect. C REES v. YOUNG, 25 C. W. N. 519; 34 C. L. J. 178

Negotlable Instruments Act (XXVI of 1881), s. 76-Hundi-Drawer and drawes

same-Presentation not necessary-Damages.

Where the drawer and the drawee of a hundi are the same, the provisions of section 76, clause (d), of the Negotiable Instruments Act, render presentation unnecessary and no question of damage arises in such a case from want of presentation. A PACHEAURI LAL v. MUL CHAND, 20 A. L. J. 437 503

Notice-Knowledge-Constructive notice-Notice by title papers in one transaction, whether notice in independent transaction.

The conception of notice was introduced into law and the rules concerning it were established from considerations of policy and expediency based upon the common experience of mankind.

Notice, even when actual is not necessarily equivalent to knowledge, but the same effects must be attributed to it which would naturally flow from

knowledge.

Whenever a party has obtained a full knowledge, although not in accordance with the rules which define the nature of notice and regulate the mode of its being given and received there is no longer any need of invoking the legal conception of notice, the rules concerning it no longer apply, the very fact for which it is intended as a substitute has been more accurately accomplished in another manner.

Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction, in which the instruments containing the recitals are not necessary to his title but he is charged constructively with notice, merely of that which affects the purchase of the property in the chain of title of which the paper forms a necessary link. Consequently, when one is purchasing a particular piece of real estate, and his title-deeds recite a charge upon, or equitable interest in another piece in favour of a third party, such recitals would not affect him with notice of such charge or interest in the event of his subsequent purchase from the holder of the legal title to the other property.

If there is a mutual mistake in a mortgage in the description of property and the same mistake is re-produced in the decree passed in a suit upon the mortgage, equity may go back to the original transaction and re-form both the mortgage and the decree so as to make them conform to the intention of

the parties concorned.

In the case of a mortgage suit the lis pendens does not terminate till the security has been realised for the satisfaction of the judgment-debt. C BEPIN KRISHNA BAY v. JOGESHWAR RAY, 34 C. L. J. 258; 26 C. W. N. 86

Occupancy holding, non-transferable, sale

of, in execution of decree.

Having regard to the view taken by the Special Bench in the case of Chandra Binode Kundu v. Ala Buz 58 Ind. Cas. 858; 81 C. L. J. 510; 24 C. W. N. 818; 48 C. 184 (S. B.', the principle enunciated in the case of Dayamoyi v. Ananda Mohan Roy Chowdhuri, 27 Ind. Cas. 61; 20 C. L. J. 52; 18 C. W. N, 971: 42 C. 172, that a transfer of the whole or part of an occupancy holding is operative against the raigat where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside, can no longer be maintained. C ABDUL 220 SAMAD U. BASIRUDDIN

Official acts, presumption as to, legality of. Official acts are to be presumed to be legally performed, and where the jurisdiction of an officer is not questioned in the Trial Court, it must be presumed that he acted within his jurisdiction. Pat BALGOSIND KUMAR V. RAI BEHARAI LAL MITIER, (1922) PAT: 114

Oplum Act (1 of 1878), s. 9 (c)-Rzclu. sive possession-Place used by several persons.

Opium Act-concld.

Where the place in which an article is found is one to which several persons have equal right of access, it cannot be said to be in the possession of any one of them. Pat KHUSIRAM MAHARAJ U. EMPEROR, 3 P. L. T. 132; 23 CR. L. J. 261 328

- S. 9 (C), (g)-Authorised agent of licensee, right of, to possess opium-Register of sales, mistake in-Agent, whether liable.

The authorised agent of a retail licensee of opium, is entitled to possess opium to the extent of his

Neither the rules, nor the terms of the license in the Punjab provide for any penalty against an authorised agent in respect of any mistake in the register of accounts of sales of opium. L DUNG CHAND U. EMPEROR, 3 L. L. J. 43; 28 CR. L. J. 387 993

Oudh Rent Act (XXII of 1886), s. 108,

Cl. 15-Profits, suit for-Co-sharer need not be full proprietor-Transferee from Hindu having life-estate, whether entitled to sue.

A co-sharer need not be a full proprietor to entitle him to file a suit against the Lambardar

for his share of the profits.

Therefore, a person to whom a Hindu widow has conveyed her rights for her life has a power to sue for the share of the profits to which but for such transfer the widow would have been entitled. O THAKUB PRASAD SINGH v. ADVA PRASAD SINGH, 24 O. C. 399

Partition, suit for -Plaintiff not entitled to share -Defendant, whether can get his share partitioned.

In a partition suit it is the right of every defendant to ask to have his own share divided off and given to him and he is qua his claim to a share on

partition in the position of a plaintiff.

But where the plaintiff is held to have no share in the property sought to be partitioned, there is no partition suit before the Court and the maxim cessante ratione, cessat ipsa les applies and the defendant has no right to ask the Court to inquire into and determine his share in any part of the property, that is sought to be divided. S CHOITHRAM MANGHANMAL v. LALCHAND, 15 S. L R. 195 808 -- Temple property-Manager, whether can

claim partition.

In the case of property dedicated to an idol the managers of the temple having to manage the landed property in the interests of the temple, have an inherent right to claim a partition under the law, being the managers of the recorded cosharer. A MUSTAJAB KHAN U, THAKUR SRI LAKSHMI 550 NABAIN

Partition Act (IV of 1893), s. 2-Partition, no formal objection to-Auction order,

validity of.

It is not necessary that there should be formal objections by the parties as to the possibility of a satisfactory partition of the property before Court puts it to auction according to the principles laid down in section 2 of the Partition Act and the auction order cannot be apset in appeal on the ground of the absence of such formal objections. L GANDA RAM v. SONATYA. RAM, 8 L, L, J, 102 885 Partnership-Accounts, partial-Dissolution.

In regard to suits by one partner against another for a partial account, the general rule as applied in India, is that if the account is sought in respect of a matter, which, though arising out of a partnership business, or connected with it does not involve the taking of general accounts, the Court will, as a rule, give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances.

Where a partner withholds the profits of a concern from a member of the firm, the partner excluded from the profits may bring a suit for an account and for his share of the profits, and such a suit cannot be dismissed for the reason that the plaintiff does not claim a dissolution. L FIRM OF RAI BAHADUR HARJI MAL-MELA RAM v. FIRM OF KIRPA RAM-BRIJ LAL, 2 L. 351

for account—Limitation Act (IX of 1908), Sch. I,
Art. 106, applicability of—Stoppage of business or
supply of capital, effect of.

Article 106 of the Limitation Act applies to a dissolved partnership, for limitation cannot apply as between partners so long as the partnership continues.

Under section 253 of the Contract Act, partners may agree that on the death of any of them his nominee or legal representative shall be entitled to take his place. Whether in a particular case there has or has not been such an agreement, may be proved by an express declaration to that effect or may be determined from the conduct of the parties.

Neither stoppage of business nor refusal of a partner to supply capital whenever the demand is made on him can be treated as dissolution of the arm. The question whether there has been abandonment by a partner is a matter of inference to be drawn from the facts of each case. C HARAMOHAN PODDAR v. SUDARSAN PODDAR, 25 C. W. N. 847 811

borrowed by one partner—Remaining partners, liability of—Indorsee of pro-note, claim by, nature of.

In the case of a partnership, which is not an ordinary trading partnership, there is, in the absence of evidence to the contrary, no implied authority in one partner to bind the others by executing negotiable instruments.

Per Robinson, C. J.—There is a distinction between suits based on a promissory-note and those on the original consideration for the note. An indorsee can claim merely on the notes, and cannot fall back on the original loan. L B MAUNG PHO MYA V. DAWOOD & Co, 11 L. B. R. 137

Patni Regulation (VIII of 1819), SS. 8, 10—Patni sale for arrears of rent—Notice, contents of—Zemindar's responsibility—Non-conformity with requirements of Patni Regulation— Sale, validity of.

Section 10 of the Patni Regulation contemplates a self-contained notice, which comprises not only a specification of the arrears and notification that the sale will be held on the 1st Jaistha following if

Patni Regulation-concid.

the amount claimed be not paid before that date but also a statement of the lots proposed to be sold in the order in which the sale will be held.

The notice to be stuck up in the Cutchery of the Collector, like the petition to him containing a specification of the arrears, must contain specification of the balances that may be due to the zemindar concerned from all the patnidars under him and a copy or extract of such part of the notice as may apply to an individual defaulter shall be sent by the zemindar to be similarly published at the Cutchery or at the principal town or village upon the land of the defaulter.

The zemindar is exclusively answerable for the observance of the forms prescribed in section 8, clause (2) of the Patni Regulation.

Strict conformity with the requirements of the Patni Regulation in respect of the contents and service of the notice mentioned in sections 8 and 10 of the Regulation is essential to secure a valid putni sale. C Beupendra Narain Singh v. Madar Bur, 34 C. L. J. 399

Penal Code (Act XLV of 1860).
ss. 96, 99, 100, 300, 302, 304, 326

—Lathi blow in a melee—Natural and probable consequences—Fracture of skull—Common intention—Guilt of all taking part—Actual consequences also probable and natural—Person retiring from the assault after first blow—Intention—Guilt—Right of private defence—Defence of master—Assault by Mahar tenant on Rajput Zemindar—Assault by followers of Zemindars whether under grave and sudden provocation.

Having regard to the great frequency with which a lathi, used in a melee, lights on the head even though not specially aimed at it, and the still higher percentage of cases in which a blow on the head with a lathi results in the death of the victim from a fractured skull, it would be contradictory to say that a person taking part in an assault with lathis does intend to break the victim's arm or leg but does not intend to break his skull, an injury which is undoubtedly sufficient in the ordinary course of nature to cause death.

Every same person of the age of discretion is presumed to intend the natural and probable consequences of his own acts.

In deciding what are the natural and probable consequences of an act, it must be presumed that every actual consequence is a natural and probable consequence unless and until the contrary is affirmatively shown.

If a man strikes another with a light stick and then retires from the assault before the general assault begins and the lathis of others begin their work he can be said to have taken no part in the common intention of others.

Under section 100 and section 96 of the Indian Penal Code an accused cannot be considered to have committed any offence, even in intentionally killing a person, while acting in his right of private defence if he has kept within the limits prescribed by section 99 of the Code, i. e, if the assault could not be prevented by anything short of killing.

If some persons were acting in the exercise of their right to defend their master against what

Penal Code-contd.

was certainly a murderous assault, and, with such care and attention as was humanly possible at the moment and in the circumstances, believing that they could not protect their master from that assault otherwise than by striking the deceased with lathis, even at the imminent risk of hitting and cracking his skull, their acts amply satisfy the conditions required to bring them within the terms of the second Exception to the definition of murder in section 300 of the Indian Penal Code.

An assault by a Mahar tenant on a Rajput Zemindar, even if it had not been likely to result in anything worse than grievous hurt, would undoubtedly give very grave provocation to the Zemindar's followers, quite sufficient to deprive ordinary men of their self-control and if they suddenly and immediately assault the tenant it must be held that they acted while they were still under the full influence of the passion engendered by the pro-Vocation. N JAIPAL KUNBI v. EMPEROR, 23 CR. L. J. 665 818

- 38. 97, 149, 325 - Right of private defence of property-Right exceeded-Unlawful assembly-Grievous hurt.

Accused, six in number, caused grievous hurt to a person, while acting in the exercise of the right of private defence of property. It was found that they had exceeded that right:

Held, (1) that it could not be held that all the

accused constituted an unlawful assembly;

(2) that the only person who could be convicted was the one who actually caused the grievous hurt. L ARMAD v. EMPEROB, 26 P. W. R. 1919; 28 CR. L. 185 J, 249; 1 L. L. J, 245

- 38. 109, 379, 381-Theft, abetment

of-Abetment, what constitutes.

To sustain a conviction of abetment of theft, it must be shown that the accused was engaged in a conspiracy with the principal offender for committing the theft, the mere fact that he was standing by the principal offender is not sufficient. Pat GOVIND MARTON U. EMPEROR, 8 P. L. T. 127; 23 CR. 334 L. J. 270

- S. 147-Riot-Unlawful assembly-Leader

of gang, liability of.

A conviction under section 147 of the Penal Gode of the leader of a gang whose common object is to assault passers by, is not illegal. B SUJATALLI D. EMPEROR, 24 BOM. L. B. 110; 28 CR. L. J. 256

- 3. 174-Failure to attend in obedience to order of public servant-Order by Cantonment Magistrate requiring agent of bungalow to attend before him, whether offence.

Petitioner, who was the agent of a bungalow in a Cantonment, was, by a verbal order, required by the Cantonment Magistrate to attend his office in connection with the acquisition of bungalows for military purposes. Petitioner failed to obey this order and was convicted under section 174 of the Renal Code :

Held, that there was nothing to show that the order was one which the Magistrate issued in his capacity as a Magistrate, or which he was legally empowered to issue or which the petitioner was

Penal Code—contd.

legally bound to obey, and that, therefore, the petitioner could not be convicted of an offence under section 174 of the Penal Code. L RAM CHAND r. EMPEROR, 23 CE. L. J. 230

423—Fabricating false 193, - SS. document-Sale-deed containing false recital of marriage executed - Offence - "Fraudulently," meaning of-Deprivation of property-Deception and injury.

Accused executed a sale-deed in favour of a woman alleging that she was married to him on a particular date and transferring to her certain land in lieu of dower. In fact, no marriage took place between the accused and the woman who was the

wife of another person:

Held, that the only possible inference was that he was acting in furtherance of his desire to secure the person of the woman, and his intention was to use this document and false statements therein in judicial proceedings to mislead the Judge and that, therefore, he was guilty of an offence of fabricating false evidence under section 193, Indian Penal Code.

Held, also, that the accused had a further intention to cause injury to the woman and her true husband. and to support his false claim to that status and that, therefore, he was also guilty under section 423,:

Indian Penal Code.

The words "fraud," "fraudulently" and "to defraud". in section 428, Indian Penal Code, are not confined to connote deprivation of property and the deception: of the person so deprived. It is not essential that: the person deceived or to be deceived and the person: injured or intended to be injured should be one and; the same. C LEGAL REMEMBRANCER U. AHI LAL 996 MANDAL, 48 C. 911 - S. 225B—Resistance to execution of Civil

Court warrant,

It is not necessary that a Bailiff executing a Civil Court warrant should in the first instance show the warrant. It is sufficient that he should apprise the person to be arrested of the contents of the warrant? and show it if desired and resistance to execution is not justified merely because the Bailiff fails to show the warrant in the first instance. C SUPERIN-TENDENT & BEMEMBRANCER OF LEGAL AFFAIRS D. BARODA KANTA, 25 C. W. N. 815 1003

- S. 228-Contempt-Insult to Court-Inten-

tion-Prosecution, duty of.

Accused was on his trial for riot, mischief by fire and attempt to murder, and, when opening his defence, put in a written statement complaining that he was being tried by a prejudiced Judge : when asked to withdraw this latter expression, he declined to do so, whereupon the Magistrate proceeded against him summarily under section 228 of the Penal Code, and convicted him thereunder:

Held, that accused was guilty of the offence charged, because his intention clearly was to offer

an insult to the Court,

In all offences in the Penal Code where the intention is an essential ingredient, of the offence, that intention must be strictly made out by the prosecution. This rule applies to the offence under section 228 and it is also the duty of the Court of Appeal to decide if the intention is proved. B' VENEATRAO RAJERAO U. EMPEROR, 24 BOM, L. R. 386. 28 CR. L. J. 325

Penal Code-contd.

only illegal—Imprisonment essential—Whipping, when should be inflicted—Whipping Act (IV of 1969), s. 4.

Where a charge under section 390 of the Penal Code is proved against an accused person, a sentence of fine only, which may or may not be accompanied with a sentence of whipping, is illegal, as under section 392 of that Code a sentence of imprisonment is essential and ought to be imposed.

Although in such a case whipping may also be inflicted, yet under the Whipping Act, as amended, a sentence of whipping should be imposed only where there is a certain amount of aggravation in the commission of the original offence; where the degree of injury is extremely slight, the penalty of whipping should not be added to the sentence of imprisonment. A BADRI PRASAD v. EMPEROR, 20 A. L. J. 388; 23 CR. L. J. 274; 4 U. P. L. R. (A.) 67

__ S. 425-Mischief, ingredients of.

The principal ingredient of an offence under section 425 of the l'enal Code is that there must be an intention to cause wrongful loss or damage to the public or to any person, that is to say, the mischief must be done to the property belonging to another. If a person wishing to eject a trespasser sets fire to his own house, he cannot be said to cause wrongful loss to any person or to the public, and, therefore, cannot be convicted of an offence under section 425. Pat RAM KRISHNA SINGH v. Emperor, 3 P. L. T. 335; 23 CR. L. J. 321

____ SS. 445, 457—"Fastened," meaning of __Entry merely by pushing shutters—Nature of offence.

The word "fastened," as used in section 445 of the Penal Code, implies something more than being closed such as chaining the shutters or tying them with a rope or bolting them or locking the door. An entry of an accused into a house by merely pushing in shutters of the door does not constitute the offence of house-breaking, as it does not come under any of the six clauses of section 445 of the Penal Code, but constitutes an offence of house-trespass under section 457 with intent to commit an offence. N Ledga v. Emperor, 422

signature and receiving money—Offence—Sentence— High Court, when will interfere.

H. remitted a sum of money by money order to B. in order that the money be paid to P. in liquidation of a debt due to him. When the money order arrived, P. represented to the postman that A. was B. and induced him to accept A's signature as the signature of B. and by that action got the money. B. was not informed of what had taken place:

Held, that P. and A. were guilty of an offence punishable under section 467 of the Penal Code viz., of forging a valuable security, i. e., the money

A High Court will not interfere with a sentence of imprisonment, unless it can be shown that it has been imposed without any regard to the facts of

Penal Code-concld.

the case, or the nature of the offence, or is so out of proportion to the facts proved that no Judge would reasonably impose it. B JOGIDAS BABU V. EMPEROR, 24 BOM. L. R. 99; 23 CR. L. J. 264 328

for good reasons. Defamation—Boycott resolution

For a number of persons to meet and resolve not to associate with a person for good reasons is not defamation nor does the sending a copy of the resolution to the person in question make it defamation. It would be a different matter if a copy of the resolution is published. L B NGA ON THI V. EMPEROR, 23 CR. L. J. 247

Plaint, misdescription of property in-Amendment, effect of-Cause of action, whether affected.

Where by mistake the plaint in a suit for redemption wrongly describes the property as being situated in one village, whereas it is really situated in another, the Court should, on an application being made, allow the plaint to be amended, as such amendment would in no way alter the plaintiff's cause of action which was the non-payment of the mortgage-money, and the mere fact of a misdescription of the property, would not alter that cause of action. A BHAGIRATHI SHUKUL v. CHANDRA HABIHAR PATAK, 20 A. L. J. 159

Pleadings—Omission to state how proceedings terminated, effect of.

Where the plaint in an action for damages for illegal attachment fails to set forth how the proceedings terminated, the Court may allow it to be amended by setting forth the necessary particulars.

The termination of proceedings in plaintiff's favour is essential to sustain an action only where a distinct termination in favour of one party or other is possible and not where the proceedings cannot end by their nature in a judicial disposal, as where money is paid to avert the process and settlement reported to Court. M. Joseph Nicholas v. Sivarama Aiyar, 15 L. W. 442; 30 M. L. T. 269; (1922) M. W. N. 242; 45 M. 527

whether should be allowed to succeed on basis of customary right—Remand on issue not raised in pleadings—Civil Procedure Code (Act V of 1908), O. XLI, r. 25.

When a plaintiff comes into Court on a specific allegation of prescriptive right, and that case is completely met by the defendant and the Trial Court, which comes to the conclusion that the evidence of prescriptive user was in a large measure unreliable, he cannot in appeal set up a new case of customary right, nor would the Appellate Court be justified in entertaining that case, and in remitting it for re-hearing on an issue not raised in the pleadings or even suggested in the Trial Court. C GOPAL KRISHNA SIL v. ABDUL SAMAD CHAUDHURI, 34 C. L. J. 319

specified in plaint not proved—Decree, whether can be granted on ground that pleadings amount to breach.

No doubt in exceptional cases a Court can take cognisance of events since the institution of the suit where the adoption of such a course tends to

Pleadings-concld.

shorten litigation, but where a suit is based on a breach of an agreement and the plaintiff fails to prove that breach he cannot demand a decree on the ground that something which has been alleged by the defendant in his plendings or statement amounts to a breach of the agreement which gives him a cause of action.

Plaintiff alleged that he was owner of a half share in a certain village, defendant being the owner of the other half, and that he had given defendant a 1/6th share in the village out of the half owned by himself under an agreement, whereby the defendant undertook to pay the malba and other miscellaneous expenses for the whole village. The agreement went on to provide that, "if any of the contracting parties or their descendants break the contract the parties would have to revert to their oliginal half and balf share in the village land." The plaintiff now sued to recover the 1/6th share on the ground that defendant had for some years ceased to pay the dues which he had undertaken to pay. The defendant pleaded that the agreement was invalid, and in the alternative that no breach of it had taken place. It was held that the plaintiff had failed to prove breach of the agreement. lu second appeal the plaintiff contended that the defendant's plea that the agreement was invalid amounted to a breach of the contract and that he was entitled to a decree on the basis of that breach :

· Held, (1) that the plaintiff was not entitled to a decree on the basis of something which had occurred alter the suit was filed and which would not neces-

sarily have occurred in any case :

(2) that if the plaintiff desired to take advantage of the alleged breach of agreement Le could only do so by means of a fresh suit. L ABBULLA SHAR U. MUHAMMAD SHAH, 4 U. P. L R. L.) 42

Police Act (V of 1861), s. 29 -Overslaying leave by Police Officer-Reasonable cause.

A Police constable after the expiry of the period of his leave applied for an extension of his leave on which he was asked to submit a medical certificate. He represented that he was not ill but was detained to settle his affairs in a Bank. He was then called upon to join his appointment, and went back. He was, thereafter, convicted under section 2) of the Police Act for overstaying his leave :

Held, that, in the circumstances of the ca-e, the petitioner did not fuil without reasonable cause to report himself to duty on the expiration of his leave and that the conviction was not sustainable JAGADISH CHANDRA BOSE P. EMPEROR, 25 C. W. N. 67 437; Z. CR. L. J. 22/

Possession of land, suit for-Trees, remotal of, uncillary prayer for-Limitation Act (IX of

. 9041, Sch. I, Art. 142.

A suit for possession of land coupled with an ancillary prayer for the removal of the trees plunted on it is governed by Ar.iclo 142, Schedule I to the Limitation Act. O GHAPUR KHAN & PRAG NARIYAY 799 9 O. L J. 17

In a suit for ejectment, it is for the plaintiff to prove possession . prior to the dispossession which

Possession-concld.

he alleges. If it is proved that he has title, and he obtained possession under that title, the general presumption of law is that possession goes with title, and unless the defendant shows that he has been in possession adversely to the plaintiff for more than twelve years, the plaintiff would be entitled to a decree. B MAHAMADSAHER IBRAHIM. SAHEB U. TILOKCHAND ARRESCHAND MARWADI, 24 764 Вом. L. R 373

Possessory title - Ouster of person in posses. sion by person with no better title or with equal title -Right of person dispossessed to be restored to possession

A person in possession of property even without a title thereto if dispossessed by another with no better right is entitled to get back possession on the strength of his possessory title. If the person who is dispossessed has an equal title with the person dispossessing the Courts should give them joint possession M AMIR SAUIB P. MUHAMMAD ALI 237 AHMAD SAHIB, 15 L. W. 420

Practice-Order relating to dismissal of suit in default of payment-Order, construction of.

In a suit the following order was passed "Ad. journed till 1st June; Rs. 200 as condition precedent to be paid before 1st June. If the money is not paid by the 1st June the suit will be dismissed with costs" The money was not paid by the lat June. On a question arising as to what was the effect of the order:

Held, that inasmuch as the order did not contain the words, "In default the suit will stand dismissed," the suit was not dead and a further order was necessary by the Court before it was dead and that it was open to the Court, if the circumstances. appeared to the Court to justify such an order, to further extend the time for making the payment. C SEWRATAN U. KRISTO MORAN SHAW, 48 C. 978

Pre-emption-Suit based on custom-Custom not proved - Appeal - Plaintiff entitled to succeed on basis of contract -Remand -Procedure.

Where a suit for pre-emption filed on the basis of custom fails for want of proof of custom and an: Appellate Court considers that the case might succeed on the basis of contract, it should not record a finding to the effect that the contract of pre-emption stood proved as between the parties, but should remand the case to the first Court for trial with permission to the plaintiff to amend the plaint basing his claim on ground of contract. A BASDEO RAI T. JHAGROO RAI, 20 A. L. J. 454 - Vendee associated with one having inferior

rights to pre-emptor - Indivisible transaction. If a purchaser having an equal right of preemption associates with himself, in a transaction that is indivisible, a person with rights inferior to tho:e of the pre-emptor, he is not entitled to resist the claim of such pre-emptor to enforce his rights even as to his own share of the purchase.

Where the purchase-money for a sale is paid by the various vendees in a lump sum without specifying the amounts paid by the various vendees, the transaction must be regarded as indivisible, though the shares to be taken by the various vendees may have been specified in the deed.

under title, continuity of-Presumption-Bjectment, suit for-Plaintiff, duty of-Adverse pusaession.

Pre-emption-concld.

Persons, who, by clothing their transaction in a particular form, have induced a pre-emptor to come forward and claim pre-emption in respect of the transaction as a whole, cannot be allowed to turn round thereafter and claim to show that their real intention was something quite different from that expressed in the sale-deed. L YAKUB KHAN v. KARMAN

recessary -Sale, nature of Question of fact.

It is not correct to say that no sale can be the subject of pre-emption where legal proceedings are necessary to obtain possession of the property.

Where a sale-deed definitely purports to sell, not a share in a law suit, but a share in a property to which he definitely and clearly states his title, the sale is subject to pre-emption, even though it is effected for the purpose of raising funds to recover the property by litigation.

The question whether a sale is a genuine sale or a mere sale of a share in a law suit is one to be determined on the facts of the case. O GAJADHAR PRASAD v. MANRAKHAN, 8 O. L. J. 403, 4 U. P. L. R. (J. C.) 41

Presidency Towns Insolvency Act (III of 1909), ss. 13 (3), 118 (1)—
Omission to serve notice, if formal defect or

irregularity-Waiver-Burden of proof.

The omission to serve the notice contemplated by sub-section 3 of section 13 of the Presidency Towns Insolvency Act is not a formal defect or irregularity within the meaning of section 118 of the Act.

An order of adjudication should not be made to the prejudice of an alleged insolvent till notice of the institution of the proceedings has been served on him.

The burden lies upon the creditor to establish that the insolvent has waived the defect caused by the omission to serve the initial notice prescribed by section 13. C NATHMAL v. GONESHMULL JIVANMULL, 34 O. L J. 349

s. 36-Insolvency-Order for discovery-

Wilful disobedience, consequence of.

An order for discovery made under section 36 of the Presidency Towns Insolvency Act may, if disobeyed, involve the person concerned in grave consequences. Wilful disobedience of such an order may be followed by an order of commitment for contempt of Court. In view of such possibilities the Court should act with great caution and afford all possible facilities to the person concerned to satisfy the Court that, at the time of the order, the things whose discovery was demanded, were either not in existence or were not under his control.

C SUKHLAL KARNANI v. OFFICIAL ASSIGNEE OF CALCUTTA, 34 C. L. J 351

of witness—Procedure—Person aggrieved, remedy of.
Applications under section 35 (1) of the Presidency Towns Insolvency Act for the examination of persons thereunder are intended to be made exparte under the rules of the Calcutta High Court, and rule 30 of those rules is applicable to such applications, and not rules 17 and 18.

Where any person is aggrieved by an ex parte order for the examination of a witness by the Registrar in Insolvency, and there are grounds which

Presidency Towns insolvency Act

justify an application to the Court, the proper course is to move the Court to set aside such order. C. SUKHLAL KARNANI v. OFFICIAL ASSIGNEE OF

CALCUTTA, 25 C. W. N. 750; 48 C. 1089 715
Probate and Administration Act
(V of 1881), ss. 50, 76, 82, 92—
General grant of Probate operation of Judgment

General grant of Probate, operation of - Judgment in rem, if can be collaterally attacked - Several executors, powers of, when can be exercised by some.

A general grant of Probate must be deemed to continue in force until the Probate or Letters of Administration shall have been re-called or revoked by the Court of Probate on one or other of the grounds enumerated in section 50 of the Probate and Administration Act.

Where a judgment operates as a judgment in rem las the decision of a Probate Court does under section 41 of the Evidence Act', it is not subject to collateral attack; while it remains in force, it is conclusive not only on the persons who are parties to the judgment but upon all persons and all Courts.

Where there are several executors, the powers of all may, in the absence of any direction to the contrary in the Will, be exercised by any of them who has proved the Will. C HEMANGINI DEBI v. SABAT SUNDARI DEBYA, 34 C. L. J. 457

discharge of surety—Power of Court to call for fresh sureties.

There is no provision in the Probate and Administration Act as to what is to be done and what the Court can do in the event of the death of a surety or in the event of a surety desiring to be relieved of the burden which he has undertaken. Section 78 of the Act, however, ought not to be read as meaning that the District Judge can once and once only direct a bond with sureties to be given and that after that has been done he becomes then and there functus officio, and that he has no power in the event of a surety dying or being discharged to call upon the administrator to furnish another surety. The Court of Probate is competent to require a new bond or additional security where the interest of the estate requires it, and especially where some new situation arises, such as the unexpected break down of one or both sureties. L BHAGWAN DEVI U. BANKA MAL, 2 P. W. R. 1972 367

Procedure-Party to suit removed from record-Party prejudiced by order-Appeal.

A suit against the Agent of a Railway Company for recovery of compensation for short delivery of goods was dismissed with costs by the Subordinate Judge on the ground that the agent could not be sued as such The District Judge on appeal also held that the suit could not be maintained against the Agent but on the petition of the plaintiffs ordered the Railway Company to be made a party defendant in place of the Agent and remanded the case for trial de novo The order of the District Judge deprived the Agent of the costs allowed by the First Court and did not award him costs in the lower Appellate Court:

Held, that as the Agent had been prejudiced by the order of the District Judge, he was competent

Procedure-concld.

to question its propriety by way of appeal oven though he was not competent to question the propriety of the order in so far as it directed the Company as such to be made a party C AGENT, B, N. W. By Co, r. JAGANNATH AGARWALLA, 34 C. 903

Promissory-note-Barred debt-Liability.

When a promissory-note is executed in respect of transactions which have gone on for some years, and the items consists of advances which would be barred and of subsequent dealings, the settlement cannot be impeached as to the items which, but for the settlement, would be barred, so long as there is no fraud or mistake. M RAMA PATTER v. VISWANATRA PATTER, 41 M. L. J. 567; 15 L. W. 130; (1922) M. W. N. 27; 26 M. L. T. 203; 45 M. 345

Assignce, right of.

A written assignment of a promissory-note is valid, and under the general law, apart from the Transfer of Froperty Act, such assignment gives to the assignee a right of suit upon the note. LB PALAWAN v. B. KANU, 11 L. B. R. 174

Provincial Insolvency Act (III of 1907), applicability of, to proceedings under Agra

Tenancy Act (II of 1901).

The provisions of the Provincial Insolvency Act do not apply so as to govern or affect the rights of a land-holder against his tenant enforceable by means of any suit or proceeding under the Agra Tonancy Act, nor do they bar a proceeding in execution of a decree before a Revenue Court against a tenant who subsequent to the decree is adjudicated an insolvert.

A landlord obtained decrees for arrears of rent against his tenant: the tenant was subsequently adjudicated an insolvent: the landlord thereafter, with the leave of the Insolvency Court, brought the present suit challenging the validity of certain transfers by his judgment-debtor, the tenant:

Held, that the suit was not maintainable and that the proper remedy of the landlord was, in the first place, to take out execution of his decroes in the Revenue Court as against any property which he alleged to be the property of his judgment-debtor, and, that if he met with any resistance, the question was one for the decision of the Execution Court, in respect of which either party aggrieved had a right to seek a determination by means of a regular suit. A PARBATI v. SHYAM RIKH, 20 A. L. J. 147; 41 A. 226

Provincial Insolvency Act (V of 1920), s. 4-Receiver-Sale of property in possession of third persons-Question of title-Insolvency Court, power of, to decide-Decision, final.

When a Receiver has reason to believe that property in the possession of third persons is the property of the insolvent, he may treat it as such and attach it or put it up for sale. When the person who alleges that the property is his and not the insolvent's objects and wishes to assert his title, he may appeal to the Insolvency Court against the act of the Receiver, but he is not obliged to do so although it is the most effective

Provincial Insolvency Act-concid.

remedy, at any rate the most expeditious means of preventing a sale. He may, if he likes, sue the

Receiver as a trespasser.

where an Insolvency Court decides a question of title its decision is final and binding between the person asserting it and the insolvent's estate but the Court should not decide such a question without hearing the claimant on the merits. A MISRI LAL T. KANHAYA LAL SHARMA 863

creditor for adjudication and cancellation of transfers - Order cancelling sales by insolvent,

legality of

On a petition under section 7 of the Provincial Insolvency Act, 1920, for adjudication in insolvency, it is not competent to the Court by the same order adjudicating the debtor an insolvent to order cancellation of sales made by the insolvent immediately prior to the application. It is for the Receiver to take action for the cancellation of the alienations under section 53 of the Act and not for the Court to do so on a petition for adjudication. M Gontu Appliedding Gontu Chinna Appliedding 14 L. W. 639, 41 M. L. J. 606; (1921) M. W. N. 816; 45 M. 189

Provincial Small Cause Courts Act (IX of 1887), s. 25—Civil Procedure Code (Act V of 1903), O. IX, r. 8—Dismissal of suit for default—Revision.

It is entirely within the discretion of the Judge deciding a case to wait for the appearance of the plaintiff's Pleader but if he does not do so and dismisses the case in default, a High Court will not interfere with his discretion. S KHEMCHAND DARYANOMAL V. MENGHOMAL CHUHARMAL, 15 S. L. R. 172

interfere. 25-Revision-High Court, when can

Under section 25 of the Provincial Small Cause Courts Act it is not open to a High Court to interfere except where some clear error of law and injustice resulting therefrom are apparent. It cannot interfere merely because, upon the evidence before the lower Court, it would have come to a different finding. S RADHOMAL KESHOWDAS v. HOLOMAL KESUMAL, 15 S. L. R. 193

Judge given extended powers of Small Cause Court— Suit cannot be tried as Small Cause Court suit.

Where the powers of a Munsif invested with Small Cause Court powers up to Rs. 100 are extended up to Rs. 250, he cannot thereafter try a suit for the recovery of money over Rs 100 but below Rs. 250, filed as a regular suit before the date of the extension of his power, as a Small Cause Court suit 'A Chunni Lal v. Gokul, 20 A. L. J. 257

decree confirmed in appeal-Revision by High Court.

Where a Small Cause Court suit is tried on the Original Side and decreed and on appeal the decree is confirmed no equity arises in the defendant's favour to have the appellate decree set aside in revision by a High Court and get the case re-tried in a less formal manner as a Small Cause Court suit. M BHUYANAPALLI SUBBAYA v. RAJA OF VENCATAGIRI. 14 L. W. 8-9, 42 M. L. J. 118

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Provincial Small Cause Courts Act

mortgage-money, cognisance of.

A shop was mortgaged to the plaintiffs with possession and the mortgagee agreed to pay a certain sum yearly as the munaja (profits) of the mortgage money, and in case of default this sum was to carry interest Plaintiffs sued to recover a sum less than Rs. 500 as the munaja for three years and interest thereon in the Court of a Munsif with Second Class powers:

Held, that the suit was one for interest on the mortgage-money and was one triable by a Court of Small Causes and that, therefore, no second appeal lay in the case. L PARDUMAN CHAND v. GANGA RAM

profits, whether cognizable by Small Cause Court— Second appeal, competency of.

A suit to recover mesne profits is excluded from the jurisdiction of a Small Cause Court, and a second appeal lies from a decision in such suit, even though the value of the subject-matter is less than Rs. 200.

UB MAUNG TUNE P MAUNG SHWE THA, 4 U. B R. (1921) 63

Punjab Courts Act (VI of 1918), s. 41 (3)- Appeal, second-Question of burden of proof involving question of custom-Certificate, necessity of.

A second appeal on the question of the burden of proof, when that question involves a question of custom, cannot be entertained without the necessary certificate under the l'unjab Courts Act.

L MILKHI v. PUNNI, 3 L. 3 8

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Punjab Limitation (Ancestral Land Alienation) Act (1 of 1900), Sch. I, Art. 2. See LIMITATION ACT, 1908, Sch. I, ART 140

Punjab Tenancy Act (XVI of 1897, s. 59-Succession to occupancy tenancy, how governed.

not by Customary I aw but by the provisions of section £9 of the Tenancy Act, and unless a plaintiff can prove that the land was occupied by the common ancestor, he has no locus standi to contest an alienation by the widow of an occupancy tenant, because he is not her heir and is in no better position than any stranger, even though he may be a collateral of her deceased husband; so far as he is concerned, the consent or otherwise of the landlords is immaterial. L Toti v Maluka, 3 L. L. J. 89 919 Purga-nashin accused—Personal attendance

CRIMINAL PROCEDURE (ODE, 8, 753 330 Railways Act (IX of 1890), ss. 42 (2), 4, (1) (b), 109-Reservation of compartment for a class, legality of-Reservation of compart-compartment, method of-Person entering compart-

A Railway Company has the right to regulate its own traffic in its own way, and is competent to reserve accommodation for a passenger or class of passengers, and such reservation is not forbidden by section 42 (2) of the Railways Act as being an undue or unreasonable preference in favour of a

Railways Act-contd,

particular description of traffic; section 109 of the Act contemplates such reservation for possible and actual passengers.

The Traffic Working Orders of a Railway Company required that the reservation of a compartment of a lailway carriage for a class should be effected by affixing to both sides of the compartment, a printed card, signed or initialled by the Station Master, in a space provided for the purpose; notwithstanding these orders, the reservation of a compartment of a Third Class Railway Carriage was effected by affixing to the compartment, under the orders of the Station Master, two slips of paper bearing the words "Feserved for Europeans and Anglo-Indians", and initialled by the Ticket Examiner, and the question was whether the reservation was in contravention of the rules of the Railway, so as to render immune from prosecution any person not of the class for whom the compartment was reserved who entered the compartment:

Held, that the reservation was not in contravention of the rules of the Bailway, and any person entering such compartment who was not of the class for which it had been reserved, and refusing to leave it when requested to do so, rendered himself liable to prosecution under section 109 of the Railways Act. M In re Komaran, (1922) M. W. N. 34; 15 L. W. 207: 30 M. L. T. 134; 43 M. L. J. 2: 23 Cr. L. J. 226; 45 M. 215

in trains-Passengers, right of-Pulling Alarm signal-Reasonable and sufficient cause.

Accused, a passenger by Railway train, complained to the Station Staff that the compartment in which he was travelling contained more than the maximum number of passengers allowed by the rules made under section 63 of the Railways Act, but his complaint was unheeded: after the train left the station, he felt a sensation of suffocation and pulled the communicating chain and stopped the train, in order to complain to the guard. He was convicted under section 108 of the Act for having, without reasonable and sufficient cause, pulled the communicating chain and so stopped the train:

Held, that, no hard and fast rule could be laid down as to what would constitute reasonable and sufficient cause, that each case depended upon its own circumstances, and that under the circumstances of the present case the accused was justified in pulling the communicating chain and stopping the train inasmuch as he had the right to have the compartment vacated so as to reduce the number of passengers therein to the prescribed limit. Pat ISHWAR DAS v. EMPEROR, (1922) PAT. 63; 3 P. L. T. 195; 25 CR L. J. 257

Correspondence with Divisional Traffic Manager .Implied notice to Agent.

A notice under section 77 of the Railways Act, having regard to section 40 of the same Act, should be given, in the case of State Railways managed by a Company, to the Government or to the Agent of the Company or the Manager of the Government and any correspondence with, or notice to, the Divisional

Railways Act-concld.

Traffic Manager of such Bailway cannot amount in law to a notice on the Agent of the Company. A FIRM RAM SAHAI-CHHIDDA LAL P. EAST INDIAN RAILWAY COMPANY, 20 A. L. J. 664

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Registration Act (XVI of 1908).
s. 17 (2) (VI)—Partition—Award—List of properties allotted to co-parceners—Registration.

Lists of properties awarded by arbitrators to the different members of a joint Hindu family on partition form part of the award, and the mere fact that they are signed by the parties themselves does not make them compulsorily registrable. L RALIA BAM
v. DUNI CHAND

dishonest intention, whether essential—Sanction to prosecute, whether necessary—Identifying witness, statement by, nature of—Penalty, when incurred.

A fraudulent or dishonest intention is not essential for an offence under section 82 of the Registration Act, nor is sanction necessary to prosecute for such

A witness who purports to identify the executant of a document before a Registering Officer must be in a position to depose without the possibility of error to the identity of the person he is identifying. Merely identifying a person as so-and-so, on the strength of having been told that he was so-and-so by some other person and with no actual knewledge of the facts would make the witness liable to the penalties of section 82 of the Registration Act N NILKANTH RAO SADAFUL U.

EMPEROR, 23 CR L. J. 203

Rennell's map, evidentiary value of— Presumption of continuity—Accuracy—Evidence Act (I of 1872), s. 83.

Whatever else may have been the purpose of the preparation of Rennell's map, that purpose included the delineation of roads and waterways and so it may be used to ascertain the position of a river shown therein.

Although Rennell's map was not contemporaneous with the Permanent Settlement, it having been made some 22 years or so before the Decennial Settlement on which the Permanent Settlement proceeded, it may be used, on the presumption of continuity, as evidence of a state of things at the time of the Permanent Settlement.

The presumption of continuity is one which varies with the circumstances of each case and is applicable to things which are continuous in their nature. If they are that, then the Court may presume that they continue in the state in which they were last known, in the absence of evidence to the contrary.

to the contrary

Where Rennell's map is referred to as evidence there is a presumption of its accuracy under section 83 of the Evidence Act in respect of such matters as to which it is admissible in evidence C SECRETARY OF STATE FOR INDIA v. ANNADA MOHAN ROY, 34 C. L. J. 205

Res judicata - Civil Procedure Code (Act V of 1978), s. 11, Exp. IV, application of - Execution application held time-barred - Subsequent application on basis of acknowledgment whether maintainable.

A decree-holder applied for execution in 1919. The application was rejected as time-barred. He

Res Judicata-contd.

applied again in 1920 relying on an acknowledgment made in his favour in 1918. The Court rejected the application saying that as his previous application was held to be barred by time, the point was resjudicate On appeal:—

Held, 1) that the only ground on which the application could be barred as resjudicata would be that the applicant ought to have raised the issue of acknowledgment in his previous application. This was an extent to which the doctrine of resjudicata

could not be extended:-

(2) that in the earlier application there was no adjudication that the execution of the decree was barred but only that the application was not shown to be within time;

3) that, therefore, the application was maintainable, B. RAMCHANDRA VENKATESH SHOLAPUR v. SHRINIVAS KRISHNA, 24 BOM. L. R. 97; 46 B. 487

Act (II of 1901), ss 5°, 11:9—Ejectment suit— Question of proprietary title referred to Civil Court— Question already determined by Revenue Court— Jurisdiction of Civil Court.

The decision of a nevenue Court does not operate as res judicata in a civil suit unless the case comes within the purview of sections 199 to 201 of the

Agra Tenancy Act.

Therefore, in matters outside the purview of those sections, when a decree of a Revenue Court is pleaded as bar to a civil suit, there is no question of res judicata, but simply whether the point before the Civil Court has been decided by a Rent Court under its exclusive jurisdiction in such a manner as prevents the Civil Court having jurisdiction to decide it and if it is not so decided it is not open to a Civil Court to refuse to determine the point.

The defendant sued plaintiff for declaration that he was the proprietor of the plot in question and that the latter was his tenant. The plaintiff asserted his own proprietary title. The suit was decreed. Subsequently the defendant sued to eject the plaintiff. The plaintiff again asserted proprietary title, and was referred to a Civil Court under section 190 of the Agra Tenancy Act. He brought this suit accordingly but the Civil Court considering it barred under the provisions of section 11 of the Civil Procedure Code refused to entertain it:

Held, that the issue as to the question of proprietary title was not resjudicata, and that it was not open to the Civil Court to refuse to determine it. A SABABJIT MAL v. BAN KHELAWAN MAL, 4 U. P. L. R. (A.) 90

Sale of property—Suit to redeem on ground that sale in reality a mortgage—Second suit to recover under contract of re-sale.

I. sold certrin property to D and continued in possession as a tenant. Subsequently, D. executed in I's favour a satekhat to sell the property to him at any time within twelve years for a stated sum, I. brought a suit claiming to redeem the property on the ground that the sale by him was a mortgage, but the suit was dismissed. Before expiry of twelve years he brought the present suit to recover the property on payment of the sum stipulated in

Res judicata-concld.

the satekhat, and it was contended that that question was res judicata:

Held, that the two suits were mutually inconsistent, and that the present suit was not barred as res judicata. B Dola KHETAJI VAHIVATDAR v. BALYA KANOO PATEL, 24 BOM. L. B. 236

Riwaj-i-am, entry in, value of.

Statements in the rivajiam when "opposed to general custom can carry very little weight unless supported by instances." L MANOHAR v. NANHI, 2 L. 364 399

Sale, agreement for-Purchase money, payment of-Vendee in possession-Sale-deed not executed-Suit by vendor for possession - Agreement, whether valid desence.

D. agreed to sell certain property to M. which at the time was in M.'s possession, M. paid the purchase-money in full and continued in possession, but no sale-deed was executed, and the time for filing a suit to get a sale-deed executed had expired. In a suit by D. to recover possession of the property:

Held, that M. was entitled to continue in possession, and to plead, as a valid defence to the suit, the agreement to sell. B VEEKLTESH DAMODAR MOKASHI v. MALLAPPA BHIMAPPA CHIKKALKI, 24 BOM L. R. 243 868

Agreement to sell.

A sale may be effected in lieu of the amount to be spent in a particular litigation, for, although the amount is unascertained, it is certainly capable of being ascertained. O BISHESHAR DAYAL v. HAR RAJ KUAR, 8 O. L. J. 316 622

 Consideration partly fictitious - Consideration actually paid not inadequate-Sale, validity of.

In a suit by reversioners to set aside a sale for want of consideration, the lower Court found that although the price ostensibly received by the vendor was Rs. 700, the sum actually paid was Rs. 595 and that there was a fictitious entry in the sale-deed about the payment of Rs 105 Thereupon it passed a decree that the sale would affect the rights of reversioners to the extent of Rs. 595 only. On appeal by the vendees it was found that the land in question, at the date of the sale, was not worth more than Rs. 595:-

Held, that as the sale would have been unobjectionable if the sum of Rs. 105 were left out of account altogether, the vendee should not be penalized merely because there was a fictitious entry in the sale deed L GHULAM MUHAMMAD v. MUHAM-898 MAD SHAH, 3 L. L. J. 8

Sea Customs Act (VIII of 1878), S. 182-Adjudication of confiscation and penalties

-Procedure.

Although the Sea Customs Act contains no provisions with regard to the adjudication of confiscatien and penalties which can be made by the Customs Officers under section 182, those officers are bound to proceed according to general principles, which are not necessarily legal principles, for the purpose of arriving at a conclusion when such inquiries are instituted. The officers are not bound to act, however, according to the provisions of the Civil or Criminal Procedure Code, as if the matter were a proceeding in a Court of law. It is sufficient that they should deal in a careful and judicial

Sea Customs Act-concld.

B MAHADEV GANESH JAMSANDEKAR manner. SECRETARY OF STATE FOR INDIA, 24 BOM. L R 245

Parganas Sonthal Settlement Regulation (III of 1872), sq. 5, 6-Sonthal Parganas Settlement (Amendment) Regulation (III of 1918), amending s. 5-Amendment, effect of - Sonthal Parganas - Settlement - Jurisdic. tion -Interest-Limitation Act (IX of 1908), 88: 2, 14-Defendant, meaning of-Suit against Mitak. shara family - New born son implended - Defendant, new, whether introduced-Hindu Law-Antecedent debt, dectrine of -Applicability as against collaterals.

The effect of the amendment of section 5 of Southal Parganas Settlement Regulation III of 1874 by Sonthal Parganas Settlement (Amendment) Regulation III of 1913, is to exclude the jurisdiction of the Civil Courts to try cases relating to land in the Sonthal Parganas only during such period as that land should be under settlement, the period being reckaned from the time when the land is notified as being under settlement to the time when the settle-

ment is notified as completed.

The operation of section 6 of Sonthal Pargunas Settlement Regulation III of 1872, unlike section 5, is not limited to the time during which a settlement is going on, nor is the section confined to the Courts locally situated in the Sonthal Par-All Courts wherever situated who have jurisdiction to decide cases within the Southal Parganas, when exercising that jurisdiction, must observe the two rules relating to usury contained in that section and refuse to decree an amount of total interest in excess of the original debt or loan, that is to say, in no case can interest be decreed in excess of the amount actually advanced, after crediting interest, if any, already paid.

Every person who acquires an interest by devolution or otherwise in the subject-matter of litigation previously vested in another which renders him liable to be impleaded as a defendant derives his liability to be sued from that person within the meaning of section 2 of the Limitation Act

In the case of a new born son in a Mitakshara family, the person or persons through whom, for the purposes of section 2 of the Limitation Act, he derives the liability to be impleaded as a defendant, are the members of the family in whom the property which the son acquires by birth was previously vested.

A suit to enforce a mortgage against certain members of a joint Hindu family was dismissed for want of jurisdiction The plaintiff sued again in the proper Court also joining as defendants persons who had in the meantime been born in the family and sought to exclude the period during which he had been prosecuting the previous suit from the operation of limitation under section 14 of the Limitation Act. The defendants objected that the section was not applicable as the defendants in the two suits were not the same :-

Held, that the section was applicable as under section 2 of the Limitation Act no new defendaut was introduced.

Sonthal Parganas Settlement Regulation - concld.

The doctrine of antecedent debt applies where the debt is one incurred in substance and in reality antecedently, whether or not the debt so incurred was secured by a charge on the family property.

Although the doctrine of antecedent debt applies only as against the sons and grandsons of the debtor and does not apply so as to permit of a valid charge on the property where the interests of collaterals are involved, nevertheless where all the adult members of a family are themselves the debtors and the only other persons interested are their minor sons and grandsons, the doctrine is clearly applicable. Pat HARI PRASAD SINGTA P. SOURENDRA MOHAN SINHA

Specific Relief Act (I of 1877), ss. 3, 54. 55 - "Obligation," meaning of -Injunction to restrain cutting of sacred tree-Prevention of breach of merely moral or religious obligation.

The first defendant having obtained a decree against the second defendant for the removal of a nim tree which had penetrated its roots into the adjoining wall of the house of the former, the plaintiffs instituted the present suit for permanent injunction to restrain the execution of the decree on the allegation that the tree was a sacred one, and that its removal would be an invasion of their religion and would offend their religious sentiments':

Held, that the injunction could granted as the refusal to grant the perpetual injunction would not lead to the breach of an obligation, that is, of a duty enforceable by law which the plaintiffs could compel the defendants to perform, within the meaning of section 54 of

the Specific Relief Act.

The word 'obligation,' in section 54 of the Specific Relief Act may be taken to be a tie or bond which constrains a person to do or suffer something, it implies a right in another person to which it is correlated, and it 'restricts the freedom of the obligee with reference to definite acts and forbearances, but in order that it may be enforced by a Court it must be a legal obligation, and not merely moral, social or religious. C BRUDES MUKERJEE U. KALACHAND MALLIK, 34 C. L. J. 315 536

- S. 31-Suit for rectification of written instrument - Plaintiff, what to prove - Mutual mistake-Mistake in mortgage deed reproduced in decree passed on mortgage-Court, power of, to rectify decree.

Courts of Equity do not rectify contracts, they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts

A plaintiff who seeks the assistance of a Court under section 81 of the Specific Relief Act for the rectification of a written instrument must clearly prove that there was a prior complete agreement which according to the common intention was embodied in writing, but by reason of mistake in framing the writing this did not express or give effect to the agreement, it being immaterial by whom the actual oversight or error was made which caused the expression to be wrong

Specific Relief Act-concid.

It may or may not be that a mutual mistake of the agents of the parties is always necessarily a mistake of the parties, but undoubtedly this is the case where the error is committed by a writer who acted as common agent of both parties in drafting the instrument. C BEPIN KRISHNA BAY v. Jogeshwar Ray, 84 C. L. J. 256; 26 C. W. N. 26

345 - S. 42-Religious endowment-Alienation by mahant-Suit by chela to challenge alienation-Burden of proof-Minor, whether can be appointed. chels-Appointment during lifetime of predecessorin-title of Mahant making appointment, validity of.

The chela of a mahant who has a contingent right to succeed to the office of makant on the death of the present holder of the office can take steps to protect the endowed property against any acts of waste committed by the present holder of the office or against any threatened sale in execution of a decree not legally enforceable against the endow-

cases of mortgages granted over the security of endowed property by the mahant thereof, it lies upon the mortgagee or those claiming through him to prove that the debt was a necessary expense of the institution itself.

It is not uncommon in the case of celibate . ascetics that a minor is taken as a disciple in. order that he might succeed to the office of mahant

after the death of the then mahant.

The appointment of a disciple is not made illegal by the fact that at the time of such appointment the predecessor-in-title of the Mahant making the appoint. ment was alive and in office. O BISHUNATE BHARTHI V HAR SABUP, 8 O. L. J. 395

Stamp Act (II of 1899) - Unsigned instru-

ments, value of.

Unsigned Burmese instruments made since the 1st July 1899 when the Stamp Act of 1899 came into force, cannot be treated as executed for the purposes of the Stamp Law. UB MAUNG Po DIN U. MAUNG PO NYEIN, 4 U B. R. (1921) 80

- S. 12-Stamp, cancellation of, criterion for determining-Parallel lines across stamp, whether effective cancellation

The criterion for determining whether an adhesive stamp has been effectually cancelled within the meaning of section 12 of the Stamp Act is, whether the ordinary conscientious man would, on seeing the stamp, come to the conclusion that it has already been brought into use The drawing of two parallel lines across an adhesive stamp ex tending beyond its edges is an effectual cancellation of the stamp within the meaning of the section. S PESSUMAL V. GAGANNAL, 15 S L R. 84

- S. 35-Unstamped document lost-Penalty -Secondary evidence-Admission of document. Section 35 of the Stamp Act prohibits the ad-

mission in evidence of any unstamped document but it does not cover the case of a copy of a document.

Where primary evidence of the contents of a document is inadmissible, secondary evidence of that primary evidence can be in no better position.

Plaintiffs sued to recover money from defendant on an unstamped bond executed in their baki. The

Stamp Act -concld.

bahi was presented in Court with the plaint and a copy of the bahi entry. The copy was compared . by the Clerk of the Court with the bahi entry and was certified by him to be a true copy. The plaintiffs then carried off their bahi which shortly after was stolen as they alleged. Defendant alleged that the bahi entry was a forgery and that being unstamped it was inadmissible in evidence:

. Held, that there was no legal authority for admitting the copy of the bahi entry as secondary evidence on payment of duty and penalty at a time when the original was not before the Court, inasmuch as the proviso to section 3, of the Stamp Act did not apply to a copy of an unstamped document.

A clerk cannot admit a document in evidence, that is a task reserved for the Court. L RAHIM BAKHSH U. MOHAMMAD AYUB 153

Succession (Property Protection) Act (XIX of 1841) - Disputes as to succession

of large estates - Remedy.

The Succession (Property Protection Act, XIX of 1841, has a larger scope than section 145 of the Criminal Procedure Code and is a more appropriate remedy in cases involving disputes as to succession in large estates involving breaches of the peace. Pat Biso RAM v EMPEROR, 23 CR. L. J. 236

Sult, delay in filing-Presumption.

Procrastination is the usual habit of litigants, and in a case where the parties are closely related there must be constant talk and hope of settlement with the interference of relations or neighbours, who would like to get credit if not money by taking sides. These are all circumstances which would lead to delay in filing a suit, so that in such a case no inference as to the weakness of the plaintiff's claim can be drawn from the fact that the suit is brought just within the period of limitation. O UMMESALMA v. AMJAD HUSAIN, 8 O. L. J. 528; 3 U. P. L. R. (J. C.) 89 448

Survey map, whether to be preferred to Thak

· There is no inflexible rule that a Survey map must have preference over a Thak map. The Thak and the Survey maps should, as a rule, agree, where they differ, the one that more nearly agrees with the local landmarks is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other, the Court may, if it considers the Thak map more reliable, follow that in preference to the Survey map

Where the Thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to a suit, that map must be treated as valuable evidence in the suit between the successors of the persons who were present. C MAHARAJA OF COOCH-BEHAR U. MAHE :DRA RANJAN RAI CHAUDHURI, 34 C. L. J. 465 943

Transfer pendente lite-Decree, ejectment against transferor-Transfer pursuant to prior agreement,

validity of.

A transfer pendente lite, even though made in purauance of a registered agreement to sell executed prior to suit, is inoperative against the holder of a decree in ejectment, where there is nothing to show

Transfer-concld.

that the seller had, at the date of the agreement, any better title to the property than at the time of the suit M MEYYAPPA CHETTI r. MEYYAPPAN SERVAI, ('921) M. W. N 698 722

Transfer of Property Act (IV of 1882), score of.

The Transfer of Property Act does not purport to consolidate the law relating to mortgages in India, it merely defines and amends certain parts of the law. A Monan Lal v. PREMRAJ, 4 U. P. L. R (A.) 78, 618

- S. 52-Lis pendens, applicability of. See CIVIL PROCEDURE CODE, O. XXXIV, B. I.

- S. 52-Lis pendens-Consent-decree, if falls within scope of rule-"Contentious suit," meaning of -Suit originally contentious, if ceases to be contentious, because it is compromised

A consent-decree falls within the scope of the rule of lis pendens enunciated in section 52 of the

Transfer of Property Act.

One acquiring interest pendente life in a proceeding which is lis pendens is bound by the decree without regard to its form, or whether it is erroneous, and it is immaterial that the relief granted in the sait is the result of agreement or compromise, except where it is the result of fraud or collusion between the parties.

In order to determine whether a suit is contentious within the meaning of section 52 of the Transfer of Property Act, the Court has to consider whether it is contentious in its origin and nature. The expression "contentious sait" must be held to be used in contradistinction to a collusive suit in which there is no contest.

If a suit is not collusive, it cannot be maintained that, though originally contentious, it ceases to be contentious because it is compromised by the act

of the parties.

A decree is nonetheless a decree as defined by the Code of Civil Procedure, because it is based on a compromise and the legal effects of the decree contemplated by Order XXIII, rule , Civil Procedure Code, do not differ from the legal effects of a decree where the suit has been fought to the end. C BHARAT RAMANUJA DAS v. SABAT KAMINI DASI, 273 25 ". W. N. 80 1; a4 C. L. J. 961

- S. 54-Mortgage of immoveable property-Sale - Registerel instrument necessary - Neg trable instrument - Indorsee for value - Debt secured by deposit of title-deeds - Security, whether enforceable.

A mortgage of immoveable property is immoveable property under the Transfer of Property Act, irrespective of the form of the mo.tgage, and a transfer of the ownership of such a right falls under section 54 of that Act and can be effected only by means of a registered instrument. Consequently, an indorsee for value of a Negotiable Instrument, the a nount of which has been secured by a morigage by deposit of title-deeds, cannot claim to enforce the mortgage, in the absence of a registered instrument conveying the mortgage rights to him. WI BLUMALI I HETTY V. BALAKRISHNA A UDALIAR, 41 M. L. J. 297; 14 L. W. 379; (1921) M. W. N. 704; 41 M. 965

Transfer of Property Act—contd.

- S. 54-"Price", what constitutes.

The term "price" in section 54 of the Transfer of Property Act is used to denote consideration in the shape of money, or what is its equivalent. O BISHESHAR DAYAL U. HAR RAJ KUAR, 8 O. L. J. 348 622

- \$. 55 (1) (g), (2)—Property sold free from encumbrance-Encumbrance existing-Purchaser, when deemed to be compelled to pay encumbrances-Purchaser, right of, to refund.

Where a sale-deed contains an express declara, tion that the property is sold free from encumbrances the vendor by reason of section 55 (1) (g) subsection (2) of the Transfer of Property Act deemed to contract with the buyers that he has power to transfer the property so sold and that the property is free from burdens.

A purchaser of a property is deemed to be compelled to pay off mortgagees who have obtained decrees for sale of the property purchased by him, even though a

sale is not immediately threatened.

Where a vendor of immoveable property binds himself to deliver the property free from encumbrances but the purchaser has to pay either for redemption of the mortgages existing on the property purchased by him at the date of such purchase, or for purchase of the property on sales under such mortgages or to prevent sales he is entitled to a refund of all monies so paid by him. P C NATHU KHAN V. BURTONATH SINGH, 20 A. L. J. 301; 42 M. L. J. 444; 26 C. W. N. 514; 35 C. L. J. 417; 24 Bon. L. R. 571; 15 L. W. 635; 107 (1922) M. W. N. 323

- S. 55 (6) (b) - "Charge," when created-8. 52, applicability to involuntary sales—"Court," meaning of.

Section 52 of the Transfer of Property Act applies equally to voluntary and involuntary transfers.

The Court to which the concluding portion of section 52 of the Transfer of Property Act refers is the Court in which the suit or proseeding mentioned earlier in the section is being actively pursued and that Court only when it is engaged in that suit or proceeding.

A charge to which a buyer is entitled under section 55 (6) (b) of the Transfer of Property Act can be secured by him under a decree declaring that he is so entitled. It does not come into existence at the time of the agreement to sell or acceptance of the price. N AMOLAKSAO U. MAHIPATRAO

property liable for debt without transfer of interest -Charge or mortgage-Evidence Act (I of 1872), ss. 69, 71, whether applicable to charges-Document creating charge on immoveable property, suit on-Contract to indemnify-Contract in writing registered -Limitation-Limitation Act (IX of 1908), 8ch, I, Arts. 83, 116, 132.

A document which gives immoveable property as security for the satisfaction of a debt, without transferring any interest in the property, merely constitutes a charge on the property, and is not a

mortgage.

The special provisions of the Transfer of Property Act, relating to the attestation of mortgages, and of the Evidence Act, relating to the method of proof of mortgages, are not applicable to charges,

Transfer of Property Act-contd.

A suit to enforce a payment of money under a document which creates a charge on immovable property is governed by Article 132 of Schedule I to the Limitation Act even though the document is a contract to indemnify, or a contract in writing registered such as would ordinarily be governed by Articles 86 and 116 respectively. M RAMASAMI IVENGAR v. KUPPUSAMI IVAR, 14 L. W. 99; (1921) M. W. N. 472 554

- S. 59-Attestation-Standing by without signing as attesting witness, whether sufficient.

To satisfy the requirements of section 59 of the Transfer of Property Act, the witnesses must sign their names after seeing the actual execution of the deed. Standing by and seeing the executant write something on the deed, without signing as attesting witness to the executant's signature, is not sufficient. LB QUAR CHENG GWAN v. MAUNG Po Myi, 11 L. B. R. 148 589

- S. 59-Mortgage for less than Rs. 100-Deed, registration of—Deed unregistered—Becondary

evidence, admissibility of.

If a mortgage is effected by means of a document, it requires registration under section 59 of the Transfer of Property Act although the sum secured is less than Rs. 100, but where the document is not registered, secondary evidence of its contents is admissible, but oral evidence of its terms as it has been reduced to writing is not evidence of its contents. U B MAUNG Po DIN v. MAUNG PO NYEIN, 4 U. B. R. (1921) 80 360

- SS. 60, 98-Anomalous mortgage-Mortgage for term-Redemption-Right to redeem in certain event excluded by contract, effect of-

Statute, interpretation of.

An anomalous mortgage enabling a mortgagee, after a lapse of time and in the absence of redemption, to enter and take the rents in satisfaction of the interest will be perfectly valid if it does not also hinder an existing right to redeem. A provision hindering such an existing right is invalid and cannot be given effect to.

A mortgage for a term provided that, if the debt was not re-paid at the end of the term, the mortgagee would be entitled to enter into possession of the mortgaged property and continue in such possession for another period during which the right of the mortgagor to redeem was excluded. The debt not having been paid at the end of the term, the mortgagee instituted a suit for possession. The mortgagor resisted the suit in all the Courts unsuccessfully and then brought a suit for redemption:

Held, that the mortgagor had, under section 60 of the Transfer of Property Act, a statutory right to redeem at the end of the term, even if the mortgage was one in which by section 98 the rights of the parties were to be determined by the contract

between them.

The provisions of one section of an Act cannot be used to defeat those of an other unless it is impossible to effect reconciliation between them. PC MOHAMMAD SHER KHAN U. RAJA SETH SWAMI DAYAL 80 M. L.T. 220; 9 O. L. J. 81; 42 M. L. J. 684, 25 O. C. 8; 20 A. L. J. 476; 85 O. L. J. 468; 24 Box. L. R. 695; 44 A. 185; (1923) M. W. N. 878

Transfer of Property Act-coneld.

determining tenancy on ground of forfeiture, inadequate, whether valid—Lease—Compensation—Time for removal of superstructure—Equity—Discretion of Court.

A notice by a landlord to his tenant unequivocally expressing the intention to determine the lease on the ground of forfeiture though inadequate under section 106 of the Act, is a sufficient compliance with section 111 of the Transfer of Property Act.

Whether section 108 (h) of the Transfer of Property Act is exhaustive or merely enabling the Court has a discretion, in a proper case, to allow reasonable time to the tenant even after the expiry of the tenancy, to remove his superstructure on the land where the terms of the lease do not provide for payment of compensation to the tenant. M Thacharakavil Manavikkaravan Thirumalapad Rajah Awergal v. Noor Mahomed Sait, 41 M. L. J. 265; 14 L. W. 308; (1921) M. W. N. 677

possession, whether necessary.

Among Hindus it is not necessary according to section 123 of the Transfer of Property Act that a deed of gift should be accompanied by delivery of possession. A Debi Singh v. Bansidhar 480

Trial by Jury-Charge-Misdirection-Discrepancies and contradictions in evidence, how to be dealt with in charge-Duty of Judge.

In determining whether there has been misdirection to a jury, the charge must be judged as a whole, and it must be seen whether the case for both sides has been fairly put, so that the jury understood what they had to decide and come to a right decision.

In dealing with discrepancies and contradictions in the statements of prosecution witnesses in his charge, the Judge should draw attention to the more essential items, and the strongest argument advanced by the defence; merely referring the jury to the speech of the Pleader for the defence is not sufficient. C HARI CHARAN DAS v. EMPEROR, 34 C. L. J. 512; 23 CR. L. J. 342

already suffering from infirmity—Charge to jury— Duty of Judge—Misdirection.

Where in a trial by jury upon charges of rioting armed with deadly weapons and murder, it appears that the person whose death was caused was suffering from a disease which accelerated his death, and the injuries described in the medical evidence were in themselves not apparently sufficient to cause immediate death, it is the duty of the Judge in his charge to the jury, to place these facts before them, and to ask them whether they are satisfied that the accused, when attacking the deceased, knew or had reason to believe that the injuries caused were likely to cause death and whether it could be inferred that death was intended to be caused. An omission on the part of the Judge to do this, amounts to a misdirection to the jury. C AINUDDI CHOWKIDAR v. EMPEROR, 34 C. L. J. 515; 23 CR. L. J. 344

Trust, construction of—Charitable trusts, creation of—Executory trusts, doctrine of, whether applicable.

A written agreement between two persons stated, "Bs. 200 with balance of interest which has been allotted for dwadeshi charity shall be allotted for that charity and a dharmasanam executed," and again, "the sum shall not remain with both of us but we shall abide by the advice of mediators and conduct the charity." In a suit to enforce the agreement as a trust:

Held, that no trust was created yet and that there was nothing more than an agreement between the parties to allot the money by a proper deed of trust to be executed hereafter.

The doctrine of executory trusts is applicable to cases of trusts created for valuable consideration, and has no application to charitable trust where the beneficiaries are purely volunteers.

Though the Trusts Act does not apply to charities and no formalities are required by law to create it, still where it is intended to create a trust with reference to a particular property it is necessary that the language used should be clear enough to show a definite intention to create a trust by it and it should amount to a declaration which is or can be construed to be imperative. Where there has been a completed dedication, the fact that the details of the trust have not been settled by the dedicator will not affect the validity of the dedication. M Veneratachalapathi Iyer v. China Muna Chaerapani Iyer, 15 L. W. 279; (1922) M. W. N. 123; 42 M. L. J. 258

Trustee and persons in representative capacity—
Delegation of powers—General or special power-ofattorney—Permanent lease by donee of power, validity
of—Non-production of power.

Fiduciary duties cannot be made the subject of delegation. Therefore, a person holding property in a representative capacity cannot delegate his powers by a general or special power-of-attorney, and a permanent lease granted by such donee of power is not valid. P C Bonnerji t. Sitanath Das, 26 C. W. N. 236; (1922) M. W. N. 98; 30 M. L. T. 182; 20 A. L. J. 294; 15 L. W. 452; 35 C. L. J. 820; 24 Bom. L. R. 565

Trusts Act (II of 1882), ss. 5, 6, 7— Minor, whether can create valid trust—Constructive trustee—Express trustee.

A minor cannot create a valid trust under section 7 of the Trusts Act.

A constructive trustee is bound to account for profits under section 95 of the Trusts Act and the fact of his doing so would not make him an express trustee. M Krishnan Patter v. Lakshni, (1922) M. W. N. 117; 42 M. L. J. 119; 30 M. L. T. 238; 45 M. 415

U. P. Court of Wards Act (III of 1899), s. 34

U. P. Excise Act (IV of 1910), ss. 3, 60—"Import," meaning of—Liquor booked but not taken delivery of—Offence, if complete.

A person who sends liquor from a Native State to a place in the United Provinces but does not take delivery of it in the United Provinces does not import liquor in the United Provinces and, consequently, commits no offence under section 60 of the United Provinces Excise Act.

U. P. Excise Act—conold,

To "import" goods to a place means to take delivery of the goods inside that area.

As a general rule a conviction under a section, which provides a penalty for a variety of acts done in contravention of the Statute is bad for duplicity where the section contains, a variety of inconsistent alternatives. The conviction should state the act of which the accused is found guilty, and the particular breach of the act established against him by his act so found. A MCNSHI LAL v. EMPEROR, 20 A. L. J. 198; 23 CR. L. J. 248

Land Revenue Act (III of 1901), S. 4 (3) - Oudh Rent Act (XXII of 1886), s. 126-Lambardar, whether can grant long term leases-Transaction by lambardar-Co-sharers deriving benefit under it, wheher can repudiate.

In the absence of a custom to the contrary, a lamburdar has no power, without the consent of his co-sharers, to grant a lease of co-parcenary land beyond such term as the circumstances of the particular year or season might require, but in circumstances of an exceptional nature a lambardar is justified in the exercise of his powers as a manager, charged with the collection of rents, to grant leases for a longer term to raise the largest income to the co-sharers on whose behalf he purports to act. Where the granting of a lease by a lambardar is shown to be for the benefit of the co-sharers, and the co-sharers have derived benefit under the lease, they cannot repudiate a transaction entered into on their behalf. О МОНАММАВ МАЗОВ АКАМ В. МОНАММАВ МАНМОВ ALAM, 24 O. C. 369; 9 O. L. J. 66

___ S. 107-Question of proprietary title-

Appeal to District Judge.

Where in a suit for partition in a Revenue Court objectors admit the proprietary title of the applicant but deny his right to demand a partition, a question of proprietary title is raised and against the decision in such a case an appeal lies to the District Judge. A MUSTAJAB KHAN v. THAKUR SRI LAKSHMI 550 NABAIN

118—Partition — Revenue Court, - S.

whether can partition house,

A Revenue Court making a partition under the provisions of Chapter VII of the U. P. Land Revenue Act has no jurisdiction to make a division of houses by reason of the provisions of section 118 of the Act.

Therefore, a plaintiff basing his title to a portion of a house under an order of partition of a Revenue Court cannot succeed. A GOBIND PERSHAD v. 910 KALIAN

Vizagapatam Agency Rules, rr. 16, 20-Execution proceedings, order in, whether

'decree' - Appeal, maintainability of - Suit wrongly goorded as petition-Agency Court, jurisdiction of,

to grant appropriate relief as in suit.

Rules 16 and 20 of the Vizagapatam Agency Rules apply only to decrees of an Agency Court and no appeal is provided in the Bules against either orders passed in execution or other orders of a miscellaneous nature

Miscellaneous orders by an Agent or Assistant Agent can be displaced only by an application to the Governor in Council.

Vizagapatam Agency Rules—∞nold.

Where what in reality is a suit is wrongly described as a petition it is open to the Agency Courts to grant the appropriate reliefs as in a suit, and orders passed on such petition may be regarded as decrees from which an appeal lies under rule 16, and a revision to the High Court under rule 20, of the Vizagapatam Agency Rules, M RANI OF TUNE v. MAHARAJA OF JEYAPORE, 48 M. L. J. 487; 30 M. L. T. 339; (1922) M. W. N. 314 16 L. W. 8

Whipping Act (IV of 1909), s. 4 418

WIII, construction of-Absolute devise to Hindu widow-"Malik," meaning of-Right of pre-emption given to heirs and co-sharers, whether restricts

absolute devise in favour of widow.

A Hindu testator by his Will authorised his widow to adopt five sons in succession and provided that if a son were adopted, the widow and the son should take the estate in equal moieties as owners (malika) with full power of gift and sale to be exercised by each of them. There was a clause in the Will which ran as follows: -"If for any reason the adopted son or my said wife is required to sell any property left by me, he or she shall sell it to my heirs and co-sharers for proper price, that is to say, the highest price, offered by them, but if they refuse to purchase the property on paying the proper price, it may be sold to others." The next clause of the Will ran thus :- "If my said wife do not adopt any sons, then on my decease, my said wife would be the owner (malik) of all my property with power of gift and sale and shall be able to give and sell it accord. ing to the directions contained in the previous clause." The widow did not adopt any son and died having herself made a Will by which she dedicated the property to religious uses. In a suit for the construction of the Will of the husband:

Held, that the widow took an absolute estate in the property left by her husband, which was not cut down by the right of pre-emption given to the heirs

and co-sharers.

Per Richardson, J .- The word "malik" usually denotes an absolute owner.

Per Chaudhuri, J .- In all cases of gift by Will whether to male or to female, unless the instrument shows that a restricted interest was intended to be created, the legatee or the devisee must be entitled to the whole interest of the testator.

The word "malik" imports full proprietary rights unless there is something in the context to qualify it. The fact that the donee is a Hindu widow is not sufficient for that purpose. C SUDHAMANI DAS v. SUBAT LAL DAS, 25 O. W. N. 527

-, construction of-Intention to create succession of life-estates-No words used to impose restriction-Estate taken-Absolute.

Where a testatrix fails to use words in the Will imposing any restriction, although she may have intended to create a succession of life-estates, the donee takes an absolute estate. A Mrs. L. F. MARTEN v. HIRDRY RAM, 20 A. L. J. 266

interpretation of-"Malik" and "varis," meanings of -Intention of testator.

The words "malik" and "varis" connote absolute ownership,

Will-contd.

Where the word "malik" is used and where there is nothing in the text or circumstances of the Will which indicate an intertion on the part of the testator to cut down the absolute estate clearly or unmistakeably then the absolute estate should be taken to have been bequeathed. S TIRATHMAL LOKCOMAL v. THATAESING, 15 S. L. R. 202 720

- Nuncupative-Finding as to intention of testator-Finding of fact-Appeal, second.

In the case of an oral Will by one R. to his daughter, the witnesses used slightly different terms of expression but all said that the daughter was to have the property for ever, or words to that effect. The lower Appellate Court taking all the circumstances into consideration came to the finding that "R. did make a Will in favour of his daughter and expressed his intention to give her an absolute estate":

Held, that this was a finding of fact binding in second appeal. N BHAWANIBAM v. DAMAESINGH 413

- Standard of proof-Suspicion-Consideration and analysis of positive evidence on record-Proof of handwriting—Comparison of signatures, value of.

In the case of a Will, reasonable, natural and proper in its terms, it is not in accordance with sound rules of construction to apply to it those canons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable or tipged with impropriety.

Wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. But this suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

In order to prevail against clear and positive evidence the improbability in a Will must be clear and cogent and must approach very nearly to, if it does not altogether constitute, an impossibility.

A comparison of handwriting is at all times a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts.

Although from the dissimilarity of signatures a Court may legitimately draw the inference that a particular signature is not genuine because it varied from an admittedly genuine signature, yet resemblance of two signatures affords no safe foundation that one of them is genuine. C SAROJINI DASI v. HARIDAS GHOSH, 34 C. L. J. 373; 26 C. W. N. 113 774 Will-concld.

- Standard of proof to establish Will-Burden of proof - Attesting witnesses, production of-Appellate Court, duty of-Verdict of Judge trying

case not to be lightly disregarded.

The standard of proof to establish a Will required by the Indian Statutes is that of the prudent man and not an absolute or conclusive one. The Evidence Act, while thus adopting the requirements of the prudent man as an appropriate concrete standard by which to measure proof, is, at the same time, expressed in terms, which allow full effect to be given to circumstances or conditions of probability or improbability, so that where forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt required in a criminal case may not be applicable.

The onus probandi lies in every case upon the party propounding a Will, to satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator; in other words, where a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed. But the suspicion must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

Though it is desirable that all the attesting witnesses capable of being called should be examined to remove all suspicion of fraud, it is not absolutely necessary that where there are many attesting witnesses, the absence of every one not called should

be specifically explained.

The verdict of a Judge trying the case should not be lightly disregarded by the Appellate Court where the issue is simple and straightforward and the only question is, which set of witnesses is tobe lelieved. But where the determination of the question of genuineness of a Will depends not merel upon the assertions of witnesses but upon surrour ing facts and circumstances whose existence is eit r admitted or indisputably proved, the judge tof the Trying Judge may be vitiated by his fai re to test the veracity of the witnesses by reference thereto. Two conflicting view-points have to be reconciled, namely, on the one hand, the undon sted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences, and conclusions, and, on the other hand, the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. C PRASANNAMAYI DEBI V. BAIKUNCHA NATH, 25 C. W. N. 779; 34 C. L. J. 384; 49 C. 132

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